

MEMORANDUM

TO: Lawyering Skills I students
FROM: Professor David E. Sorkin
DATE: August 24, 2009
RE: Stewart Sutcliffe

Stewart Sutcliffe seeks our advice regarding the scope and enforceability of an agreement he signed in 1999. Sutcliffe is a retired music teacher and an avid collector of Beatles memorabilia. His collection includes rare Beatles records, photographs, and other documents, some bearing band members' autographs. He lives in Rockford, Illinois.

Sutcliffe's former employer, Patricia Best, lives in Woodstock, Illinois, about forty miles east of Rockford. In 1987 she opened an antique shop in downtown Woodstock called Best Music, specializing in old musical instruments, antique radios, and other music-related items. Over the years she developed an active mail-order business. She advertised in various collector magazines and maintained a mailing list of collectors around the world who had purchased items from her in the past. Because many collectors are sensitive about their privacy and security, she refused to share her mailing list with other dealers.

In July 1999 Sutcliffe stopped by Best's shop and expressed interest in several Beatles items in her inventory. He and Best ended up having a long conversation, the result of which was that Best hired Sutcliffe to work at the shop on a part-time basis, earning credit toward the purchase of items in the shop. Best promised to share with Sutcliffe her considerable knowledge of the antiques business, and to teach him how to identify and authenticate documents and autographs. She told him that she wanted to protect herself against the possibility that he would later use that information to compete with her, and insisted that he sign a confidentiality and noncompetition agreement before he began work. He signed the agreement on July 25, 1999, and began working at the shop that day. (A copy of the agreement is attached.)

In the summer of 2008 Sutcliffe began experiencing severe allergy attacks, which he believed were caused by a construction project in an old building adjacent to the shop. He explained the situation to Best and departed on amicable terms in September 2008.

Sutcliffe's health problems continued into the fall, and his medical bills began piling up. In December his daughter lost her job, and she moved into a spare room in Sutcliffe's house. In the face of these financial pressures Sutcliffe decided that he needed to liquidate at least part of his Beatles collection. He took some of his more valuable items to Best and asked whether she would be interested in purchasing them. She declined, explaining that the economic downturn had hurt her sales and she was not in a position to add to her inventory. He tried another local antique dealer, who also declined but suggested that he try listing the items for sale on eBay.

Sutcliffe began researching Beatles memorabilia sales on eBay, and was surprised to find that people were buying and selling many such items for prices much higher than he had

expected. He estimated that his own collection might be worth \$100,000 or even more. He began photographing items in his collection and on January 4, 2009, he posted ten different items for sale on eBay, with starting bids ranging from \$100 to \$500. Several of the items attracted multiple bids, and by mid-January Sutcliffe had earned over \$4,000 from his eBay sales.

As Sutcliffe was preparing to post many more items for sale on eBay, he received an angry email message from Best, demanding that he stop dealing in music-related antiques through eBay pursuant to the noncompetition agreement that he had signed. Sutcliffe has asked our firm for advice on whether he must comply with Best's demand.

Please write a memorandum addressing whether Sutcliffe's sale of Beatles items on eBay is permissible despite the noncompetition agreement that he signed in 1999. Your research has unearthed the attached authorities, some or all of which may be relevant to this matter. Cite only to materials that are included here, and submit a complete draft of your memorandum no later than the due date stated on the course syllabus.

CONFIDENTIALITY AND NONCOMPETITION AGREEMENT

This Agreement is made and entered into at Woodstock, Illinois, on July 25, 1999, by and between Patricia Best d/b/a Best Music ("Employer") and Stewart Sutcliffe ("Employee"). In consideration of the covenants contained herein and for other good and valuable consideration, the parties agree as follows:

- (1) Employee acknowledges that he may obtain access to confidential information in the course of his employment by Employer, and agrees to protect and maintain the confidentiality of such information.
- (2) In the event that Employee leaves the employment of Employer for any reason, whether by termination, resignation, or otherwise:
 - (a) Employee agrees that he will not engage in the businesses of dealing in collectibles, memorabilia, antiques, rare documents, or ephemera; including buying, selling, trading, bartering, or exchanging in any manner, either directly or indirectly, as an owner, partner, stockholder, employee, proprietor, consultant, agent, or otherwise; for a period of two years immediately following the date on which Employee leaves the employment of Employer. The restrictions set forth in this paragraph shall apply only to activities conducted by Employee within the geographic area that includes Woodstock, Illinois, and a surrounding radius of one hundred (100) miles. With regard to transactions conducted by mail, telephone, or any other medium, the aforementioned restrictions shall apply if either party to the transaction is within said geographic area.
 - (b) Employee agrees that he will neither solicit nor conduct business with customers of Employer with whom he has had contact in the course of his employment with Employer for a period of two years immediately following the date on which Employee leaves the employment of Employer. This prohibition shall not apply to customers with whom Employee was personally acquainted prior to the date of this Agreement.
- (3) Nothing in this Agreement shall limit Employee's ability to purchase items for his own personal collection.
- (4) In the event that any provision contained herein shall, for any reason, be held to be invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect any other provisions of this agreement, and they shall remain in full force and effect. In the event that any provision herein is held to be invalid or unenforceable due to the unreasonableness of restrictions as to the scope of activities, duration, or geographical area, such restrictions shall be effective for such activities, duration, and area as may be determined to be reasonable by a court of competent jurisdiction.

This Agreement shall take effect immediately.

In witness whereof, the Parties have executed this instrument in duplicate at Woodstock, Illinois, on July 25, 1999.

Patricia Best

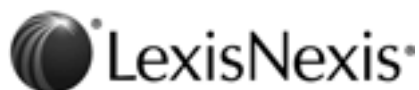
Patricia Best

Stewart Sutcliffe

Stewart Sutcliffe

AUTHORITIES

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LEXSEE 221 F.3D 981

JIM LIAUTAUD, an individual and JIMMY JOHN'S INCORPORATED, an Illinois Corporation, Plaintiffs-Appellants, v. MICHAEL LIAUTAUD, an individual, Defendant-Appellee.

No. 99-1700

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

221 F.3d 981; 2000 U.S. App. LEXIS 17439; 55 U.S.P.Q.2D (BNA) 1497

January 12, 2000, Argued
July 20, 2000, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of Illinois. No. 95 C 2133. Harold A. Baker, Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed from the judgment of the United States District Court for the Central District of Illinois, granting summary judgment in favor of defendants in plaintiff's contract action to enforce the terms of a noncompetition agreement and for unjust enrichment.

OVERVIEW: Plaintiff sandwich shop owner provided defendant cousin with the secrets behind his successful sandwich shop business. Defendant agreed to the terms of a noncompetition agreement, but violated it by expanding his business into other parts of Wisconsin. Plaintiff sued defendant to enforce the terms of their agreement and for unjust enrichment. The district court held that the agreement was void as against public policy. The court held the covenant not to compete was overly broad because the stringent geographic restrictions on defendant were not necessary to protect plaintiff's business interest, were oppressive to defendant, and were injurious to the public. In light of the severe and unnecessary restrictions on defendant, the covenant not to compete was void as against public policy. Plaintiff could not recover damages for defendant's use of the trade secrets because damages

are not recoverable for unjust enrichment pursuant to a gift relationship.

OUTCOME: Judgment affirmed because the covenant not to compete was void as against public policy and plaintiff could not recover for unjust enrichment pursuant to a gift relationship.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] The appellate court reviews a grant of summary judgment de novo and draws all reasonable inferences in favor of the nonmoving party.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Types of Contracts > Covenants Real Property Law > Restrictive Covenants > Enforcement

[HN2] Under Illinois law, when the basic facts are not in dispute, the existence of a contract is a question of law. More specifically, the question of whether a restrictive covenant is enforceable or not is a question of law.

Contracts Law > Contract Interpretation > General Overview

[HN3] A contract is to be construed strictly against the drafter.

Contracts Law > Contract Interpretation > General Overview***Contracts Law > Types of Contracts > Covenants
Real Property Law > Restrictive Covenants > General Overview***

[HN4] Because Illinois courts abhor restraints on trade, restrictive covenants are carefully scrutinized.

***Contracts Law > Contract Conditions & Provisions
Contracts Law > Types of Contracts > Covenants
Labor & Employment Law > Employment Relationships
> General Overview***

[HN5] Under Illinois law, a naked promise by one merchant not to compete against another merchant is against public policy because it injures the public and the promisor, while at the same time it serves no protectable interest of the promisee. In order for a noncompetition agreement to be valid, therefore, it must be ancillary to a valid transaction, such that the covenant not to compete is subordinate to the main purpose of the transaction.

***Contracts Law > Contract Conditions & Provisions
Labor & Employment Law > Employment Relationships
> Employment Contracts > Conditions & Terms >
Trade Secrets & Unfair Competition > Noncompetition
& Nondisclosure Agreements***

[HN6] A valid restraint on trade may be based on a purchase or sale of a business or any other analogous circumstance giving one party a just right to be protected against competition from the other.

***Contracts Law > Consideration > General Overview
Estate, Gift & Trust Law > Personal Gifts > Elements of
Valid Gifts > General Overview***

[HN7] A gift is a voluntary gratuitous transfer of property from donor to donee where the donor manifests an intent to make such a gift and absolutely and irrevocably delivers the property to the donee.

***Contracts Law > Contract Conditions & Provisions
Contracts Law > Types of Contracts > Covenants
Real Property Law > Restrictive Covenants > General******Overview***

[HN8] For a restrictive covenant to be reasonable, its terms (1) must not be greater than necessary to protect the promisee, (2) must not be oppressive to the promisor, and (3) must not be injurious to the general public.

Contracts Law > Contract Conditions & Provisions

[HN9] Although a lack of geographic limits on a noncompetition agreement is not per se unreasonable, a complete bar on competition needs to be reasonably related to the promisee's interest in protecting his own business.

Contracts Law > Contract Conditions & Provisions

[HN10] Generally, courts will uphold a restriction on competition that is coextensive with the area where the promisee is doing business.

***Contracts Law > Contract Conditions & Provisions
Healthcare Law > Antitrust Actions > Physicians
Healthcare Law > Business Administration &
Organization > Covenants Not to Compete > Employer
& Physician Covenants***

[HN11] Illinois courts generally have refused to enforce noncompetition agreements that do not limit the duration of the restriction. The length of time for the restriction must be reasonably related to the needs of the promisee's business.

***Contracts Law > Remedies > Equitable Relief > General
Overview
Trade Secrets Law > Civil Actions > Remedies >
Damages > General Overview***

[HN12] A party may not recover damages for unjust enrichment pursuant to a gift relationship.

***Contracts Law > Remedies > Equitable Relief > General
Overview***

[HN13] Illinois law does not allow a claim for unjust enrichment when the underlying contract has been held to be void as against public policy.

COUNSEL: For JIM LIAUTAUD, JIMMY JOHN'S INCORPORATED, Plaintiffs - Appellants: James A. Martinkus, ERWIN, MARTINKUS & COLE, Champaign, IL.

For MICHAEL LIAUTAUD, Defendant - Appellee:
Martin B. Carroll, HEFTER & CARROLL, Chicago, IL.

JUDGES: Before POSNER, Chief Judge, and COFFEY
and RIPPLE, Circuit Judges.

OPINION BY: RIPPLE

OPINION

[*984] RIPPLE, *Circuit Judge*. Jim Liautaud, upon request, provided his cousin, Michael Liautaud, with the secrets behind his successful sandwich shop business. To protect himself, he proffered to Michael a noncompetition agreement, which prevented Michael from expanding his new business beyond the Madison, Wisconsin, market. Michael agreed to the terms of the agreement; however, he later violated it by expanding his business into other parts of Wisconsin. This lawsuit followed.

Jurisdiction in this suit is based on diversity of citizenship under 28 U.S.C. § 1332. The amount in controversy exceeds \$ 50,000,¹ and the parties are of diverse citizenship.² The parties do not dispute that the applicable law is Illinois state law. The district court granted summary judgment for Michael and, for the reasons set forth in this opinion, we affirm the judgment of the district court.

1 The amount in controversy under 28 U.S.C. § 1332, since Jim filed his lawsuit, has changed from in excess of \$ 50,000 to in excess of \$ 75,000. This amendment does not apply retroactively.

[**2]

2 Jim is a citizen of Illinois, and Jimmy John's, Inc. is incorporated in Illinois with its principal place of business in Illinois. Michael is a citizen of Wisconsin.

I

BACKGROUND

A. Facts

Jim Liautaud owns and operates a chain of gourmet submarine sandwich shops in Illinois called Jimmy John's, Inc. He claims that the secret behind the success of his shops is a combination of his style of preparing the sandwiches and of his business strategies.

In 1988, Jim's cousin, Michael, approached Jim about opening his own submarine sandwich shop in Madison, Wisconsin. Jim agreed to provide Michael with his "secrets of success" so that Michael could open Big Mike's Super Subs. Pursuant to his offer to help, Jim sent Michael a letter outlining the agreement between the cousins. The letter states as follows:

I want to confirm at this time exactly what we agreed on so that it is clear and understood by both parties.

The agreement:

1. Mike will open up a sub shop in Madison using Jimmy John's products and systems.
2. Mike can open up as many shops [as] he would like in Madison only. [**3]
3. If you want to expand the sub/club business beyond Madison you will do so using Jimmy John's sub shops as a partner or franchisee. This is subject to 100% agreement on both parties. If you don't use Jimmy John's Inc. you will not expand the sub/club business beyond Madison.
4. You will not disclose to any one: recipes, products or systems that are given to you. (Except your managers who run your store).

I believe that's [sic] what we agreed on. If I have made any misrepresentations of our agreement please correct them in the margin of this letter and return a copy to me. If I don't receive a copy I'll assume this letter to be the agreement. R.1, Ex.A. Michael returned the letter to Jim and, in handwriting at the bottom, wrote: "Jimmy, If I agree on all items stated above, you must agree that you [*985] (Jimmy Johns Inc.) won't enter the Madison WI market." *Id.*

Jim then helped Michael open a sandwich shop in Madison. In 1991, Michael opened a sandwich shop outside Madison, in LaCrosse, Wisconsin, in violation of the cousins' agreement. Although the cousins attempted to reach a franchise agreement, it never materialized. Jim thereafter filed this action against Michael to enforce

[**4] the terms of their agreement and for unjust enrichment.

B. Holding of the District Court

1.

The district court held that the "agreement" between the cousins constituted a "classic noncompetition covenant." R.65 at 3. For a noncompetition agreement to be valid under Illinois common law, the court explained, the covenant must be: (1) ancillary to a valid transaction or relationship and (2) reasonable in scope.

The court addressed first whether the covenant was ancillary to a valid transaction or relationship. Although the typical noncompetition agreement stems from an employment relationship or from the sale of a business, the court found that a valid relationship existed here because Jim intended the trade secrets to be a gift and Michael accepted them as such. The court stated that "[a] gift certainly creates a valid relationship imposing rights and obligations on both parties, just as do employment relationships and where money is paid for a business or some part of it." *Id.* at 5. Therefore, according to the court, the trade secrets that Jim provided to Michael were a gift and not for the mere sake of obtaining a covenant not to compete. Thus, the court concluded that the [**5] covenant not to compete was ancillary to the gift relationship.

Next, the court questioned whether the covenant not to compete was reasonable in its scope. The court explained that "to be deemed reasonable, a noncompetition agreement must not be greater than necessary to protect the seller, oppressive to the buyer, or injurious to the public." *Id.* To be enforceable, the court clarified, the agreement must be reasonable in time, in geographical scope, and in the activities restricted. As the court noted, absolutely no durational or geographical limits [other than the restriction that Michael remain in Madison] existed on Jim's and Michael's noncompetition agreement. Also, according to the court, Jim had not explained why such stringent limitations were justified. Therefore, the court found that the covenant was unreasonable because it was overly restrictive and, thus, that it was void as against public policy.

2.

The district court also held that Jim was not entitled

to restitution because of unjust enrichment. First, the court determined that Jim was not entitled to damages for unjust enrichment for Michael's use of Jim's trade secrets in his Madison shops because the trade [**6] secrets were a gift. Next, the court discussed the availability of damages for unjust enrichment for Michael's use of Jim's trade secrets outside of Madison. The court explained that unjust enrichment does not apply when an agreement is unenforceable because it is illegal or contrary to public policy. Because it had concluded that the noncompetition agreement was void as against public policy, the court held that Jim could not receive damages for Michael's use of the trade secrets in his shops outside Madison, Wisconsin.

II

DISCUSSION

A.

Standard of Review

[HN1] We review a grant of summary judgment *de novo* and draw all reasonable inferences in favor of the nonmoving party. *See Hill v. American Gen. Fin., Inc.*, 218 F.3d 639, 2000 U.S. App. LEXIS 8775, 2000 WL 536670, *2 (7th Cir. 2000). [HN2] "Under Illinois law, when the basic facts are not in dispute, the existence of a contract is a question of law." *Echo, Inc. v. Whitson Co.*, 121 F.3d 1099, 1102 (7th Cir. 1997); [*986] *accord Burgess v. J.C. Penney Life Ins. Co.*, 167 F.3d 1137, 1139 (7th Cir. 1999) (explaining that when the question on appeal is the interpretation of the terms of a contract, it is a question of law that [**7] is subject to plenary review). More specifically, "the question of whether a restrictive covenant is enforceable or not is a question of law." *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 685 N.E.2d 434, 440, 226 Ill. Dec. 331 (Ill. App. Ct. 1997); *accord Applied Micro, Inc. v. SJI Fulfillment, Inc.*, 941 F. Supp. 750, 753 (N.D. Ill. 1996).

[HN3] "A contract is to be construed strictly against the drafter." *Sharon Leasing, Inc. v. Phil Terese Transp., Ltd.*, 299 Ill. App. 3d 348, 701 N.E.2d 1150, 1157, 233 Ill. Dec. 876 (Ill. App. Ct. 1998); *see also Brian Properties, Inc. v. Burley*, 278 Ill. App. 3d 272, 662 N.E.2d 522, 524, 214 Ill. Dec. 956 (Ill. App. Ct. 1996); *accord Advance Process Supply Co. v. Litton Indus. Credit Corp.*, 745 F.2d 1076, 1079 (7th Cir. 1984). Also,

[HN4] "because Illinois courts abhor restraints on trade, restrictive covenants are carefully scrutinized." *Prairie Eye Ctr., Ltd. v. Butler*, 305 Ill. App. 3d 442, 713 N.E.2d 610, 613, 239 Ill. Dec. 79 (Ill. App. Ct. 1999); *see also Gillespie v. Carbondale & Marion Eye Ctrs., Ltd.*, 251 Ill. App. 3d 625, 622 N.E.2d 1267, 1269, 190 Ill. Dec. 950 (Ill. App. Ct. 1993).

[**8] B. Validity of the Noncompetition Agreement

1.

[HN5] Under Illinois law, "[a] 'naked' promise by one merchant not to compete against another merchant is against public policy because it injures the public and the promisor, while at the same time it serves no *protectible* interest of the promisee." *Abel v. Fox*, 274 Ill. App. 3d 811, 654 N.E.2d 591, 596, 211 Ill. Dec. 129 (Ill. App. Ct. 1995). In order for a noncompetition agreement to be valid, therefore, it must be ancillary to a valid transaction, such that the covenant not to compete is subordinate to the main purpose of the transaction. *See* 654 N.E.2d at 593. Although noncompetition agreements typically stem from an employment relationship or from the sale of a business, another valid transaction may support a covenant not to compete. The Supreme Court of Illinois has stated that [HN6] a valid restraint on trade may be based on a purchase or sale of a business or "any other analogous circumstance giving one party a just right to be protected against competition from the other." *More v. Bennett*, 140 Ill. 69, 29 N.E. 888, 891 (Ill. 1892).

Although Jim urges that we characterize the transaction as a franchise agreement, [**9] we believe that the arrangement is more accurately characterized as a gift. [HN7] "A gift is a voluntary gratuitous transfer of property from donor to donee where the donor manifests an intent to make such a gift and absolutely and irrevocably delivers the property to the donee." *In re Estate of Poliquin*, 247 Ill. App. 3d 112, 617 N.E.2d 40, 42, 186 Ill. Dec. 801 (Ill. App. Ct. 1993). We believe that there is no question that Jim intended to provide Michael with the gift of the "secrets of his success." Also, the parties do not dispute that Jim delivered his gift to Michael and that Michael accepted Jim's gift. Thus, the parties entered a valid gift relationship. The donor in a gift relationship, when the gift is trade secrets, is providing the donee with valuable advice for free. The donor may wish to protect both his generosity and his business interests from exploitation; therefore, he may

desire to impose a covenant not to compete on his donee. *See More*, 29 N.E. at 891. Here, the covenant not to compete was ancillary to the gift transaction between Jim and Michael: The gift from Jim to Michael was the essential element of the transaction, and the noncompetition [**10] agreement was subordinate to the main purpose of that transaction. Thus, because the gift relationship is a valid relationship or transaction and the noncompetition agreement is subordinate to that relationship, the noncompetition agreement meets the first requirement that it be ancillary to a valid relationship or transaction.

[*987] 2.

The next question is whether the scope of the noncompetition agreement is reasonable, a determination which is based on the facts and circumstances of the particular case. *See Eichmann v. National Hosp. & Health Care Servs., Inc.*, 308 Ill. App. 3d 337, 719 N.E.2d 1141, 1143, 241 Ill. Dec. 738 (Ill. App. Ct. 1999); *Lawrence & Allen*, 685 N.E.2d at 441; *Weitekamp v. Lane*, 250 Ill. App. 3d 1017, 620 N.E.2d 454, 462, 189 Ill. Dec. 486 (Ill. App. Ct. 1993). [HN8] For this restrictive covenant to be reasonable, its terms (1) must not be greater than necessary to protect Jim, (2) must not be oppressive to Michael, and (3) must not be injurious to the general public. *See Decker, Berta & Co. v. Berta*, 225 Ill. App. 3d 24, 587 N.E.2d 72, 76, 167 Ill. Dec. 190 (Ill. App. Ct. 1992); *see also Lawrence & Allen*, 685 N.E.2d at 441; [**11] *Abel*, 654 N.E.2d at 593; *Weitekamp*, 620 N.E.2d at 462; *Howard Johnson & Co. v. Feinstein*, 241 Ill. App. 3d 828, 609 N.E.2d 930, 934, 182 Ill. Dec. 396 (Ill. App. Ct. 1993); *accord Applied Micro*, 941 F. Supp. at 753.

Jim asserts first that, given the nature of his business and the trade secrets involved, the restraint on Michael's expansion was necessary to protect his business interests. He explains that his trade secrets are the fundamental elements of his business success and that providing Michael with access to these secrets, without compensation for Jim, is fundamentally unfair. Next, Jim argues that the restrictions were not oppressive to Michael because (1) he provided the trade secrets to Michael for free, (2) Michael could expand outside Madison in any business other than the submarine sandwich business, and (3) Michael could expand his submarine sandwich business outside Madison, as long as he used Jimmy John's, Inc. as a partner. Finally, Jim

asserts that not enforcing the covenant would be injurious to the public because it would restrict the freedom of parties to contract.

Conversely, Michael submits that the noncompetition [**12] agreement was unreasonable. According to Michael, Jim does not have a legitimate business interest in preventing Michael from establishing submarine sandwich shops where Jim is not located. Also, the geographical restriction is not reasonable, Michael claims, because the restriction prevents Michael from expanding anywhere in the world besides Madison, Wisconsin.

In our view, under Illinois common law principles, the covenant here is overly broad because there is an unnecessarily stringent geographic restriction on the promisor, Michael, and no temporal restriction whatsoever. These restrictions are not necessary to protect Jim's business interest, are oppressive to Michael, and are injurious to the public. Generally, in a covenant not to compete, the agreement restricts competition within a certain town or city or within a defined radius from the promisee's own business. *See, e.g., Prairie Eye Ctr.*, 713 N.E.2d at 612 (upholding an agreement which restricted the promisor from competing within specified cities as well as within a 10-mile radius from certain other cities); *Gillespie*, 622 N.E.2d at 1270 (enforcing a 50-mile radius restriction on competition [**13] with a medical practice); *Weitekamp*, 620 N.E.2d at 462 (allowing an agreement with a 300-mile radius limit); *Decker, Berta & Co.*, 587 N.E.2d at 76 (sanctioning a covenant with a 35-mile radius restriction). [HN9] Although a lack of geographic limits is not per se unreasonable, the complete bar on competition needs to be reasonably related to the promisee's interest in protecting his own business. *See Eichmann*, 719 N.E.2d at 1147; *Lawrence & Allen*, 685 N.E.2d at 441.

Here, Michael is prevented from expanding anywhere in the world outside of Madison. Although this may seem to be an exaggeration of what the parties expected in reality, we can only read the plain language of the agreement, and in its terms the covenant not to compete does [*988] not contain any geographic limitations. Jim's articulated legitimate business interest, protection of his trade secrets, does not show why Michael should not be able to expand to locations other than Madison, even when Jim is not in those locations. Jim has not indicated that he plans to expand into the

markets where Michael is located. Also, Michael has not suggested that he plans to expand to places where [**14] Jim already is located. [HN10] Generally, courts will uphold a restriction on competition that is coextensive with the area where the promisee is doing business. *See Lawrence & Allen*, 685 N.E.2d at 442. Jim has not demonstrated why expansion by Michael in cities and states where Jim is not located would injure Jim.

Moreover, the agreement is oppressive to Michael because it restricts him from expanding his sandwich business, regardless of whether he continues to use Jim's trade secrets. According to the terms of the agreement, Michael could not open *any* kind of sandwich shop outside Madison without Jim's approval. Finally, the complete ban on expansion is injurious to the public because it completely restricts competition. Although it seems "fair" that Jim should receive some compensation for Michael's use of Jim's trade secrets, this noncompetition agreement, without any geographic limitations, is not the reasonable means of accomplishing that end.

The agreement also fails to provide any limits on time. Instead, the agreement, as written, merely states that Michael may not expand his business. Read literally, this means that Michael may not expand his business beyond Madison [**15] for the rest of his life. [HN11] Illinois courts generally have refused to enforce noncompetition agreements that do not limit the duration of the restriction. *See Eichmann*, 719 N.E.2d at 1148; *but see Storer v. Brock*, 351 Ill. 643, 184 N.E. 868 (Ill. 1933) (allowing an activity restriction for all time within Chicago on retired physician because physician received valuable consideration for contract and could practice anywhere outside the city). The length of time for the restriction must be reasonably related to the needs of the promisee's business. *See Eichmann*, 719 N.E.2d at 1148; *Lawrence & Allen*, 685 N.E.2d at 442. For example, in a business where client development takes over a year, a restriction on competition for one to two years is reasonable because of the time it takes to cultivate a client. *See, e.g., Prairie Eye Ctr.*, 713 N.E.2d at 612 (upholding a two-year restriction because of the time needed to cultivate patients); *Gillespie*, 622 N.E.2d at 1270 (enforcing a two-year restriction on competition with a medical practice).

Jim has not produced any reason for perpetually restricting Michael's ability [**16] to expand beyond

Madison. Even though it may take time to establish a sandwich shop business and to attract a sufficient customer base to make the venture profitable, the time to accomplish this is not in perpetuity. Jim has not shown that he needs to prevent Michael from ever expanding beyond Madison in order to protect his business interests. Also, as stated above, under the agreement, Michael is prevented from ever expanding his shops, even if he develops his own recipes and business strategies. Finally, this infinite agreement injures the public because it stifles competition. We conclude that, in light of the severe and unnecessary restrictions on Michael, this covenant not to compete is unreasonable and is, therefore, void as against public policy.

C. Unjust Enrichment

Jim also asserts that he has a claim of unjust enrichment against Michael for the use of his trade secrets in (1) Michael's Madison shops and (2) Michael's shops outside of Madison. However, the district court correctly held that [HN12] a party may not recover damages for unjust enrichment pursuant to a gift relationship. *See generally Hartman v. Townsend*, 169 Ill. App. 3d 111, 523 N.E.2d 199, 202-03, 119 Ill. Dec. 731

[*989] (Ill. App. Ct. 1988). [**17] Thus, Jim may not recover damages for Michael's use of the trade secrets in his Madison shops.

We also agree with the district court that [HN13] Illinois law does not allow a claim for unjust enrichment when the underlying contract has been held to be void as against public policy. *See First Nat'l Bank v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 688 N.E.2d 1179, 1186, 228 Ill. Dec. 202 (Ill. 1997); *see also Juneau Academy v. Chicago Bd. of Educ.*, 122 Ill. App. 3d 553, 461 N.E.2d 597, 601, 78 Ill. Dec. 13 (Ill. App. Ct. 1984). Because the noncompetition agreement is void as against public policy, we cannot award Jim damages for unjust enrichment under it. Thus, Jim cannot receive damages for Michael's use of his trade secrets in Michael's Madison shops or in his shops outside Madison.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

2 F.Supp.2d 701, 13 IER Cases 1793
(Cite as: 2 F.Supp.2d 701)

United States District Court,
 E.D. Pennsylvania.
 NATIONAL BUSINESS SERVICES, INC., d/b/a
 Advertising Specialty Institute, Plaintiff,
 v.
 Roni S. WRIGHT, Defendant.
No. CIV.A. 98-1593.

April 21, 1998.

A former employer sued a former employee, seeking a permanent injunction enforcing a non-competition provision of an employment contract. The District Court, Anita B. Brody, J., held that: (1) the terms of the agreement were enforceable, even though the former employee said she had not read them; (2) the agreement was entered into ancillary to employment, even though it was not signed until 10 days after the employee began work; (3) a one-year non-compete period was reasonable; (4) the geographical area of the agreement could comprise the entire country, as the employee was in charge of Internet presentations; (5) there was a legitimate business interest underlying the noncompete agreement; (6) the employer would be deemed to have suffered irreparable harm, as the employee went to work for the major competitor in the field, possessed with extensive insider information; (7) the employer established that its harm was greater than the harm to the employee; and (8) the public interest would be served by an injunction.

Permanent injunction granted.

West Headnotes

[1] Injunction 212 

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k9 k. Nature and Existence of Right Requiring Protection. Most Cited Cases

In determining whether to grant a permanent injunction, the court is to consider whether (1) the moving party has shown actual success on the merits; (2) the

moving party will be irreparably harmed by the denial of injunctive relief, (3) the granting of the permanent injunction will result in even greater harm to the defendant, and (4) the injunction would be in the public interest.

[2] Contracts 95  **116(1)**

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k116 In General

95k116(1) k. In General. Most Cited

Cases

Restrictive covenants in employment agreements are enforceable, under Pennsylvania law, if they are (1) ancillary to the taking of employment, (2) supported by adequate consideration, (3) reasonably limited in time and geographic scope, and (4) reasonably designed to safeguard a legitimate interest of the former employer.

[3] Contracts 95  **93(2)**

95 Contracts

95I Requisites and Validity

95I(E) Validity of Assent

95k93 Mistake

95k93(2) k. Signing in Ignorance of Contents in General. Most Cited Cases

The terms of an agreement not to compete were enforceable against an employee, despite her claim that she did not read or understand them; she was afforded ample time to read the agreement before signing it, and to have any part she did not understand explained to her, and she manifested understanding of the agreement by stating that she would not go back to work for her former employer (a competitor) under any circumstances.

[4] Contracts 95  **116(1)**

95 Contracts

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95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k116 In General

95k116(1) k. In General. Most Cited

Cases

A noncompete agreement was ancillary to the taking of employment, as required for enforceability under Pennsylvania law, even though they were not signed until 10 days after the employee started work; the employee understood when she accepted the position that she would be required to sign a noncompete agreement.

[5] Contracts 95 141(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k141 Evidence

95k141(1) k. Presumptions and Burden of Proof. Most Cited Cases

Under Pennsylvania law the former employee bears the burden of showing that temporal and geographical restrictions in an employee noncompete agreement are unreasonable.

[6] Contracts 95 117(2)

95 Contracts

95I Requisites and Validity


95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k117 General or Partial Restraint

95k117(2) k. Limitations as to Time and Place in General. Most Cited Cases

A one year noncompete period, contained in the employment contract of an employee working for one of two companies providing services to the advertising specialty and promotional product industry, was not unreasonable despite the employee's claim that change occurred so fast in the industry that one year was too long an interval to protect any legitimate interest the suing employer might have; the employee worked on long-range technical and marketing plans for the suing employer.

[7] Contracts 95 117(7)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k117 General or Partial Restraint

95k117(7) k. Restrictions Unlimited as to Place. Most Cited Cases

A nationwide area in which a former employee was precluded from competing against her former employer, contained in the employment contract of an employee working for one of two companies providing services to the advertising specialty and promotional product industry, was not unreasonable; the employee had responsibility for the employer's product as shown on the Internet, which had a nationwide scope, and knew potential customers throughout the country.

[8] Injunction 212 61(2)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k61 Contracts in Restraint of Trade

212k61(2) k. Contracts Not to Engage in Particular Business. Most Cited Cases

A provider of services to the advertising specialty industry had a legitimate business interest to protect, as required under Pennsylvania law to obtain a permanent injunction prohibiting a former employer from working with its major competitor for one year anywhere in the United States; she had developed her expertise in marketing products on electronic media while employed by the employer, and she would be contacting the same people on behalf of her new employer that she became aware of and cultivated while working for the former employer.

[9] Injunction 212 61(2)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k61 Contracts in Restraint of Trade

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212k61(2) k. Contracts Not to Engage in Particular Business. Most Cited Cases
Harm is “irreparable,” for permanent injunction purposes under Pennsylvania law, when it cannot be adequately compensated in damages, either because of the nature of the right that is injured, or because there exists no certain pecuniary standards for the measurement of damages.

[10] Injunction 212 ↪61(2)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k61 Contracts in Restraint of Trade

212k61(2) k. Contracts Not to Engage in Particular Business. Most Cited Cases

An employer would be deemed to have suffered irreparable harm, as required under Pennsylvania law to obtain a permanent injunction against a former employee precluding her employment by a competitor for the one year period specified in a noncompete agreement; the employee was in charge of the employer's marketing efforts on the Internet and knew many customers, so that whatever she did for the competitor would conflict with her work for the former employer.

[11] Injunction 212 ↪61(2)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k61 Contracts in Restraint of Trade

212k61(2) k. Contracts Not to Engage in Particular Business. Most Cited Cases

An employer satisfied the requirement under Pennsylvania law for obtaining a permanent injunction enforcing the terms of a one-year noncompete agreement signed by a former employee now employed by a competitor, that the harm to it of not enforcing the agreement exceeds the harm to the employee through enforcement; because of her exposure, she could easily get other jobs in the industry, and she was even offered reemployment by the former employer, and her present employer had agreed to indemnify her against and losses resulting from any breach of the noncompete agreement.

[12] Injunction 212 ↪61(2)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k61 Contracts in Restraint of Trade

212k61(2) k. Contracts Not to Engage in Particular Business. Most Cited Cases

The public interest favored the entry of a permanent injunction, enforcing the provision of a noncompete agreement in which a former employee agreed not to work for a competitor for one year after termination of employment; granting of the injunction would discourage unfair competition, the misappropriation and wrongful use of confidential information and trade secrets and the disavowal of freely contracted obligations.

***702** Martin J. Black, Cynthia L. Randall, David M. Howard, Philadelphia, PA, for Plaintiff.

Francis X. Manning, Lee A. Rosengard, Philadelphia, PA, for Defendant.

MEMORANDUM AND ORDER

ANITA B. BRODY, District Judge.

Plaintiff seeks to enforce two restrictive covenants --- a non-compete agreement and a non-disclosure agreement --- entered into as part of an employment contract it made with defendant. Pursuant to the agreement of the parties, the trial of this action on the merits was consolidated with the preliminary injunction hearings held on April 7 and April 10, 1998. Fed.R.Civ.P. 65(a)(2). After thoroughly reviewing the evidence presented and the relevant law, I make the following findings of fact and conclusions of law. I shall ***703** grant plaintiff's request to enforce the restrictive covenants against defendant.

I. Facts

Plaintiff National Business Services (“NBS”) d/b/a Advertising Specialty Institute (“ASI”), is a Pennsylvania corporation, with its principal place of business in Langhorne, Pennsylvania. ASI sells information products and services in print and electronic form

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to the advertising specialty and promotional product industry. ASI markets its products throughout the United States. Its customers include both suppliers and distributors of advertising products.

Defendant Roni S. Wright (“Wright”) is an individual citizen of the State of Florida, who resides in Crystal Beach, Florida. For the past thirteen years, Wright has worked in the advertising specialty industry. Wright was an employee of ASI from July 31, 1995 to March 17, 1998 (Ex. P-3; P-12; P-13).^{FN1}

FN1. All citations are to the transcript of the April 7, 1998 preliminary injunction hearing and to the exhibits introduced at the hearing.

The advertising specialty industry, also known as the promotional products industry, revolves around suppliers, who place slogans and insignias on merchandise, and distributors, who purchase products from suppliers, and sell them to consumers. (Cohn, p. 6; Klein, p. 218). There are approximately 1500 suppliers in the advertising specialty industry in the United States. (Hughes, p. 169). There are over 15,000 distributors in the United States that sell specialty products. (Hughes, p. 169). Two principal companies provide sales, marketing, and information services to suppliers and distributors in the advertising specialty industry: ASI and Impact. (Cohn, p. 12; Klein, p. 218).

Impact, like ASI, sells information products and services in print and electronic form to the advertising specialty and promotional product industry. Impact and ASI have a history of aggressive competition: they produce and market similar products and serve the same customers. (Klein, pp. 218-20).^{FN2}

FN2. Impact and ASI have been involved in two litigations over the use of confidential and proprietary information. Shortly after Impact was formed, ASI sued Impact for allegedly using ASI’s confidential and proprietary name and address information. Impact counterclaimed on antitrust grounds. The case settled, and as part of the settlement agreement, Impact is permitted to purchase ASI’s information products and to be listed as both a supplier and a distributor within ASI’s publications in exchange for a royalty pay-

ment. (Klein, pp. 224-25). A second case was filed on similar grounds and settled. The settlement agreement is covered by a confidentiality agreement. (Klein, pp. 224-25). Although these litigations are important to understanding the relationship of ASI and Impact in the advertising specialty industry, they are not directly relevant to the instant case.

Wright was an employee of Impact Group (“Impact”) for ten years prior to joining ASI, from 1985 to 1995. (Klein, p. 229). Wright worked her way up from selling catalogs to the position of Acting Vice President of Impact. (Wright, pp. 120-21). However, Peter Klein (“Klein”), the Chairman of Impact, told Wright that he would not make her a permanent Vice President, and demoted her from the position of Acting Vice President, because, although Wright is Jewish, she did not possess what he called the “Jew gene.” Wright understood this comment to mean that Klein did not believe she was “management material.” (Wright, pp. 74-75). During the time Wright worked for Impact, she worked only with print, not electronic, materials. (Wright, p. 76). When Wright left Impact, in early 1995, she did not have another job in the advertising specialty industry. (Wright, p. 76).

Wright first discussed employment at ASI in May 1995 with the Chairman of the Board of ASI, Norman Cohn (“Cohn”). (Wright, pp. 79-80, 126-27; Cohn, pp. 15-17). Cohn emphasized to Wright that ASI could only offer her a job if she signed a non-compete agreement. (Cohn, p. 17). Wright understood that every ASI employee must sign a non-compete agreement. (Wright, p. 80). Wright agreed to sign the non-compete agreement and emphasized that she would never return to work for Impact. (Wright, p. 83).

After discussing employment at ASI with Cohn, Wright traveled to ASI in Langhorne, Pennsylvania to further interview for a position at ASI. Wright was hired by ASI to launch a new Internet product, Promomart, to distributors. Wright had no prior Internet*704 experience when she began working at ASI. (Wright p. 77; Lovell, p. 198).

On August 1, 1995, Wright’s second day of work for

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ASI, she signed an employment terms letter, which specified the compensation and benefits of her employment. (Ex. P-3; Wright, p. 129). Wright believed that the employment terms letter was the non-compete agreement that she and Cohn had discussed. (Wright, p. 86). The employment terms letter did not contain a non-competition or non-disclosure clause, but did expressly state that employee must sign the “NBS Covenant Agreement” and the “NBS Employee Agreement,” in order to receive a “NBS Employee Manual.” (Ex. P-3; Wright, p. 85).

On August 8, 1995, Eli Lawrence, an in-house lawyer for ASI, called Wright and told her that he was sending her a document by express mail to which she should pay “very close attention,” and which she should sign and return right away. (Wright, pp. 89-90). On August 9, 1995, Wright received a document entitled “Agreement.” (Wright, pp. 90-91; Ex. P-1, P-3).

The Agreement included the following covenants:

2.3 *NONCOMPETITION*. During the term of Employee's employment with NBS and for a period of 12 months thereafter, Employee shall not, except with NBS's express prior written consent, or except in the proper course of his employment with NBS, directly or indirectly, in any capacity, for the benefit of any Person:

2.3.1 Solicit, interfere with or divert any Person who is or during such period becomes a customer, supplier, employee, salesman, agent or representative of NBS, in connection with any business in competition with NBS.

2.3.2 Establish, engage, own, manage, operate, join or control, or participate in the establishment, ownership, management, operation or control or be a director, officer, employee, salesman, agent or representative of, or be a consultant to, any Person in any business in competition with NBS in any state where NBS now conducts or during such period begins conducting any material business.

2.3.3 Solicit, divert or induce any of NBS' employees to leave or to work for any person with which employee is connected.

2.2 *NONDISCLOSURE*. At all times during and after the term of Employee's employment with NBS, Employee shall not, except with NBS's express prior written consent, or except in the proper course of his employment with NBS, directly or indirectly, communicate, disclose or divulge to any Person, or use for his own benefit or the benefit of any Person, any confidential or proprietary knowledge or information, no matter when or how acquired, concerning the conduct and details of NBS's business including, without limitation, particular methods of operation, technical information, trade secrets, and confidential plans, practices and information relating to NBS's products, services, marketing and customers.

The Agreement also contained a provision that made every idea Wright had about ASI's business during her employment the exclusive property of ASI (Ex. P-1, ¶ 2.1), a provision requiring Wright to return all ASI property on the termination of her employment (Ex. P-1, ¶ 2.4), as well as a provision that, in the event of a breach, ASI would be irreparably harmed and entitled to injunctive relief (Ex. P-1, ¶ 2.5).

Wright signed the Agreement without reading it carefully. (Wright, pp. 90-91, 128). Wright signed the Agreement below the following statement: “Having read and understood this Agreement, the parties enter into and agree to the terms contained herein of their own free will and accord.” (Ex. P-1). Wright realized that the agreement was something she needed to sign “for [her] employment.” (Wright, p. 90). When Wright signed the agreement, on August 9, 1995, she had been an ASI employee for 10 days. (Wright, p. 130). The agreement read in part: “In consideration of Employee's promises and covenants contained herein, NBS [] agrees to hire employee.” (Ex. P-3, § 1).

The employment terms letter signed by Wright on August 1, 1995 required a countersignature by a Senior Vice President of ASI. (Ex. P-3). The Senior Vice President did not sign Wright's employment terms letter until August 9, 1995, when Wright signed the *705 Agreement sent to her by Lawrence containing the non-compete and non-disclosure covenants. (Ex. P-1, P-3).

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During her employment at ASI, Wright held two different positions. Wright worked for two years as Internet Distributor Sales Manager for ASI. (Wright, pp. 70-72). Wright's primary responsibility in this position was to launch ASI's product, Promomart, to all of ASI's customers. (Wright, pp. 70-72). Wright had contact with customers and industry members all over the United States. (Wright, pp. 121-22).

In the summer of 1997, Wright assumed the function of National Account Manager for Distributor Sales. (Wright, pp. 183-84). Wright had responsibility for selling all of ASI's products, both print and electronic, to 38 of ASI's biggest distributor clients. (Wright, pp. 70-72; Lovell, p. 201). In January 1998, Wright's title formally changed to reflect her new responsibilities. (Lovell, p. 201).

During her employment at ASI, Wright's duties included primary responsibility for Internet sales to distributors; collecting customer feedback on products; and attending quarterly management meetings regarding Internet products (including discussion of product development, technical issues, marketing, and competitors). (Ex. P-29; Lovell, pp. 198-203). Although Wright was not part of ASI's management (Cohn, pp. 38-39; Lovell, p. 194), Wright had access to ASI's products prior to their introduction on the market, and was familiar with confidential information, relating to manufacturing, research, product development, marketing strategies, advertising plans, pricing, and customers. (Ex. P-29; Lovell, sealed transcript). Wright received extensive memoranda relating to management meetings which described the issues, problems, and initiatives Cohn intended to discuss, as well as the participants' responses. (Lovell, sealed transcript; Ex. P-29). For example, Wright knew which customers had stopped purchasing ASI products, and the reasons given by those customers for cancellation. (Lovell, sealed transcript; Ex. P-29). Wright also knew plans for future products and product improvements. (Cohn, p. 20). Much of the information about ASI that Wright possesses is only valuable for a limited time because of rapid changes in the industry, particularly in the Internet sphere. (Ex. P-29; Lovell, sealed transcript).

Wright was one of ASI's top sales persons for both electronic and print products. (Lovell, sealed tran-

script). Wright developed relationships with hundreds of customers and potential customers of ASI. (Cohn, pp. 58-61; Lovell, sealed transcript). In her position as Internet Distributor Sales manager, Wright sold ASI's Promomart to at least 200 customers. (Wright, sealed transcript).

Before Wright began work at ASI, she had little Internet experience. (Wright, p. 77). Wright is now considered an expert on Internet information products in the advertising specialty industry. (Wright, pp. 120-22; Lovell, p. 203). Wright sold products and spoke about the Internet at industry meetings throughout her employment at ASI. (Lovell, p. 203).

On February 12, 1998, Wright had lunch with Sarah Macario ("Macario"), President of Impact, and a friend of Wright's, and Wright and Macario discussed employment opportunities for Wright at Impact. (Wright, p. 179).

Wright told Macario about her August 9, 1995 non-compete agreement with ASI. (Wright, pp. 179-80). Before giving Macario a copy of the non-compete agreement, Wright requested a confidentiality agreement. (Wright, pp. 179-80; Klein, p. 241). Wright requested the confidentiality agreement in order to keep her discussions with Impact confidential, so that no one would learn that Wright was considering leaving ASI. (Wright, p. 179; Klein, p. 241).^{FN3}

FN3. Although it is not material to this permanent injunction decision, the parties brought out the fact that after Impact agreed to the confidentiality agreement, Wright gave Macario a copy of what she thought was the non-compete agreement she had signed with ASI. (Wright, pp. 130-31). The Agreement that Wright gave Macario was not a copy of the Agreement she had signed with ASI, but a different version, which, in addition to the terms in Wright's contract, also contained a paragraph restricting the employee from working for distributors or suppliers. At the time Wright gave the document to Macario, she mistakenly believed it to be a copy of the Agreement she had signed. (Wright, 130-134; Ex. D-1).

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***706** On March 5, 1998, Macario gave Wright a “Memo of Understanding” which described the position that Impact was offering Wright. (Ex. P-10).

On March 17, 1998, Wright wrote a letter to Cohn informing him that she intended to resign her position at ASI and pursue employment with Impact, her former employer. (Ex. P-12).

On March 18, 1998, ASI's Vice President of Sales, Christine Lovell (“Lovell”), called Wright and told her that if Wright were unhappy, ASI would find her another job at ASI or a related business. (Wright, p. 106). Wright did not express interest in another job at ASI or a related business. (Wright, p. 106).

Cohn wrote back to Wright on March 18, 1998, asking her to remain at ASI and offering her other opportunities at ASI. (Ex. P-14). Cohn also notified Wright that ASI would enforce the covenant not to compete, which Wright had signed, if she went to work for Impact. (Ex. P-14). Cohn is still willing to offer Wright a job in another one of his companies. (Cohn, p. 30).

Wright entered into an employment agreement with Impact on March 25, 1998. (Ex. P-11;). Wright's employment agreement with Impact provides that: “Impact shall employ Roni Wright (“Wright”) as Vice-President of its Internet services division.” The agreement outlines Wright's responsibilities to (a) manage and direct the sales and marketing activities; (b) hire and fire all employees; (c) plan marketing and sales activities; (d) confer with product development personnel to provide customer feedback and requests; (e) set all business operational policies and goals; and (f) participate as a member of Impact's executive committee. (Ex. P-11, ¶ 2). Impact agreed to pay Wright a yearly base salary of \$80,000. (Ex. P-11, ¶ 4). This salary would be a \$25,000 per year increase from Wright's salary at ASI. (Wright, p. 97). In addition, if Wright met certain performance targets, the Internet Services Division would become a separate corporation, with Wright as president, if 80% of the shareholders of Impact so agreed. (Ex. P-11, ¶¶ 5-6; Wright, pp. 97-99; Klein, p. 269).

As part of the employment agreement, Impact recognized that the covenants Wright had entered into with ASI could affect the type of work she could do at Impact, and agreed to offer Wright another job at the same compensation, but with different responsibilities until Wright could assume the position of Vice-President of Internet Services. (Ex. P-11, ¶ 7). Peter Klein, Chairman of Impact, would be willing to offer Wright another job at Impact, such as in a customer service position at Impact Data and Information Services Company, ASI's direct competitor, or as a liaison to the industry's non-profit trade association, to which both Impact and ASI are trying to sell products. (Klein, pp. 244-45, 275-76).

The employment agreement with Impact also provides that Impact would “assume full costs of defending Employee in any action brought by the Third Party,” and Impact “shall indemnify and hold Wright harmless, subject to the condition that Impact shall have final determination as to how such defense be conducted.” (Ex. P-11, ¶ 8).

Wright has not sought employment with any supplier or distributor in the advertising specialty industry. (Wright, p. 106). Nor has she sought employment outside of the advertising specialty industry. (Wright, pp. 106-07, 190). There are over 200 suppliers in Florida, where Wright resides, and over 1,000 distributors. (Lovell, sealed transcript). Wright is well known throughout the industry, both because of her work at ASI, and because of her involvement in both national and regional trade associations (Wright, p. 107). For example, while working at ASI, Wright served as President of the Florida Professional Products Association. (Wright, p. 107). ASI's expert witness testified that Wright's experience would make her a “most desirable” candidate for employment with a supplier or distributor. (Holt, pp. 139-44). Wright's expert witness agreed that she could easily find another job in the industry, although it might take some time for her to earn a commensurate income. (Hughes, pp. 165-71).

II. Discussion

[1] In deciding whether to grant a permanent injunction, I must consider whether: ***707** (1) the moving party has shown actual success on the merits; (2) the

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moving party will be irreparably harmed by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest. *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1477 nn. 2-3 (3d Cir.1996).

A. Actual Success on the Merits

[2] Pennsylvania law controls the interpretation of this case, pursuant to express agreement of the parties. Ex. P-1, ¶ 3.4. Pennsylvania courts disfavor restrictive covenants; however, the covenants that ASI seeks to enforce are enforceable under Pennsylvania law, if they are: (1) ancillary to the taking of employment; (2) supported by adequate consideration; (3) reasonably limited in time and geographic scope; and (4) reasonably designed to safeguard a legitimate interest of the former employer. *See Gagliardi Bros. v. Caputo*, 538 F.Supp. 525, 527 (E.D.Pa.1982); *Thermo-Guard, Inc. v. Cochran*, 408 Pa.Super. 54, 64-66, 596 A.2d 188, 193-94 (1991).

The covenants apply to the present situation, that is, the non-compete covenant prohibits Wright from accepting employment with a competitor within one year of the termination of her employment with ASI: Impact is a competitor and Wright seeks to work for Impact within one year of ending employment with ASI. (Ex. P-1, ¶ 2.3). The non-disclosure covenant took effect as soon as Wright signed it. (Ex. P-1.¶ 2.2). Wright does not contest that she violated the terms of the covenants, but argues that the covenants are unenforceable.

Wright argues that the covenants are unenforceable against her for several reasons:

There was no meeting of minds as to the meaning of the non-compete covenant: although she signed the covenant, she did not read it carefully, and her understanding of a non-compete covenant at the time she signed it was that such a covenant prevented her from stealing secrets from ASI or starting her own competitive company.

The covenants were not ancillary to her taking of

employment with ASI, because she signed the Agreement containing the covenants ten days after beginning employment.

The covenants are unreasonable in temporal and geographical scope: in the information industry, Wright argues, one year is a very long time, and her primary responsibilities were for 38 distributors, not for every distributor across the nation.

The covenants do not protect a legitimate business interest of ASI: Wright's goodwill and understanding of the industry belong to her, not to ASI, and are the product of her hard work. Wright will not reveal ASI's confidential information under any circumstances.

I will address these arguments in turn.

[3] Wright's testimony that she did not read or understand what she had agreed to when she signed the restrictive covenants is not credible, given her statement to Cohn that she would never go back to work for Impact. Wright had the opportunity to ask what the covenants meant, either at the time of her discussion with Cohn, or before she signed them. The covenants at issue here are clear on their face and were entered into knowingly and of Wright's free will.

[4] The covenants at issue are ancillary to the taking of employment. Wright's argument that they were not ancillary because of a ten-day lapse between beginning employment and signing the covenants is not persuasive. Wright agreed to the non-compete covenant prior to accepting employment and signed an agreement expressly referring to the covenants when she first started employment. Such a short period of time is not sufficient to render the covenants unenforceable. *See Beneficial Fin. Co. v. Becker*, 222 A.2d at 876 (contract signed two days after employee commenced work); *Nagaraj v. Arcilla*, 20 D. & C.3d 574, 582-83 (Pa.Com.Pl.1981) (two weeks). Furthermore, ASI did not ratify Wright's employment agreement until after she had signed the covenants; from ASI's point of view, Wright had not yet consummated her employment. Because the restrictive covenants were part of the formation*708 of the employment relationship, they are supported by adequate consideration as a matter of law. *Barb-Lee Mobile*

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Frame Co. v. Hoot, 416 Pa. 222, 225, 206 A.2d 59, 61 (1965).

[5][6][7] Defendant Wright bears the burden of showing that the covenants are unreasonable in temporal or geographical scope. *Admiral Services, Inc. v. Drebit*, 1995 WL 134812, *6 (E.D.Pa. Mar.28, 1995); *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164, 1169 (1977).^{FN4} Plaintiff seeks to enjoin Wright from working for Impact in any capacity for a one year period. Pennsylvania courts routinely uphold one year restrictive covenants. *See, e.g., Diversey Lever, Inc. v. Hammond*, 1997 WL 28711, *1, *23 (E.D.Pa. Jan.24, 1997) (upholding employer's one year covenant not to compete); *Worldwide Auditing Services, Inc. v. Richter*, 402 Pa.Super. 584, 591-92, 587 A.2d 772, 776 (1991) (upholding employer's two year covenant not to compete). Furthermore, Wright participated in quarterly Internet management meetings where ASI's long-range technical and marketing plans were discussed. A one-year term, although admittedly a long time in this industry, seems necessary to protect ASI's confidential information. Similarly, the geographic scope of the restrictive covenant is reasonable. Although nationwide covenants are disfavored, in this case both ASI and Impact are nationwide businesses, and Wright, while employed by ASI, had extensive contacts with customers all over the nation. *See Graphic Management Assocs.*, 1998 WL 159035, at *14 (upholding covenant restricting defendant from competing with plaintiff in North America); *Volunteer Firemen's Insurance Services, Inc. v. CIGNA Property and Casualty Insurance Agency*, 693 A.2d 1330 (Pa.Super.1997) (upholding nationwide noncompete agreement). Transactions involving the Internet, unlike traditional "sales territory" cases, are not limited by state boundaries. *See Kramer v. Robec, Inc.*, 824 F.Supp. 508, 512 (E.D.Pa.1992) (nationwide bar on competition reasonable "because Robec and its competitors market their products in all fifty states"). The temporal and geographical scope of the covenants at issue here are reasonable.

FN4. Pennsylvania law governs this diversity case, and, therefore, determines the parties' burdens of proof on the enforceability of the employment covenants.

[8] Finally, ASI seeks to protect its customer goodwill and its business information, both of which courts have recognized as legitimate business interests. *See, e.g., Thermo-Guard*, 596 A.2d at 193-94 ("Pennsylvania cases have recognized that trade secrets of an employer, customer goodwill, and specialized training and skills acquired from the employer are all legitimate interests protectable through a restrictive covenant"). Wright had wide-ranging contact with ASI's customers and potential customers over a significant period of time. Wright was introduced to the Internet through her work with ASI, and became an industry spokesperson on Internet products while at ASI. Wright had access to confidential information regarding ASI's customers, products, technical details, and marketing strategies, both present and future.

Wright's proposed work for Impact would violate the noncompete agreement. If Wright were to work as Vice-President of Internet Services for Impact, she would be marketing and developing Impact products in direct competition with the ASI products she marketed, and she would be selling to the exact same customers that she dealt with at ASI. It is virtually inconceivable that Wright would be able to avoid utilizing the confidential information she learned at ASI and exploiting ASI's customer goodwill. Even if Wright did not have direct contact with customers, Impact could publicize its employment of Wright in order to capitalize on ASI's goodwill.

No evidence was produced at the hearing that there is any job at Impact that Wright could perform without endangering ASI's legitimate business interests in protecting its goodwill and information. The jobs proposed by Peter Klein all entail extensive customer contact on Internet issues (Klein, pp. 244-45, 1.22) exactly what ASI bargained to prevent. Wright argues that she could work for Impact without violating the agreement, by limiting her customer contacts and resolutely *709 refusing to make use of ASI's confidential information. I do not doubt Wright's good intentions; however, it would be impossible for Wright to work for Impact without making use of her goodwill and information: Wright's every decision would be informed by the information she acquired at ASI. The one-year non-compete and non-disclosure provisions are reasonably necessary to protect the legitimate business interests of ASI in protecting its

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customer goodwill and its confidential and proprietary business information. Any narrowing of these provisions, whether in temporal scope or employment function, would irreparably harm ASI.

ASI has proven that without an injunction Wright will break the restrictive covenants by working for Impact as the Vice-President of their Internet Services Division. ASI has shown that the covenants were ancillary to Wright's employment, were supported by adequate consideration, are reasonably limited in time and geographic scope, and that the covenants are reasonably necessary to protect ASI's legitimate business interests. ASI has succeeded on the merits.

B. Irreparable Harm to Plaintiff

[9][10] Harm is irreparable when it cannot be adequately compensated in damages, either because of the nature of the right that is injured, or because there exists no certain pecuniary standards for the measurement of damages. *Albert E. Price, Inc. v. Metzner*, 574 F.Supp. 281, 289 (E.D.Pa.1983). ASI will suffer substantial injury if Wright goes to work for Impact. Wright developed extensive customer relationships while employed by ASI, which constitute the goodwill of ASI. Wright also has a wide-ranging knowledge of ASI's business, products and customers, which would be impossible for her not to call on if she was working for ASI's direct competitor. As an employee of Impact, Wright's duties will certainly be in conflict with ASI's objectives, which are to sell its products and services and promote its goodwill. The potential injury to ASI's goodwill and the potential use of ASI's confidential information constitutes irreparable harm. *See id.*

C. Greater Harm to Defendant

[11] Granting the permanent injunction, and thereby enforcing the covenants, will not result in even greater harm to Wright than denying it would to ASI. Wright is not only indemnified by Impact for any harm, but also appears well-qualified to find employment with a non-competitor of ASI, certainly for a year's time. Wright's numerous contacts in the industry make it likely that she could find employment rapidly. Wright might not be able to obtain a position as rewarding, in either monetary or career terms, as the one at Impact;

however, Wright does not have a right to the ideal job, but rather, to be able to earn a livelihood. *See e.g., Graphic Management Assocs.*, 1998 WL 159035, at *18 (finding defendant will not be irreparably harmed, where he could work outside of North America, or work for non-competitor of former employer). Furthermore, ASI has offered repeatedly to employ Wright at a related business. Wright voluntarily left ASI, with full knowledge that ASI would enforce the covenants against her; this factor is worth considering in balancing the harms to the parties.^{FN5} *See, e.g., Surgical Sales Corp. v. Paugh*, 1992 WL 70415, *10 n. 6 (E.D.Pa. March 31, 1992). Wright has no lack of opportunities. Wright has not chosen, up to this point, to pursue opportunities outside of Impact.

FN5. Note that Wright also expressly agreed, as part of the "Agreement" containing the non-compete and non-disclosure covenants, that, were she to breach the "Agreement," ASI would be irreparably harmed and entitled to injunctive relief. (Ex. P-1, ¶ 2.5). Although Wright's agreeing to injunctive relief at the formation of her employment is not determinative of the enforceability of the covenants, it does indicate Wright's awareness of the potential consequences of any breach, and, therefore, weighs into the balance of equities.

D. The Public Interest

[12] The public interest is best served, in this case, by upholding the restrictive covenants freely entered into by Wright. Granting a permanent injunction to ASI "will discourage unfair competition, the misappropriation and wrongful use of confidential information and trade secrets and the disavowal of freely contracted obligations." *Graphic Management Assocs., Inc. v. Hatt*, 1998 WL 159035, at *19.

*710 III. Conclusions of Law

Consistent with the above findings of fact and discussion, I make the following conclusions of law:

1. I have subject matter jurisdiction over this action, because there is diversity of citizenship between the

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parties and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a).

2. Pennsylvania law governs this action. Ex. P-1, § 3.4.

3. I must consider four factors when determining whether to issue a permanent injunction: (1) the moving party has shown actual success on the merits; (2) the moving party will be irreparably harmed by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest. *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1477 nn. 2-3 (3d Cir.1996).

4. Plaintiff has succeeded on the merits of its case.

5. Plaintiff has shown that the restrictive covenants signed by defendant in August 1995 are ancillary to the defendant's employment, supported by adequate consideration, reasonable in time and geographic scope, and reasonably necessary to protect the plaintiff's business interests.

6. Plaintiff has shown that it will be irreparably harmed absent the grant of a permanent injunction.

7. Defendant has not shown that she will suffer a greater harm if a permanent injunction is granted.

8. ASI is entitled to the permanent injunction it seeks.

ORDER

AND NOW, this day of April 1998, upon consideration of all the evidence before me, **IT IS ORDERED** that the Standstill Agreement entered into by the parties on March 31, 1998 is vacated; judgment is entered in favor of the plaintiff; and defendant Wright is enjoined from:

(1) working for Impact for one year from the effective date of Wright's resignation from ASI (April 1, 1999);

(2) using, disclosing, or revealing any confidential

information belonging to ASI;

(3) destroying or copying any information taken from ASI; and

(4) retaining any property of ASI.

E.D.Pa.,1998.

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620 N.E.2d 479
250 Ill.App.3d 922, 189 Ill.Dec. 511
SPRINGFIELD RARE COIN GALLERIES, INC.,
Plaintiff-Counterdefendant-Appellant and Cross-Appellee,
v.
Steve MILEHAM, Defendant-Counterplaintiff-Appellee and
Cross-Appellant.
No. 4-92-0958.
Appellate Court of Illinois,
Fourth District.
Argued June 22, 1993.
Decided Sept. 9, 1993.

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[250 Ill.App.3d 925] [189 Ill.Dec. 514] Bruce A. Beeman and Stephen M. Osborne (argued), Beeman Law Offices, Springfield, for appellant.

[250 Ill.App.3d 926] R. Kurt Wilke (argued), Barber, Segatto, Hoffee & Hines, Springfield, for appellee.

Justice KNECHT delivered the opinion of the court:

Plaintiff, Springfield Rare Coin Gallery, brought suit against defendant, Steve Mileham, its former employee, for breach of a restrictive covenant. Plaintiff obtained a preliminary injunction, and sued for damages. Defendant countersued, alleging conversion of his property by plaintiff. The trial court found the restrictive covenant to be unenforceable as defendant had not obtained any confidential information during his employment and plaintiff did not have a near-permanent relationship with its customers. The trial court found plaintiff did not convert defendant's property; however, it found plaintiff was in possession of property belonging to defendant and ordered the transfer of the property to defendant. Both parties appeal. We affirm the trial court's judgment with respect to the unenforceability of the restrictive covenant, but reverse its finding defendant did not establish the elements of conversion.

I. FACTS



Plaintiff is in the business of dealing in rare coins and precious metals. James Hausman, plaintiff's president, began operating his first coin business out of his home in 1975. The plaintiff corporation was formed at a later date. Defendant, Steve Mileham, began working part-time for his father's coin business in the late 1960's, and worked full-time for the business between 1973 and 1986.

In 1986, defendant approached Hausman regarding the possibility of employment with plaintiff. Hausman testified since defendant was the son of a local competitor, he (Hausman) was concerned if plaintiff employed defendant, defendant would learn plaintiff's business, and then return to work for his (defendant's) father. Accordingly, plaintiff required defendant to sign a

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[189 Ill.Dec. 515] restrictive covenant, agreeing not to compete with plaintiff in Sangamon County for two years after the termination of the employment relationship.

Defendant began his employment with plaintiff in February 1987 and was terminated in January 1989. At the outset of the employment relationship the parties created an account which they termed the "show account." The show

account was funded equally by the parties: defendant contributed property valued at \$12,456, and plaintiff contributed \$12,456 in cash. Defendant paid for his purchases with show account funds, and deposited his sales proceeds in the show account. [250 Ill.App.3d 927] Defendant was paid a salary of \$7,000 per year, plus half the profits generated in show account transactions.

Initially, defendant worked in plaintiff's store. After a few months, defendant began to devote his time exclusively to the middleman portion of plaintiff's business. Acting as a middleman in the coin and precious metals trade involves buying goods at low prices from small dealers, and selling them at higher prices to larger dealers. Defendant developed purchasing routes to Peoria, Decatur, Champaign, Danville, and St. Louis. Hausman introduced him to some of the coin dealers in these locations, others had been known to defendant prior to his employment with plaintiff. Defendant also learned of other dealers by referring to local telephone directories and by asking dealers if they knew of other dealers in the area; defendant would then make a cold call to their businesses. The parties agreed defendant conducted 95% of the show account business outside of Sangamon County. Hausman testified he had handwritten notes, made on FACTS dealer listing sheets, regarding the financial reliability of dealers he had previously done business with, and he showed these notes to defendant. Defendant testified he did not use this information. Defendant did not take the FACTS sheets with him when he left plaintiff's employ. Hausman also testified he told defendant the profit margin plaintiff had on some items.

The employment contract provided the property in the show account belonged equally to plaintiff and defendant and was to be divided equally between them upon termination of the employment relationship. After the termination of the employment relationship, plaintiff and defendant had discussions regarding distribution of the show account property, but whether they arrived at an agreement regarding the distribution is in dispute. Plaintiff withdrew

\$71,225.66 as its share of the assets on March 22, 1989. Defendant's share of the assets remains in plaintiff's possession.

After the termination of the employment relationship between plaintiff and defendant, defendant did not return to work for his father, and did not open a business in Sangamon County. However, defendant did continue to do business as a middleman. Defendant traveled to coin dealer's businesses, bought goods from them, and resold them to larger dealers.

Plaintiff obtained a preliminary injunction against defendant, prohibiting him from transacting business with any of plaintiff's "protected customers" under the following circumstances:

"1. When Sangamon County is the point of delivery of a product being the subject of the transaction or when the product[250 Ill.App.3d 928] has Sangamon County as a destination (that is, when the outgoing or shipping point is Sangamon County or when Sangamon County is the destination in connection with the purchases or receipt of materials by the defendant); or

2. When the transaction was negotiated or consummated in whole or in part either physically between the Defendant and the customer in Sangamon County or when the transaction or the consummation of the transaction was, in whole or in part, reached by a telephone conversation in which the point of origin or destination was in Sangamon County."

"Protected customers" were defined as those customers meeting both of the following criteria:

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[189 Ill.Dec. 516] "(a) Customers who transacted business with the Plaintiff with a frequency of either once a month, or twelve times within a twelve[-] month period from March, 1987 and before January 17, 1989; and

(b) Customers with whom the Defendant has had no business transactions (including while with B & J Coin Co.) prior to Defendant's employment by Plaintiff in March, 1987."

On July 8, 1991, plaintiff filed an amended complaint requesting damages for breach of the restrictive covenant. Plaintiff alleged defendant had transacted business with 20 to 25 of its protected customers. Plaintiff later limited its claim to five or six customers, i.e., Joel Coen, Dave's Trading Post, Bob Glenn, Speciality, and Blue Diamond. Defendant conceded he had not transacted business with these customers prior to becoming affiliated with plaintiff. The parties disagreed regarding whether defendant had transacted business with a sixth customer, Premiere, prior to becoming affiliated with plaintiff. Plaintiff alleged Premiere was a protected customer if Hausman's testimony defendant had not transacted business with Premiere prior to becoming affiliated with plaintiff was accepted as true. However, Premiere would not be a protected customer if defendant's testimony he had transacted business with Premiere's parent company prior to becoming affiliated with plaintiff were accepted as true.

It is unclear from the evidence presented at trial whether plaintiff voluntarily ceased transacting business with Joel Coen. Hausman testified he did not continue to do business with Coen because defendant had bought all of the "product," and there was no product available for plaintiff to buy and resell to Coen. However, Hausman was impeached with his deposition testimony, in which he stated he ceased transacting business with Coen because he could receive better prices from other customers. Hausman testified he did not recall introducing [250 Ill.App.3d 929] defendant to Premiere, Dave's Trading Post, Specialty or Blue Diamond. However, Hausman testified although he did not introduce defendant to a particular client, on many occasions he instructed defendant regarding whether to do business with the client. Defendant testified he developed Blue Diamond, Dave's Trading Post and Specialty as

customers by making cold calls to their businesses.

At trial, plaintiff attempted to prove its damages by presenting evidence of defendant's income and his transactions with various customers. Plaintiff alleged the measure of damages should be the percentage of defendant's income equal to the percentage of defendant's business with plaintiff's protected customers. Plaintiff presented no evidence it had ever been underbid by defendant, it had ever been unable to buy materials for resale as the result of defendant's business, or it had ever been unable to resell materials as the result of defendant's business. Although Perrino initially testified plaintiff could not buy scrap gold to resell due to defendant's business transactions, he was impeached with his deposition testimony in which he acknowledged nothing prevented plaintiff from buying scrap gold and reselling it to other dealers.

As stated, the trial court found the restrictive covenant was unenforceable. In determining defendant did not obtain confidential information while in plaintiff's employ, the court ruled the names of plaintiff's customers were not confidential information. However, the trial court did not specifically address plaintiff's claims that customer information, instructions given to defendant, and pricing information were confidential information.

The trial court ordered plaintiff to return defendant's share of the show account property to defendant. Defendant filed a motion to reconsider, alleging return of property was not the proper measure of damages in a conversion action, and plaintiff should have been ordered to pay defendant a money judgment in the amount of the value of the property, as of the date of the conversion, plus interest. The trial court ruled defendant had not established the elements of conversion, and, accordingly, was entitled only to the return of the

[189 Ill.Dec. 517] property. This appeal and cross-appeal followed.

II. RESTRICTIVE COVENANT

Plaintiff alleges the trial court erred in finding the restrictive covenant was not enforceable. Restrictive covenants operate in partial restraint of trade and are scrutinized carefully to ensure their intended effect is not the prevention of competition per se. (*Lee/O'Keefe Insurance Agency, Inc. v. Ferega* (1987), 163 Ill.App.3d 997, 1003, 114 Ill.Dec. 919, 923, [250 Ill.App.3d 930] 516 N.E.2d 1313, 1317.) Reasonable restrictive covenants will, however, be enforced under two sets of circumstances: (1) where the former employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit, or (2) where, by the nature of the business, the customer relationship is near permanent and, but for his association with plaintiff, defendant would not have had contact with the customers in question. *Lee/O'Keefe*, 163 Ill.App.3d at 1004, 114 Ill.Dec. at 924, 516 N.E.2d at 1318.

A. Confidential Information

Plaintiff alleges the trial court erred in holding defendant did not acquire confidential information during his employment and use it to his benefit after the termination of the employment relationship. A restrictive covenant may be enforced if the employee learned trade secrets or other confidential information while in plaintiff's employ and subsequently attempted to use it for his or her own benefit. (See *Office Mates 5, North Shore, Inc. v. Hazen* (1992), 234 Ill.App.3d 557, 569, 175 Ill.Dec. 58, 70, 599 N.E.2d 1072, 1084.) On appeal, plaintiff alleges defendant received the following information: (1) the names of its customers; (2) financial information regarding its customers; (3) instruction on the authentication and valuation of rare coins and collectibles; and (4) its policies regarding price margins. The trial court, in making its written ruling, addressed only the first of the plaintiff's four contentions.

We find the trial court did not err in determining plaintiff's customer list did not constitute confidential information. We conclude the trial court implicitly rejected plaintiff's contentions that the financial information regarding plaintiff's customers, the instructions defendant received, and plaintiff's pricing policies constituted confidential information, and we agree they did not (see 134 Ill.2d R. 366(b)(3)(i)).

1. Customer Names

Under Illinois law, customer lists and other customer information will constitute confidential information only when the information has been developed by the employer over a number of years at great expense and kept under tight security. However, the same type of information is not protectable where it has not been treated as confidential and secret by the employer, was generally available to other employees and known by persons in the trade, could easily be duplicated by reference to telephone directories or industry publications, and when the customers on such lists did business with more than one company or otherwise changed businesses frequently so that their identities [250 Ill.App.3d 931] were known to the employer's competitors. See *Office Mates*, 234 Ill.App.3d at 574-75, 175 Ill.Dec. at 70, 599 N.E.2d at 1084.

In the present case, plaintiff presented no evidence of any great expense incurred for the development of its customer list. Moreover, the evidence showed plaintiff's customers were well known to others in the trade, could be easily ascertained by reference to telephone directories and trade journals, and did business with and were known to plaintiff's competitors. Accordingly, we find the trial court did not err in finding the names of plaintiff's customers did not constitute confidential information.

2. Financial Information Regarding Customers

The information regarding the financial reliability of plaintiff's customers was not financial information which was used by defendant after leaving plaintiff's employ. As noted, customer information constitutes

confidential information only when the information has been developed

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[189 Ill.Dec. 518] by the employer over a number of years at great expense and kept under tight security. (Office Mates, 234 Ill.App.3d at 574, 175 Ill.Dec. at 70, 599 N.E.2d at 1084.) Hausman testified he made handwritten notes regarding the financial reliability of his customers, including whether a given customer was a "fast payer" or "slow payer." The record is devoid of any great expense incurred to develop this information. Moreover, information regarding credit worthiness and payment history is obtainable from credit reporting agencies or by credit references furnished by the customer. This customer financial information did not constitute confidential information.

Additionally, even if such information were considered confidential, the evidence did not establish defendant used this information to his benefit. Hausman testified he showed the handwritten notes to defendant; however, defendant testified he did not use the notes. The evidence additionally established defendant did not take the FACTS listing, upon which the notes were written, with him when he left plaintiff's employ. As plaintiff did not introduce the notes or identify any of defendant's current customers as the subject of such notes, there is no evidence defendant used this information to his advantage after leaving plaintiff's employ.

3. Instructions

The instruction defendant received regarding the authentication and valuation of rare coins and collectibles was not confidential information. While defendant may have learned or benefitted from this instruction, the determination of whether an employee received [250 Ill.App.3d 932] confidential information does not involve an inquiry into whether the employee learned anything during his employment, but whether the employee learned

a trade secret, confidential process, or the like. Our supreme court has stated:

"Conflicting social and economic policy considerations are present in each trade secret case. A business which may invest substantial time, money and manpower to develop secret advantages over its competitors, must be afforded protection against the wrongful appropriation of confidential information by a prior employee, who was in a position of confidence and trust. At the same time, the right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right. Our society is extremely mobile and our free economy is based upon competition. One who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience. These skills are valuable to such employee in the market place for his services. Restraints cannot be lightly placed upon his right to compete in the area of his greatest worth." (ILG Industries, Inc. v. Scott (1971), 49 Ill.2d 88, 93-94, 273 N.E.2d 393, 396.)

Thus, when the employee merely learns the trade during his term of employment, the employee has not learned confidential information. In the present case, the evidence established defendant attended a seminar to learn about counterfeit coins, and was taught how to grade coins by plaintiff. Clearly defendant could not learn confidential information regarding plaintiff's business at a seminar offered by a third party. By receiving instruction from plaintiff, defendant learned techniques integral to the trade of dealing in coins, but he did not learn confidential information particular to plaintiff's business.

4. Policies Regarding Price Margins

Plaintiff argues its policies on price margins constitute confidential information. Plaintiff and defendant operate as middlemen. One aspect of their trade is dealing in scrap gold. Large dealers publicize the price they are willing to pay for scrap gold. Middlemen such as

plaintiff and defendant buy scrap gold from small dealers at a lower price, and resell it to the larger dealers at the publicized price. Plaintiff has developed a pricing policy. Under this policy, plaintiff deducts the

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[189 Ill.Dec. 519] amount of profit it wishes to realize from the large dealers' publicized prices in order to determine how much to pay the small dealers for scrap gold. Plaintiff argues defendant, having knowledge of its [250 Ill.App.3d 933] pricing policies, knows what plaintiff will offer and can buy the scrap gold from the small dealers by offering one cent more than plaintiff would offer.

Plaintiff directs the court's attention to Donald McElroy, Inc. v. Delaney (1979), 72 Ill.App.3d 285, 27 Ill.Dec. 892, 389 N.E.2d 1300. McElroy was in the business of recovering silver from photographic film and silver flake extracted from photographic fixer solution. (McElroy, 72 Ill.App.3d at 287, 27 Ill.Dec. at 895, 389 N.E.2d at 1303.) In the market for photographic film, silver recovery companies submit bids to suppliers based in part upon the silver yield which can be expected to be recovered from the film. In the silver flake market, bids for silver flake are calculated by formulae utilizing yield figures based on the recovery capabilities of the equipment used. (McElroy, 72 Ill.App.3d at 289, 27 Ill.Dec. at 896, 389 N.E.2d at 1304.) The reclaiming equipment used by McElroy to obtain silver flake is manufactured exclusively for McElroy. (McElroy, 72 Ill.App.3d at 289, 27 Ill.Dec. at 897, 389 N.E.2d at 1305.) John Delaney was employed by McElroy for seven years, serving as McElroy's purchasing manager and executive vice-president. (McElroy, 72 Ill.App.3d at 288-89, 27 Ill.Dec. at 896, 389 N.E.2d at 1304.) Delaney was the only employee who knew all the components used in determining McElroy's bids. (McElroy, 72 Ill.App.3d at 289, 27 Ill.Dec. at 897, 389 N.E.2d at 1305.) Affirming the granting of a preliminary injunction predicated

upon a restrictive covenant, the appellate court stated:

"Here, the hearing testimony indicates that Delaney had access to sensitive information while employed by McElroy. This included information about McElroy's equipment, recovery capabilities, yield figures, bidding procedures and suppliers' requirements. In addition, it was shown that Delaney had established customer contacts through close personal involvement with McElroy's suppliers. In combination, this insider information could potentially give defendants an unfair advantage in bidding against McElroy for photographic waste material." McElroy, 72 Ill.App.3d at 293, 27 Ill.Dec. at 899, 389 N.E.2d at 1307.

Plaintiff argues the present case is analogous to McElroy because in both cases the businesses were highly competitive and the employees had previous experience in the trade and were, during the period of employment, responsible for the majority of the customer contacts. However, we find the present case distinguishable from McElroy for two reasons. First, the pricing policies in McElroy were based in part on the recovery capabilities of McElroy's equipment, some of which had been specially manufactured for him. Conversely, the evidence at trial does not establish plaintiff's pricing policies were based on anything [250 Ill.App.3d 934] other than its desired profits. While a court could determine that knowledge of a pricing policy based on the capacity of specially manufactured equipment might constitute confidential information regarding the employer's business, mere knowledge of the amount of profit desired by the employer does not mandate similar treatment by the court. Second, the court in McElroy found the combination of information about McElroy's equipment, recovery capabilities, yield figures, bidding procedures and requirements of suppliers gave Delaney's new employer an unfair advantage over McElroy. In the present case, such a combination of factors was not present.

Defendant contends the first district, first division, in *Office Mates*, has distinguished the fourth division's decision in *McElroy* from cases in which customer information is readily available to competitors. In *Office Mates*, the plaintiff alleged information regarding client names, addresses, key contact persons, benefit packages, word processing equipment, products and services, number of employees, and other client information was confidential information. (*Office Mates*, 234 Ill.App.3d at 575, 175 Ill.Dec. at 70, 599 N.E.2d at

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[189 Ill.Dec. 520] 1084.) The court noted this information could be elicited by placing a cold call to the business and asking questions designed to elicit this information. The court stated that when customer information is readily available to competitors through normal competitive means, there is no protectible interest. The court then contrasted *McElroy* with cases involving customer information. (*Office Mates*, 234 Ill.App.3d at 575-76, 175 Ill.Dec. at 71, 599 N.E.2d at 1085.) This distinction is pertinent with respect to customer information; however, with respect to information regarding plaintiff's own policies, the distinction made by the court in *Office Mates* is not directly on point.

Defendant also argues plaintiff's pricing information was not confidential because dealers in the trade make their prices and pricing formulas available to others. In *Label Printers v. Pflug* (1991), 206 Ill.App.3d 483, 496, 151 Ill.Dec. 720, 727, 564 N.E.2d 1382, 1389, the appellate court rejected an argument that pricing information was confidential because many customers would willingly disclose prices being offered by a competitor and plaintiff had not shown its pricing was substantially different from that of the competitors. In the present case although there was no testimony customers would disclose prices being offered by a competitor, defendant testified he disclosed his pricing formula to customers. Defendant additionally introduced into evidence a flier

distributed by another dealer setting forth its pricing formula. Defendant also testified other dealers publicize their price formulas, and two dealers have toll-free numbers which may be called to ascertain the [250 Ill.App.3d 935] daily price paid for scrap gold. Although plaintiff presented evidence it did not publish its pricing formula, it did not present evidence regarding how its pricing formula is different from those of its competitors, which are readily available.

We are persuaded by the reasoning in *Label Printers*, and find plaintiff's price margins did not constitute confidential information.

B. Near-Permanent Relationship

An independent basis for the enforcement of a covenant not to compete exists under the near-permanency test. This two-prong test is satisfied when (1) the employer's relationship with the customers is near permanent, and (2) but for the association with the employer, the employee would not have had contact with the customers. (*Lee/O'Keefe*, 163 Ill.App.3d at 1004, 114 Ill.Dec. at 924, 516 N.E.2d at 1318.) The First District Appellate Court has noted factors which are relevant to determining whether the near-permanency test has been met, including (1) the number of years required to develop the clientele; (2) the amount of money invested to acquire clients; (3) the degree of difficulty acquiring clients; (4) the extent of personal customer contact by the employee; (5) the extent of the employer's knowledge of its clients; (6) the duration of the customers' association with the employer; and (7) the continuity of the employer-customer relationships. (*Agrimerica, Inc. v. Mathes* (1990), 199 Ill.App.3d 435, 444, 145 Ill.Dec. 587, 593, 557 N.E.2d 357, 363.) However, the first district has also recognized the outcome of the near-permanency test turns in large degree on the nature of the business involved. *Office Mates*, 234 Ill.App.3d at 572, 175 Ill.Dec. at 68, 599 N.E.2d at 1082.

A near-permanent relationship with clients is inherent in the provision of professional services. (See *Nationwide Advertising Service*,

Inc. v. Kolar (1973), 14 Ill.App.3d 522, 528, 302 N.E.2d 734, 738.) Conversely, a near-permanent relationship with customers is generally absent from businesses engaged in sales. Moreover, a near-permanent relationship is not generally present in a business which does not engender customer loyalty by providing a unique product or personal service, and customers of the business utilize many suppliers simultaneously to meet their needs. (Office Mates, 234 Ill.App.3d at 571, 175 Ill.Dec. at 68, 599 N.E.2d at 1082.) Likewise, when the names of the employer's customers are readily ascertainable by reference to the telephone directory or professional

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[189 Ill.Dec. 521] publications, or are generally well known by the employer's competitors, the employer will generally be unable to establish the employee would not have had contact with the customers [250 Ill.App.3d 936] but for the association with the employer. See Image Supplies, Inc. v. Hilmert (1979), 71 Ill.App.3d 710, 714-15, 28 Ill.Dec. 86, 90, 390 N.E.2d 68, 72.

Where the employer is engaged in the provision of professional services and employs the employee to assist in the provision of these services, and the evidence indicates the employee would not have had contact with the clients but for the association with the employer, the near-permanency test is satisfied. Thus, when an established veterinarian employs a newly licensed veterinarian with no previous affiliation with the community, a covenant not to compete will be enforced. (Cockerill v. Wilson (1972), 51 Ill.2d 179, 184, 281 N.E.2d 648, 651.) Similarly, when an established association of physicians employs a physician with no previous patients of his own and no previous affiliation with the community, a covenant not to compete will be enforced. (Canfield v. Spear (1969), 44 Ill.2d 49, 51-52, 254 N.E.2d 433, 434.) However, even though engaged in providing professional services, when the

evidence indicates the clients utilize several providers of the same type of professional services simultaneously, the near-permanency test will not be satisfied. Thus, where the employer is an insurance defense law firm, and the clients of the firm also retain other law firms to do insurance defense work, the law firm does not have a consistent expectation of representing the clients, and the near-permanency test is not satisfied. Williams & Montgomery, Ltd. v. Stellato (1990), 195 Ill.App.3d 544, 554, 142 Ill.Dec. 359, 366, 552 N.E.2d 1100, 1107.

The sales category is the opposite of the professional services category. When the employer's business is sales of a nonunique product, its customers also do business with its competitors, are generally known to the competitors, or are ascertainable by reference to telephone or specialized directories, the near-permanency test will not be satisfied. Thus, in Image Supplies, the appellate court determined a printing supply company did not have a near-permanent relationship with its customers where the customers were listed in the telephone directory and three professional journals, and the customers also did business with the printing supply company's competitors. (Image Supplies, 71 Ill.App.3d at 714-15, 28 Ill.Dec. at 90, 390 N.E.2d at 72.) Likewise, in Label Printers (206 Ill.App.3d at 493-94, 151 Ill.Dec. at 726-27, 564 N.E.2d at 1388-89), the court found a printer of pressure sensitive labels did not demonstrate a near-permanent relationship with its customers where its customers also did business with its competitors. Finally, in Office Mates, the appellate court determined an office support personnel placement agency did not have a near-permanent relationship with its customers where the customers' names, addresses and nature of business are readily available by way of canvassing, cold calling, and the use of telephone [250 Ill.App.3d 937] and specialized directories, and the customers did business with other placement agencies. Office Mates, 234 Ill.App.3d at 572, 175 Ill.Dec. at 68, 599 N.E.2d at 1082.

In Sarah Bush Lincoln Health Center v. Perket (1992), 238 Ill.App.3d 958, 962-63, 178

Ill.Dec. 819, 822-23, 605 N.E.2d 613, 616-17, this court recognized these two categories of cases. The employer in Sarah Bush, a hospital, sought to enforce a covenant not to compete made by an employee who had been the director of physical medicine and rehabilitation at the hospital. This court examined the nature of the business, concluding the situation was more like that of the professionals in Cockerill and Canfield than the "ordinary case" in which the employee is in a position such as a salesperson. Accordingly, we upheld the trial court's injunction predicated on the enforcement of the covenant not to compete. Sarah Bush, 238 Ill.App.3d at 963, 178 Ill.Dec. at 823, 605 N.E.2d at 617.

Plaintiff alleges analyzing the nature of the plaintiff's business, as this court did in Sarah Bush, is not the proper

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[189 Ill.Dec. 522] approach to determining whether the near-permanency test has been met; rather, plaintiff alleges application of the seven factors set forth by the first district in Agrimerica is the better approach. While the Agrimerica factors may be helpful in some cases, we find they need not be applied in all cases. When a given business falls squarely within one of the two categories of cases this court has previously recognized, the near-permanency determination may be made without resort to the Agrimerica factors. However, when a business is lacking some of the characteristics of a category, has characteristics inconsistent with the category in which it would otherwise be placed, or for some other reason does not fall squarely within one of the two categories, the Agrimerica factors may be helpful to the court in determining whether the near-permanency test has been met. Thus, for example, when a business is engaged in selling custom-made goods and its clients do not also do business with its competitors, and are not readily ascertainable by reference to available sources, the business does not fall squarely within either

of the two categories and the Agrimerica factors may be helpful in determining whether the business meets the near-permanency test.

In the present case, the trial court resolved the near-permanency issue by analyzing the nature of the business. The trial court concluded:

"In this case the evidence does not support the argument that a near-permanent relationship has been established. Instead the evidence establishes a large group of coin and precious[250 Ill.App.3d 938] metal dealers constantly bartering with each other and always seeking products and business may be available at the nearest store, telephone or fax machine. Businesses likely to be engaged in the services offered by Springfield Rare Coin are not secret, their names are readily available by reference to the yellow pages, attendance at shows, or specialized directories."

We find plaintiff's business falls squarely within the sales category, and the lack of near-permanent relationship with its customers may therefore be ascertained without reference to the Agrimerica factors.

Plaintiff is not engaged in the provision of professional services; rather, plaintiff's business, or at least the sector of plaintiff's business with which defendant was affiliated, is that of a middleman. Plaintiff buys coins and precious metals such as scrap gold from small dealers at a low price, and sells them to larger dealers at a higher price. Plaintiff is not the exclusive supplier to its customers. Defendant testified and the trial court found plaintiff's customers also do business with its competitors. Plaintiff's customers are ascertainable by reference to yellow pages, trade directories and attendance at trade shows. The customers may be approached by making cold calls, as evidenced by the testimony that many of the dealers defendant dealt with while in plaintiff's employ were not plaintiff's prior customers, but new customers defendant had contacted by making cold calls.

Plaintiff contends that although defendant might have known the names of other dealers by reference to trade journals, he would not have

had access to them but for his affiliation with plaintiff. Although Hausman testified extensively regarding his good reputation, which resulted in the good reputation of plaintiff, this testimony was not corroborated by any other source. No dealers testified they would not have done business with defendant had he not been affiliated with plaintiff. On the contrary, three dealers who began to do business with plaintiff through defendant, after defendant became employed by plaintiff, testified they did not do any business with plaintiff prior to being contacted by defendant, and one dealer testified he did not know Hausman until after defendant contacted him. The court could have concluded plaintiff's reputation was not necessary to defendant's access to the dealers. Thus, this situation falls squarely within the sales category, and the trial court properly determined, by virtue of the nature of plaintiff's business and the characteristics it possesses, that it does not satisfy the near-permanency test.

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[189 Ill.Dec. 523] Finally, in its reply brief, plaintiff alleges the covenant not to compete in the employment contract should not be treated as a covenant not to compete in an employment contract, but rather as a covenant[250 Ill.App.3d 939] not to compete in a contract analogous to a contract for the sale of a business. Courts impose a more stringent test of reasonableness on restrictive covenants in employment contracts than they do on restrictive covenants ancillary to the sale of a business. The basis for the distinction rests upon the fact that a purchaser in the sale of a business context holds more bargaining power than an ordinary employee in an employment context. (Decker, Berta & Co. v. Berta (1992), 225 Ill.App.3d 24, 28, 167 Ill.Dec. 190, 192, 587 N.E.2d 72, 74.) In Decker, this court noted the First District Appellate Court had analyzed the distinction between a sale-of-business restrictive covenant and a written covenant as part of an employment contract, and had written:

"Illinois courts have historically distinguished between the two types of covenants, based on the unique interest which each seeks to protect. Whereas a covenant ancillary to an employment contract shields the employer from the possibility of losing his clientele to an employee who appropriates proprietary customer information for his own benefit, and also shields him from the possibility of losing customers with whom he enjoys a near-permanent relationship, a covenant ancillary to the sale of a business ensures the buyer that the former owner will not walk away from the sale with the company's customers and goodwill, leaving the buyer with an acquisition that turns out to be only chimerical." (Decker, 225 Ill.App.3d at 29-30, 167 Ill.Dec. at 193, 587 N.E.2d at 75, quoting Hamer Holding Group, Inc. v. Elmore (1990), 202 Ill.App.3d 994, 1007, 148 Ill.Dec. 310, 319, 560 N.E.2d 907, 916.)

In the present case plaintiff did not purchase a business from defendant; it employed defendant. Although defendant contributed capital to the "show account," he did not purchase plaintiff's interest in the business; he became plaintiff's employee. The covenant is not being invoked to prevent the seller of a business from retaining the company's customers and good will. It is being invoked to prevent a former employee from competing with the business. In short, plaintiff has cited no authority to support its position that its contract was not an employment contract but a contract analogous to a contract for the sale of a business.

III. CONVERSION

Defendant alleges the trial court erred in ordering plaintiff to transfer the property remaining in the show account to him, rather than granting him a cash judgment in the amount of \$71,225.66, plus statutory interest of 5% beginning March 22, 1989. Resolution of this issue turns upon whether the trial court erred in finding his portion of [250 Ill.App.3d 940] the show account property had not been converted by plaintiff. This is because the proper award, if conversion has been proved, is generally a money judgment in the amount of the value of

the property at the time of conversion, plus legal interest. (*Henkel v. Pontiac Farmers Grain Co.* (1977), 55 Ill.App.3d 898, 902, 13 Ill.Dec. 635, 639, 371 N.E.2d 352, 356.) In order to make a case for conversion, a party must establish (1) unauthorized and wrongful assumption of control, dominion, or ownership over the personal property of another; (2) a right to the property; (3) an absolute and unconditional right to immediate possession of the property; and (4) a demand for possession. (*First National Bank v. Lachenmyer* (1985), 131 Ill.App.3d 914, 917, 87 Ill.Dec. 53, 56, 476 N.E.2d 755, 758.) Plaintiff contends the determination of the trial court was correct because defendant did not establish two of the elements of conversion: his unconditional right to immediate possession and an unauthorized assumption of control by plaintiff.

Defendant testified he received a letter from Hausman instructing him to submit his valuations of the property in the show account. This letter was introduced into evidence. Defendant testified he made a valuation of the property and had a telephone

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[189 Ill.Dec. 524] conversation with Hausman, and at Hausman's request, agreed to increase the value of certain coins by \$1,800. Defendant testified he received a later letter from Hausman, dated February 6, 1989, which set forth the valuation of the property, as adjusted in the telephone conversation and containing a settlement proposal. The letter was introduced into evidence and provided, in part: "[t]he settlement proposal is being made subject to review by our legal counsel, our certified public accountant and you. No distribution of assets in any form will be made until all parties are in agreement and until the terms of the employment contract are fulfilled in full to my satisfaction." Defendant testified he made arrangements to pick up his share of the property in the show account on February 7, 1989, but plaintiff prevented him from doing so.

Hausman testified no settlement was ever made regarding the value of the inventory in the show account. Hausman testified he signed a document agreeing to a value of the inventory, but it was never accepted as a settlement. Hausman testified he and the other members of plaintiff's board resolved, on November 27, 1989, that the "assets belonging to [defendant] should not be released." On clarification, Hausman testified this resolution was made based upon legal advice. Hausman testified he took cash from the show account amounting to approximately half of its value. Perrino testified Hausman wrote himself a check for \$71,225.66. Hausman testified he made notes of inventory defendant had agreed to. On clarification, Hausman[250 Ill.App.3d 941] testified this was merely a list of the "inventory Steve Mileham has agreed to, not what we have." Hausman further stated the value of this inventory was never agreed upon. It is not clear from the testimony whether "inventory Steve Mileham has agreed to, not what we have" means inventory defendant agreed was property of the show account, or inventory defendant agreed to accept as his share of the show account. Although not necessary to this court's resolution of defendant's cross-appeal, we note the phrase "not what we have" would seem to indicate this inventory was not the inventory plaintiff and defendant had in the show account, but the inventory defendant agreed to accept as his share of the show account, thus supporting defendant's testimony the parties had agreed upon valuation and distribution of the property.

Plaintiff alleges defendant did not establish an immediate and unconditional right to possession of the property in the show account and the unauthorized assumption of control over the property by plaintiff because the contract provided the property was to remain in the vault until valuation of the property was determined by agreement or arbitration. Thus, plaintiff alleges, since the parties did not agree to the valuation and the matter was not arbitrated, defendant had no immediate right to possession of the property, and plaintiff's right to retain the property was authorized under the terms of the employment contract. Although plaintiff's

summary of the terms of the employment contract is accurate, the position that no agreement was reached and defendant was not entitled to his share of the property until the valuation was agreed upon or determined through arbitration is inconsistent with plaintiff's removal of its share of the property from the show account on March 22, 1989.

Defendant argues by removing \$71,225.66 from the show account, plaintiff either believed the valuation of the property had been agreed upon as \$142,451.32, or plaintiff chose to waive the contractual provision that all property was to remain in the vault area until the property has been divided by agreement or arbitration. We agree plaintiff's conduct has one of two implications: it either contradicts its contention the valuation had not been agreed upon, or evidences an intention to waive the requirement that all property remain in the vault until the division had been agreed upon. Under either scenario, defendant became entitled to the property on March 22, 1989.

If plaintiff removed its share of the property because it believed the valuation

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[189 Ill.Dec. 525] issue had been resolved, it cannot allege defendant was not entitled to his share of the property because the valuation issue had not been resolved.

[250 Ill.App.3d 942] If plaintiff did not believe the valuation issue had been resolved, its withdrawal of \$71,225.66 from the show account was in contravention of the contractual provision providing all property was to remain in the vault until division had been agreed upon. If plaintiff chose to withdraw what it believed to be its share of the show account property even though division had not been agreed upon or determined by arbitration, it could not require defendant to wait for agreement or arbitration before becoming entitled to his share of the property. A contractual right to arbitration may be waived by a party through conduct

inconsistent with the arbitration clause, which would thus indicate that he has abandoned the right to avail himself thereof. (*Applicolor, Inc. v. Surface Combustion Corp.* (1966), 77 Ill.App.2d 260, 266-67, 222 N.E.2d 168, 171.) Accepting as true plaintiff's contention it did not believe the valuation issue to be resolved, plaintiff waived its right to insist defendant's share of the property remain in the vault until the matter had been arbitrated by withdrawing its half of the property although the matter had not been arbitrated.

Plaintiff seems to argue its removal of \$71,225.66 on March 22, 1989, was permissible under the employment contract, because the contract gave it the right to receive its share of the show account property in cash. The contract provided the show account property was to be divided equally between plaintiff and defendant. Thus, plaintiff's "share" of the property was half of the property. Although the contract provision regarding distribution did give plaintiff the right to receive its half of the show account property in cash, the employment contract does not give plaintiff the right to remove what it determines to be half of the value of the show account property, in cash, before the value of the show account is determined by agreement or arbitration. Simply put, since the value of half of the property could not be determined until the value of all of the property was determined, plaintiff by definition could not remove "its half" of the property until the valuation was determined.

Moreover, the employment contract required "all property" to remain in the vault of plaintiff's business until divided by agreement or arbitration. The employment contract does not define "property" as being exclusive of cash. On the contrary, the contract provides all property of the show account, including cash, is the "joint property belonging equally to employer and employee." Thus, under the terms of the employment contract, the cash, or the checkbook representing access to the cash, was to remain in the vault until the property, including the cash, was divided by agreement or arbitration.

[250 Ill.App.3d 943] We also note plaintiff's fifth affirmative defense to the counterclaim indicates it did not retain defendant's share of the show account property merely because it believed no agreement had been reached regarding the valuation of the show account property and the matter had not been arbitrated. Rather, plaintiff retained the defendant's share of the show account property as security for satisfaction of the judgment it hoped to obtain against defendant in its action for damages. Plaintiff's fifth affirmative defense states:

"Defendant intentionally violated the terms of his employment agreement and/or the preliminary injunction ordered by the court and that if said property was turned over to defendant the plaintiff would likely never be able to recover any damages from the defendant."

Plaintiff has referred to no provision in the employment contract or principle under Illinois law which would permit it to retain defendant's property as security for the satisfaction of a judgment it had not yet obtained.

Defendant became immediately entitled to the remaining property in the show account on March 22, 1989, which according to plaintiff's valuation was worth \$71,225.66.

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[189 Ill.Dec. 526] Plaintiff's continued control over such property was unauthorized. In light of these conclusions and as plaintiff has not challenged defendant's establishment of the other elements of conversion, the trial court's decision defendant did not establish the elements of conversion must be reversed.

The plaintiff has not disputed defendant's contention the proper measure of damages in a conversion action is the value of the property at the time of the conversion, plus interest. Defendant has adopted plaintiff's own valuation of the property on March 22, 1989. Accordingly,

we vacate the order requiring plaintiff to transfer the remaining property in the show account to defendant, and remand with directions to enter judgment in favor of the defendant and against the plaintiff in the amount of \$71,225.66, plus 5% interest from March 22, 1989.

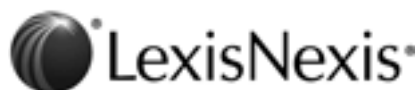
IV. CONCLUSION

With respect to plaintiff's appeal, we determine the trial court did not err in determining plaintiff did not have a near-permanent relationship with its customers. The trial court correctly determined plaintiff's customer list does not constitute confidential information. The customer information, and instructions and pricing information received by defendant also did not constitute confidential information.

[250 Ill.App.3d 944] With respect to defendant's cross-appeal, we find the trial court erred in finding defendant did not establish the elements of conversion. Accordingly, we vacate the order requiring plaintiff to convey the balance of the property in the show account to defendant and remand with directions to enter judgment in favor of defendant and against plaintiff in the amount of \$71,225.66, plus 5% interest from March 22, 1989.

Affirmed in part; reversed in part, vacated in part and remanded with directions.

COOK and GREEN, JJ., concur.



LEXSEE 675 S.E.2D 314

AZZOUZ et al. v. PRIME PEDIATRICS, P.C.

A08A2340.

COURT OF APPEALS OF GEORGIA, FOURTH DIVISION

296 Ga. App. 602; 675 S.E.2d 314; 2009 Ga. App. LEXIS 287; 2009 Fulton County D.
Rep. 895; 28 I.E.R. Cas. (BNA) 1762

March 12, 2009, Decided

PRIOR HISTORY: Employment contract. Whitfield Superior Court. Before Judge Morris.

DISPOSITION: [***1] Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pediatrician challenged a Georgia trial court judgment granting an interlocutory injunction to a professional corporation (PC) that formerly employed him, in the PC's action after the pediatrician allegedly violated a restrictive covenant within his employment contract.

OVERVIEW: The pediatrician's contract with the PC prohibited him from practicing in a five-county area for two years should his employment terminate for any reason. The pediatrician left to start his own practice in the prohibited area. The pediatrician claimed the trial court erred by granting the injunction because the contract was ambiguous and, as a consequence, overly broad and not enforceable with regard to hospitals with which he was prohibited from associating during the two-year period. The appeals court found nothing in the agreement to suggest that the pediatrician was prohibited from working at a hospital outside the prohibited area if that hospital advertised within that area. There was no ambiguity in the agreement with regard to the hospitals with which he was not allowed to maintain privileges. His argument that the trial court erred by not construing the agreement against the drafter, the PC, was without

merit. O.C.G.A. § 13-2-2(5) provided only that if the construction was doubtful, that which went most strongly against the party executing the instrument or undertaking the obligation was generally to be preferred. In the instant case the construction was not doubtful.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] The decision to grant an interlocutory injunction rests in the sound discretion of the trial court. Interlocutory injunctions are granted to preserve the status quo and balance the conveniences of the parties while the final adjudication of the case is pending. A trial court's discretion in granting or denying an injunction will not be disturbed on appeal as an abuse of discretion unless there was either no evidence upon which to base the ruling or it was based on an erroneous interpretation of the law.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms >

Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN2] A restrictive covenant within an employment contract will be upheld if the restraint on trade is not unreasonable, it was founded on valuable consideration, it is necessary to protect the interests of the party who is seeking to impose it, and it does not unduly prejudice the interest of the public.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

[HN3] When a contract is at issue, the court first determines whether the language of the agreement is ambiguous. The language is ambiguous if it is susceptible to more than one meaning. If the language is clear and unambiguous, contract construction is not necessary, and the agreement will be enforced according to its clear and unambiguous terms. If there is ambiguity, the court will apply the rules of contract construction in an attempt to resolve it. If application of those rules does not resolve the ambiguity, the contract's meaning and the contracting parties' intentions are questions left to the trier of fact.

Contracts Law > Contract Interpretation > General Overview

[HN4] A contract should be given a reasonable construction that will uphold the agreement rather than a construction that will render the agreement meaningless and ineffective.

Contracts Law > Contract Interpretation > General Overview

[HN5] O.C.G.A. § 13-2-2(6) provides that with regard to the interpretation of contracts, grammatical problems may be disregarded: the rules of grammatical construction usually govern, but to effectuate the intention they may be disregarded; sentences and words may be transposed, and conjunctions substituted for each other.

Contracts Law > Contract Interpretation > General Overview

[HN6] The cardinal rule of construction is the ascertainment and effectuation of the intent and this must be done even if it requires transposing words and sentences to the point of ignoring minor clauses.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN7] A noncompete provision must balance the employee's right to earn a living and his ability to determine with certainty the prohibited territory with the employer's interest in customer relationships created or furthered by its former employee on its behalf and its right to protect itself from the former employee's possible unfair appropriation of contacts developed while working for the employer.

Civil Procedure > Appeals > Records on Appeal

[HN8] In a case where there is no transcript of a hearing, the Court of Appeals of Georgia court assumes that the trial court's factual conclusions are supported by the record.

Contracts Law > Contract Interpretation > General Overview

[HN9] Where there the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

[HN10] See O.C.G.A. § 13-2-2(1).

Contracts Law > Contract Interpretation > General Overview***Contracts Law > Contract Interpretation > Parol Evidence > General Overview***

[HN11] O.C.G.A. § 13-2-2(6) allows the court to disregard rules of grammatical construction, such as those regarding punctuation and word and sentence order, where they thwart the intent of the parties as shown in the agreement itself; it is not a back door for the admission of parol evidence.

Contracts Law > Contract Interpretation > General Overview

[HN12] See O.C.G.A. § 13-2-2(5).

COUNSEL: *Minor, Bell & Neal, James H. Bisson III, Stephen B. Farrow*, for appellants.

Coppedge & Leman, Warren N. Coppedge, Jr., Joseph B. Evans, for appellee.

JUDGES: ADAMS, Judge. Smith, P. J., and Mikell, J., concur.

OPINION BY: ADAMS

OPINION

[*602] [**316] Adams, Judge.

Rami Azzouz, M.D., a pediatrician, entered into an employment contract with Prime Pediatrics, P.C., that prohibited him from practicing pediatric medicine in a five-county area for two years should his employment terminate for any reason. After Azzouz announced that he intended to quit and start his own practice in the prohibited area, Prime brought suit against Azzouz and his new firm and sought an interlocutory injunction, which the trial court granted. This appeal ensued.

The undisputed facts show that Prime provides general and specialized pediatric care to patients in Dalton, Georgia and the surrounding area. Azzouz entered into the employment contract with Prime on January 27, 2004, and although the contract has since been modified, the relevant terms are unchanged. Generally speaking, the agreement bars Azzouz from working as a pediatrician within the five-county region surrounding Dalton, Georgia, namely Whitfield, Murray, Gordon, Catoosa and Walker counties. Around April 24, 2008, while still employed at Prime, Azzouz formed Bright Pediatrics, P.C., with its principal place of business [***2] in Dalton, Whitfield County. On June 12, 2008, Azzouz informed Prime that he planned to leave and open a pediatric practice in Whitfield County. He also announced his intention to maintain privileges to practice pediatric medicine at a hospital in Chattanooga, Tennessee. Azzouz's employment with Prime ended, and when he left, Azzouz took a record of all the patients whom he had cared for during his tenure with Prime. Prime brought suit against Azzouz and Bright alleging breach of the employment agreement.

Prime sought an interlocutory injunction to preserve the status quo while the case was pending. And on July 8, 2008, following an evidentiary hearing, the trial court held that the noncompete provision was reasonable and entered an interlocutory injunction against Azzouz and Bright. The court modified its order twice to add findings

of fact. The trial court applied strict scrutiny to the employment agreement and determined that the noncompete provision was reasonable because it falls within the range of time, geographic territory and scope limitations that have been deemed reasonable in prior case law.

[HN1] The decision to grant an interlocutory injunction rests in the sound discretion [***3] of the trial court. *MARTA v. Wallace*, 243 Ga. 491, 494 (3) (254 SE2d 822) (1979). Interlocutory injunctions are granted to preserve the status quo and balance the conveniences of the parties while the final adjudication of the case is pending. *Id.* A trial court's discretion in granting or denying an injunction will not be [*603] disturbed on appeal as an abuse of discretion unless there was either no evidence upon which to base the ruling or it was based on an erroneous interpretation of the law. *Atlanta Area Broadcasting v. James Brown Enterprises*, 263 Ga. App. 388, 393 (587 SE2d 853) (2003).

1. [HN2] A restrictive covenant within an employment contract will be upheld if the restraint on trade is not unreasonable, it is founded on valuable consideration, it is necessary to protect the interests of the party who is seeking to impose it, and it does not unduly prejudice the interest of the public. *McAlpin v. Coweta Fayette Surgical Associates, P.C.*, 217 Ga. App. 669, 671 (1) (458 SE2d 499) (1995).

[**317] (a) Azzouz's main argument is that the trial court erred by granting the interlocutory injunction because the contract is ambiguous and, as a consequence, overly broad and not enforceable with regard to [***4] the hospitals with which he is prohibited from associating during the two-year period.

Section 13 of Azzouz's employment contract, entitled "Non-Competition Agreement," is the only relevant section of the agreement. The first paragraph of the section clearly bars Azzouz from practicing pediatric medicine or a pediatric subspecialty within a five-county area for two years after termination of employment:

NON-COMPETITION AGREEMENT.

Employee hereby covenants and agrees with Employer that during his employment pursuant to the terms of this Agreement and for a period of two (2) years following the termination of his employment for any reason, the Employee

shall not practice pediatric medicine or any pediatric sub-specialty within the following counties located in the State of Georgia: Whitfield, Murray, Gordon, Catoosa, and Walker except as an Employee of the Employer pursuant to the terms of this Employment Agreement.

The paragraph then adds limitations to the construction of the agreement:

Nothing contained herein however shall be construed so as to prohibit the Employee from practicing medicine as a pediatrician outside the territory set forth above before the expiration of said two (2) [***5] years, or within the territory as described above after the expiration of two (2) years, nor from prohibiting the Employee from practicing specifically any specialty of medicine other than pediatrics.

...

The second paragraph sets out additional terms of the non-competition [*604] agreement:

The parties agree that prohibited competition shall include maintaining pediatric privileges at any hospital located in the prohibited area, advertising in any form, including but not limited to, telephone, white and yellow pages, radio, newspaper advertisements, signage advertising, keeping or maintaining an office within the prohibited geographical area, posting web-sites showing business locations in the prohibited geographical area, or mailings to patients of Employer within the prohibited geographical area.

Finally, Azzouz agreed that the geographic and time limitations in the contract were reasonable:

Additionally the parties agree that the prohibited areas are reasonable considering that said areas are in the Employer's trade area to which the Employer has introduced the Employee. Employer and Employee also agree that in consideration of the cumulative time of employment of Employee by Employer the [***6] time limitation set forth herein is reasonable.

Azzouz and Bright contend the language of the contract is at best ambiguous and at worst overly broad because it can be read to mean either (1) the defendant is only barred from working as a pediatrician and advertising his services within the five-county area, or (2) the defendant is *also* barred from working in any hospital that advertises within the five-county area. Under the latter interpretation, Azzouz contends the agreement's territorial restriction would be overly broad.

[HN3] When a contract is at issue, the court first determines whether the language of the agreement is ambiguous. *Michna v. Blue Cross and Blue Shield of Georgia*, 288 Ga. App. 112, 113 (653 SE2d 377) (2007). The language is ambiguous if it is susceptible to more than one meaning. *Id.* at 114. If the language is clear and unambiguous, contract construction is not necessary, and the agreement will be enforced according to its clear and unambiguous terms. *Homer v. Board of Regents of University System of Georgia*, 272 Ga. App. 683, 685-686 (613 SE2d 205) (2005); *Michna*, 288 Ga. App. at 113. If there is ambiguity, the court will apply the rules of contract construction in an [***7] attempt to resolve it. *Michna*, 288 Ga. App. at 113. If application of those rules does not resolve the ambiguity, the contract's meaning and the contracting parties' intentions are questions left to the trier of fact. *Id.*

[**318] The trial court held that in light of the plain meaning of the words and given the clause providing that "[n]othing contained [*605] herein however shall be construed so as to prohibit the Employee from practicing medicine as a pediatrician outside the territory . . . ," the agreement is not ambiguous. We agree. With regard to hospitals with which Azzouz is allowed to associate, the second paragraph plainly states that he may not maintain privileges at a hospital in the prohibited area, which directly implies that he may maintain privileges with hospitals outside the area. This construction is underscored by the express limitation of the agreement quoted above.

With unusual candor, Azzouz and Bright admit that they "favor a construction that expands the limitations of the agreement if such construction would render the agreement unenforceable." But, [HN4] "a contract should be given a reasonable construction that will uphold the agreement rather than a construction that will render [***8] the agreement meaningless and ineffective. [Cit.]"

McLendon v. Priest, 259 Ga. 59, 60 (376 SE2d 679) (1989). We find nothing in the agreement to suggest that Azzouz is prohibited from working at a hospital outside the prohibited area if that hospital advertises within that area. There is no ambiguity in the agreement with regard to the hospitals with which Azzouz is not allowed to maintain privileges.

(b) Azzouz contends that even under this interpretation, the territorial restriction on his own advertising is overly broad because it is unlimited in geographic area. Azzouz argues that although the second paragraph of the noncompete agreement limits certain of his activities to "the prohibited geographic area," it limits his ability to advertise anywhere, which would be an overly broad limitation. We disagree. The second paragraph is not constructed perfectly, and it could have used some semicolons. Nevertheless, [HN5] OCGA § 13-2-2 (6) provides that with regard to the interpretation of contracts, grammatical problems may be disregarded:

The rules of grammatical construction usually govern, but to effectuate the intention they may be disregarded; sentences and words may be transposed, and conjunctions [***9] substituted for each other.

Here, as the trial court held, in addition to the limitation regarding hospitals, the second paragraph prohibits three forms of advertising within the prohibited area as shown by the following marked-up version of the second paragraph.

The parties agree that prohibited competition shall include . . . , advertising in any form, including but not limited to: (1) telephone, white and yellow pages, radio, newspaper advertisements, signage advertising, keeping or maintaining an office within the prohibited geographical area[; [*606] (2) posting web sites showing business locations in the prohibited geographical area[;] or [(3) mailings to patients of Employer within the prohibited geographical area.

Thus, all prohibited activities are limited to the prohibited area. In addition, the plain intent of the parties, considering the entire agreement, is to limit all of the activities only within the defined prohibited geographical

area. The addition of the semicolons as shown resolves any possible ambiguity. See *McVay v. Anderson*, 221 Ga. 381, 385 (144 SE2d 741) (1965) ([HN6] "The cardinal rule of construction is the ascertainment and effectuation of the intent and this must be [***10] done even if it requires transposing words and sentences to the point of ignoring minor clauses."); *Ardis v. Printup*, 39 Ga. 648, 653 (1869) ("[I]f we substitute the word *or* for the words *and also*, . . . all difficulty is removed, and the intention of the parties, as we gather it from the whole instrument, is carried into effect.").

(c) Azzouz contends the scope of the restrictions is unreasonably broad in that he cannot be prohibited from certain forms of advertising in the prohibited area, namely mailings to Prime's patients within the prohibited area or listing his name in the white pages or on the internet.

[HN7] A noncompete provision must balance "the employee's right to earn a living and his ability to determine with certainty the prohibited territory" with "the employer's interest in customer relationships created or furthered by its former employee on its [***319] behalf and its right to protect itself from the former employee's possible unfair appropriation of contacts developed while working for the employer." *Sysco Food Svcs. v. Chupp*, 225 Ga. App. 584, 586 (1) (484 SE2d 323) (1997). With regard to the restriction on mailings to all of Prime's patients, there is an interplay between the [***11] scope of the prohibited behavior and the territorial restriction:

if the scope of prohibited behavior is narrow enough (e.g., contacting those with whom the employee dealt while working for the employer), the covenant may be reasonable even if it has no territorial limitation or has a territorial limitation which is very broad. But if the scope of the prohibition is broader, the territorial limitation must be specified and closely tied to the area in which the employee actually worked.

Chaichimansour v. Pets Are People Too, 226 Ga. App. 69, 71 (1) (485 SE2d 248) (1997). Here, because we have [HN8] no transcript of the hearing, we assume that the trial court's factual conclusions are supported by the record. *Tavakolian v. Scott*, 282 Ga. 578, 579 (652

[*607] SE2d 542) (2007). The court found that Azzouz indicated that he intended to *continue* practicing in all five counties, which implies that he had practiced in all five on behalf of Prime. Accordingly, the prohibition on mailings to Prime's customers is not unreasonable. *Chaichimansour*, 226 Ga. App. at 71 (1). Cf. *Nunn v. Orkin Exterminating Co.*, 256 Ga. 558, 559 (1) (a) (350 SE2d 425) (1986) (where prohibition against soliciting any customer was [***12] limited to the employee's former territory, the limitation was reasonable).

Azzouz's argument about the white pages and the internet is also without merit. The second paragraph of the noncompetition section provides that advertising related to the "prohibited competition" is barred. The first paragraph explains that the prohibited competition refers to practicing pediatric medicine or any pediatric subspecialty in the prohibited area for the prohibited time. Thus, the limitation on advertising means that Azzouz is prohibited for two years from advertising in the white pages that he is practicing pediatric medicine or a subspecialty in the prohibited area. This provision's scope is a reasonable restriction related to the "prohibited competition" under the agreement.

And, finally, reviewing the agreement as a whole, we find that this noncompete provision is similar to the one upheld in *Raiford v. Kramer*, 231 Ga. 757, 758 (204 SE2d 171) (1974). Here, as in that case, both provisions were for two-year durations, both provisions applied to five-county geographic territories where the employer's practice was located and from which it drew patients, and both provisions were limited to the [***13] specialty that the doctor practiced during his employment. *Id.*

2. Azzouz contends the court erred by finding that the parties had equal bargaining power as a matter of fact. In its findings of fact, the court found no disparity in bargaining power between the parties. But we have no transcript in the record of the hearing on the interlocutory injunction from which to review the findings of fact. Second, the factual point goes to the proper level of scrutiny to be applied when assessing the reasonableness of a restrictive covenant, and the court applied the highest level of strict scrutiny. See, e.g., *McAlpin*, 217 Ga. App. at 672 (2). We find no reversible error.

3. Azzouz contends the trial court should have considered the intent of the parties to the contract as found in documents written years after the agreement and that, therefore, the court applied "grammatical construction to thwart the intentions of the parties." But [HN9] "[w]here the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties. [Cits.]" *Health Serv. Ctrs. v. Boddy*, 257 Ga. 378, 380 (2) (359 SE2d 659) (1987). Azzouz misreads OCGA § 13-2-2 (6), [***14] which is set forth above. Subsection (1) of that Code section provides [*608] that [HN10] "[p]arol evidence is inadmissible to add to, take from, or vary a written contract." And [HN11] subsection (6) simply allows the court to disregard rules of grammatical construction, such as those regarding punctuation and word and sentence order, where they thwart the intent of the parties as shown in the agreement itself; it is not a [**320] back door for the admission of parol evidence. See generally *McVay*, 221 Ga. at 385; *Bridges v. Home Guano Co.*, 33 Ga. App. 305, 33 Ga. App. 306, 310-311 (125 SE 872) (1924).

4. Azzouz's argument that the trial court erred by blue-penciling the agreement is not supported by the record. The court's order shows that the court simply found that the agreement was not ambiguous and it construed the agreement accordingly.

5. Azzouz's argument that the trial court erred by not construing the agreement against the drafter, Prime, is without merit. OCGA § 13-2-2 (5) provides only that [HN12] "[i]f the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred." Here, the construction is not doubtful. The same is true of the [***15] rule requiring construction in favor of the insured. See *Michna*, 288 Ga. App. at 114 ("[E]ven though ambiguous exclusions may be construed liberally in favor of the insured and strictly construed against the insurer, this cannot be done when the exclusion is clear and unequivocal.").

Judgment affirmed. Smith, P. J., and Mikell, J., concur.

295 Ill.App.3d 935

230 Ill.Dec. 335

WOODFIELD GROUP, INC., an Illinois Corporation, Plaintiff–Appellant,

v.

**Donna DeLISLE, Defendant–Appellee,
(The Future Now, Inc., an Ohio Corporation, Defendant).**

No. 1–97–1737.

Appellate Court of Illinois,
First District, Sixth Division.

March 31, 1998.

Employer filed suit against former employee, seeking money damages and injunctive relief resulting from alleged breach of restrictive covenant agreement relating to her employment. The Circuit Court of Cook County, Michael B. Getty, J., granted employee's motion to dismiss. Employer appealed. The Appellate Court, Greiman, J., held that: (1) restrictive covenant agreement may meet requirements for ancillarity if it is ancillary to employment relationship, even if employment lacks written agreement and remains at will, and (2) covenant at issue satisfied requirements of ancillarity.

Reversed and remanded.

1. Pretrial Procedure ⇌624

Motion for dismissal should not be granted unless it clearly appears that no set of facts could be proved that would entitle plaintiff to recovery. S.H.A. 735 ILCS 5/2–615.

2. Pretrial Procedure ⇌681

In ruling on motion for dismissal, only those facts apparent from face of pleadings, matters of which court can take judicial notice, and judicial admissions may be considered. S.H.A. 735 ILCS 5/2–615.

3. Appeal and Error ⇌893(1)

Appellate Court reviews trial court's order with respect to motion to dismiss de novo, taking as true all well-pleaded facts and reasonable inferences. S.H.A. 735 ILCS 5/2–615.

4. Contracts ⇌142

Determination of whether restrictive covenant is enforceable is question of law.

5. Contracts ⇌116(1)

Postemployment restrictive covenant is unenforceable where its sole purpose is to restrict competition.

6. Contracts ⇌116(1)

For purpose of determining enforceability of postemployment restrictive covenant, employer generally has no proprietary interest in its customers.

7. Contracts ⇌116(1)

For purpose of determining enforceability of postemployment restrictive covenant, individual has fundamental right to pursue particular occupation, and one who has worked in particular field cannot be compelled to erase from his mind all general skills, knowledge and expertise acquired through his experience.

8. Contracts ⇌116(2), 117(.5)

Postemployment restrictive covenant will be enforced if its terms are reasonable in geographical and temporal scope and necessary to protect legitimate business interest of employer.

9. Contracts ⇌65(2), 116(1)

Prior to analyzing reasonableness of covenant not to compete, court must make two determinations: covenant must be ancillary to valid contract, that is, subordinate to contract's main purpose; and there must be adequate consideration to support covenant.

10. Contracts ⇌116(1)

Restrictive covenant agreement may meet requirements for ancillarity if it is ancillary to employment relationship, even if employment lacks written agreement and remains at will.

11. Contracts ⇌116(1)

Restrictive covenant entered into between employer and at-will employee satisfied requirement of ancillarity, despite contention that there was no employment agreement to which covenant could be ancillary and that covenant itself did not create such an agreement; at-will employment rela-

tionship was sufficient to satisfy requirement of ancillarity, and covenant was subordinate to the purpose of employment relationship. Restatement (Second) of Contracts §§ 187, 188.

12. Contracts ⇌65(2)

Substantial continued employment may constitute sufficient consideration to support restrictive covenant agreement; judicial review is not limited to numerical formula for determining what constitutes substantial continued employment, and factors such as whether employee or employer terminated employment may need to be considered to properly review issue of consideration.

Shaheen, Lundberg, Callahan and Orr, P.C., Chicago (Henry N. Novoselsky, of counsel), for Plaintiff-Appellant.

Chuhak & Tecson, P.C., Alan R. Dolinko, Jordan M. Cramer, Chicago, for Defendant-Appellee.

Justice GREIMAN delivered the opinion of the court:

Plaintiff, Woodfield Group, Inc., filed suit against defendant Donna DeLisle, a former employee of Woodfield, seeking money damages and injunctive relief resulting from an alleged breach of a restrictive covenant agreement relating to her employment with the company. The circuit court granted DeLisle's motion to dismiss the claim, finding the restrictive covenant unenforceable because it failed to meet the requirement of ancillarity. Woodfield appealed.

For the reasons that follow, we reverse and remand.

The facts, according to the complaint, are as follows.

DeLisle began working as a sales representative for Woodfield, a computer hardware and software company, in September 1988. In September 1993, Woodfield promoted DeLisle to the position of sales manager, making her responsible for the day-to-day supervision and management of Woodfield's sales representatives and sales support staff. In this position, DeLisle was entrusted with confidential information.

In February 1994, DeLisle executed a restrictive covenant agreement with Woodfield. Under this agreement DeLisle was prohibited from soliciting or accepting sales of any computer hardware or software from any customer or active prospect of Woodfield's for a period of 18 months following any termination of her employment. For the same time period, the agreement prohibited DeLisle from soliciting, inducing or influencing any person who had a business relationship with Woodfield to discontinue or reduce the extent of such relationship. The agreement also prohibited DeLisle from disclosing any of the company's confidential information for the same time period.

The agreement recited several reasons for its creation, including Woodfield's expenses in developing expertise in the business, its client and customer base, and its goodwill. The agreement also stated that Woodfield's methods of doing business and its client base were confidential and Woodfield wished to maintain that confidentiality. The parties acknowledged and agreed that any breach by an employee of the restrictive covenant would be severely detrimental to the business of Woodfield, and that, without agreeing to the terms of the covenant, Woodfield would not employ the employee. The agreement stated that it supplemented and was in addition to all other employment agreements and clarified:

"This Agreement shall not be construed in any way as an employment agreement, or a guarantee of employment, of Employee by the Woodfield Group. Employee is, and shall remain, an 'employee at will' of the Woodfield Group."

On July 18, 1995, DeLisle terminated her employment with Woodfield. She then went to work for The Future Now, a company engaged in the same business and market area as Woodfield.

Woodfield filed suit alleging that DeLisle breached the restrictive covenant agreement after taking new employment with The Future Now by soliciting and accepting from Woodfield's customers sales of computer software or hardware, and by utilizing and disclosing Woodfield's confidential informa-

tion in order to sell computer software and hardware for her new employer. As a result, Woodfield alleged that certain customers began purchasing goods and services from The Future Now which they had previously purchased from Woodfield. Woodfield sought money damages and injunctive relief.

DeLisle moved to dismiss the count against her, contending that the restrictive covenant agreement is not enforceable. The circuit court agreed, stating:

“The restrictive covenant agreement in the present case is not an employment contract. This is manifestly evident by the agreement itself which provides employee-at-will. This agreement shall not be construed in any way as an employment agreement or a guarantee of employment of the employee by Woodfield Group. The employee is and shall remain an ‘employee-at-will of the Woodfield Group[’]—per the restrictive covenant agreement section 0.8.

Because the Woodfield Group specifically provided that the agreement could not be considered an employment contract, there is no employment contract to which the restrictive covenant could be ancillary. As such, similar to the covenant in *Creative Entertainment, Inc. v. Lorenz*, 265 Ill. App.3d 343, 202 Ill.Dec. 571, 638 N.E.2d 217 (1994), the restrictive covenant agreement DeLisle signed is a naked agreement, the sole purpose of which was to restrain trade. The restrictive covenant agreement is therefore not enforceable.”

The circuit court granted the motion to dismiss the claim against DeLisle. Woodfield moved for a finding pursuant to Supreme Court Rule 304(a) (134 Ill.2d R. 304(a)) and the court entered that finding. Woodfield now appeals the dismissal of the claim against DeLisle, arguing that the circuit court erred in finding the restrictive covenant agreement unenforceable for lack of ancillarity. We agree and reverse the lower court’s ruling.

[1–3] A section 2–615 (735 ILCS 5/2–615 (West 1996)) motion for dismissal should not be granted unless it clearly appears that no set of facts could be proved that would entitle the plaintiff to recovery. *Mt. Zion State Bank & Trust v. Consolidated Communica-*

tions, Inc., 169 Ill.2d 110, 115, 214 Ill.Dec. 156, 660 N.E.2d 863 (1995). In ruling on such a motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions may be considered. *Mt. Zion*, 169 Ill.2d at 115, 214 Ill.Dec. 156, 660 N.E.2d 863. The appellate court reviews such orders *de novo* (*Estate of Strocchia v. City of Chicago*, 284 Ill.App.3d 891, 898, 220 Ill.Dec. 102, 672 N.E.2d 919 (1996)), and all well-pleaded facts and reasonable inferences are taken as true. *Mt. Zion*, 169 Ill.2d at 115, 214 Ill.Dec. 156, 660 N.E.2d 863.

[4–7] The determination of whether a restrictive covenant is enforceable is a question of law. *Corroon & Black of Illinois, Inc. v. Magner*, 145 Ill.App.3d 151, 162, 98 Ill.Dec. 663, 494 N.E.2d 785 (1986). A post employment restrictive covenant is unenforceable when “its sole purpose is to restrict competition.” *Millard Maintenance Service Co. v. Bernero*, 207 Ill.App.3d 736, 744, 152 Ill.Dec. 692, 566 N.E.2d 379 (1990). “[O]rdinarily an employer has no proprietary interest in its customers.” *Preferred Meal Systems, Inc. v. Guse*, 199 Ill.App.3d 710, 718, 145 Ill.Dec. 736, 557 N.E.2d 506 (1990). An individual has a fundamental right to pursue a particular occupation and “[o]ne who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience.” *ILG Industries, Inc. v. Scott*, 49 Ill.2d 88, 93–94, 273 N.E.2d 393 (1971).

[8, 9] A post employment restrictive covenant will be enforced if its terms are reasonable. *Millard*, 207 Ill.App.3d at 744, 152 Ill.Dec. 692, 566 N.E.2d 379. It must be reasonable in geographical and temporal scope and necessary to protect a legitimate business interest of the employer. *Millard*, 207 Ill.App.3d at 744, 152 Ill.Dec. 692, 566 N.E.2d 379. Prior to analyzing the reasonableness of a covenant not to compete, the court must make two determinations: (1) the covenant must be ancillary to a valid contract, that is, it must be subordinate to the contract’s main purpose; and (2) there must be adequate consideration to support the cov-

enant. *Millard*, 207 Ill.App.3d at 744, 152 Ill.Dec. 692, 566 N.E.2d 379.

The circuit court in this case found that the restrictive covenant agreement signed by the parties could not be ancillary to a valid contract because there was no employment contract. DeLisle was an employee at will. Further, the language of the restrictive covenant agreement specifically stated that it was not an employment contract. The court determined, based on *Creative Entertainment*, 265 Ill.App.3d 343, 202 Ill.Dec. 571, 638 N.E.2d 217, that the agreement was unenforceable and dismissed the claim.

Woodfield contends the circuit court erred in finding there was a lack of ancillarity between the covenant and DeLisle's employment. It argues that the court erred in relying on the holding and rationale set forth in *Creative Entertainment* because the rule announced in that case was based upon "a fundamental misapprehension of the nature and purpose of the doctrine of ancillarity." Woodfield urges this court to adopt the reasoning of the fourth district in *Abel v. Fox*, 274 Ill.App.3d 811, 211 Ill.Dec. 129, 654 N.E.2d 591 (1995), and the second district in *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill.App.3d 131, 226 Ill.Dec. 331, 685 N.E.2d 434 (1997), which expressly reject the rationale of *Creative Entertainment*.

DeLisle contends that *Creative Entertainment* does not necessarily hold that restrictive covenants are *per se* unenforceable in oral at-will employment cases. She argues, however, that regardless of how the court interprets *Creative Entertainment*, the restrictive covenant agreement in this case disavows any nexus to the terms of DeLisle's employment, and therefore the covenant cannot be subordinate to the main purpose of the employment relationship. Thus, according to DeLisle the covenant must be held invalid.

In *Creative Entertainment*, 265 Ill.App.3d at 344, 202 Ill.Dec. 571, 638 N.E.2d 217, an employee signed a restrictive covenant with his employer eight months after he had begun working for the employer. The covenant prohibited the employee from contacting or soliciting customers or poten-

tial customers of the employer for a two-year period after termination. *Creative Entertainment*, 265 Ill.App.3d at 345, 202 Ill.Dec. 571, 638 N.E.2d 217. Over three years later, the employee voluntarily resigned. Later that month, the employee started his own company, providing the same services that the employer had provided. The employer sued for breach of the restrictive covenant and the trial court dismissed the complaint. *Creative Entertainment*, 265 Ill.App.3d at 346, 202 Ill.Dec. 571, 638 N.E.2d 217.

The First District Appellate Court upheld the trial court's decision, holding that the restrictive covenant was unenforceable because there was no contract for which the covenant could be ancillary. *Creative Entertainment*, 265 Ill.App.3d at 351, 202 Ill.Dec. 571, 638 N.E.2d 217. The court noted that at the time the employee signed the agreement

"[t]here were no negotiations of the terms of employment, nor were the employment terms in writing. The agreement itself did not specify a definite length of time for which [employee] would be employed by [employer]. In fact, [employer] conceded that [employee's] employment was at will and subject to change at any time in [employer's] sole and exclusive discretion. Hence, there were no facts from which the trial court could conclude that a valid employment contract existed. The trial court characterized the agreement as a 'naked agreement,' with which we agree. It was not a promise by [employer] of a definite term of employment in exchange for a promise by [employee]. There were no provisions for termination of the employment relationship by either party, no additional incentives or forbearances. Clearly, the covenant was not ancillary to an employment contract. The sole purpose of the agreement was to restrain trade." *Creative Entertainment*, 265 Ill.App.3d at 348-49, 202 Ill.Dec. 571, 638 N.E.2d 217.

However, several subsequent cases have disagreed with *Creative Entertainment*.

In *Abel*, 274 Ill.App.3d 811, 211 Ill.Dec. 129, 654 N.E.2d 591, the fourth district reversed a dismissal of a claim for breach of a

covenant not to compete. Fox was employed under an oral at-will employment agreement with a cleaning service company. *Abel*, 274 Ill.App.3d at 812-13, 211 Ill.Dec. 129, 654 N.E.2d 591. Sometime after her employment in 1990, Fox signed a covenant stating that she would not compete with her employer for three years after termination of employment and she would not make use of customer lists acquired during her employment with the company. In 1993, Fox terminated her employment with the company and began to solicit its customers on behalf of her newly formed cleaning service. *Abel*, 274 Ill.App.3d at 813, 211 Ill.Dec. 129, 654 N.E.2d 591. Her former employer filed suit and, following *Creative Entertainment*, the trial court dismissed the complaint.

On review, the fourth district reversed, stating:

“We read *Creative Entertainment* * * * to stand for the proposition [that] a covenant not to compete signed by an at-will employee employed under an oral agreement cannot be ancillary to an employment agreement, because an at-will employee employed under an oral agreement does not have an otherwise ‘valid employment contract.’” *Abel*, 274 Ill.App.3d at 816, 211 Ill.Dec. 129, 654 N.E.2d 591.

The fourth district criticized *Creative Entertainment* for “imprecisely stating the law.” *Abel*, 274 Ill.App.3d at 820, 211 Ill.Dec. 129, 654 N.E.2d 591. The fourth district examined the history of ancillarity and concluded that “[t]o be enforceable, a covenant not to compete must be ancillary to *either* a transaction (an otherwise valid contract), *or* a valid relationship.” (Emphasis in original.) *Abel*, 274 Ill.App.3d at 820, 211 Ill.Dec. 129, 654 N.E.2d 591. The court reasoned:

“Although an at-will employment agreement, whether written or oral, might not be considered ‘enforceable’ in the strictest sense of the term, it is nonetheless an agreement and relationship with numerous legal consequences, imposing rights and obligations on both parties. Therefore, a noncompetition covenant entered into by an at-will employee, whether the employee is employed under a written or oral agreement, complies with the requirement of

ancillarity. This is because a covenant in such a situation is not a ‘naked’ restraint on trade, but instead is merely ancillary to the primary purpose of the relationship: an employer-employee relationship. Thus, noncompetition covenants occurring in an at-will employment relationship are *not* unenforceable *per se*. Instead, the judicial determination whether they are enforceable is based on the same rules which apply to any other post-employment noncompetition covenant made during an employment relationship.” *Abel*, 274 Ill.App.3d at 820, 211 Ill.Dec. 129, 654 N.E.2d 591.

The fourth district found Fox’s covenant ancillary to the employment relationship and ruled it could be an enforceable covenant if it passed the other requirements for enforceability. *Abel*, 274 Ill.App.3d at 821, 211 Ill. Dec. 129, 654 N.E.2d 591.

In *Lawrence*, 292 Ill.App.3d at 137, 226 Ill.Dec. 331, 685 N.E.2d 434, the second district also rejected the ruling of *Creative Entertainment* and followed the “well-reasoned decision” in *Abel*, recognizing that a covenant not to compete “must be ancillary to *either* a transaction (an otherwise valid contract) *or* a valid relationship.” (Emphasis in original.) The court determined that the restrictive covenant in that case was ancillary to the employee’s employment relationship with the former employer despite the fact that it had been an at-will employment situation. The court ultimately found, however, that the covenant was not enforceable because its restrictions were unreasonable and the employer lacked a legitimate business interest. *Lawrence*, 292 Ill.App.3d at 144, 226 Ill.Dec. 331, 685 N.E.2d 434.

[10] Upon review of these cases and the underlying rationale, we agree with the second and fourth districts of this court and decline to follow *Creative Entertainment*. A restrictive covenant agreement may meet the requirements for ancillarity if it is ancillary to an employment relationship even though the employment may lack a written agreement and remain at will.

[11] DeLisle nevertheless suggests that the language of the restrictive covenant

agreement in this case makes the situation distinguishable from the prior cases, including *Creative Entertainment*, because the agreement expressly states it is not an employment agreement. We find it significant, however, that the preamble to the covenant agreement directs that employment would not continue unless the employee signed the agreement. We do not find the language of the agreement a sufficient distinction here.

We also observe that section 187 of the Restatement (Second) of Contracts, examined in *Abel*, 274 Ill.App.3d at 816-17, 211 Ill.Dec. 129, 654 N.E.2d 591, discusses the doctrine of ancillarity with regard to restrictive covenants, stating:

“A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction *or relationship* is unreasonably in restraint of trade.” (Emphasis added.) Restatement (Second) of Contracts § 187, at 38 (1981).

Section 188 further states:

“(2) Promises imposing restraints that are ancillary to a valid transaction *or relationship* include the following:

* * *

(b) a promise by an employee or other agent not to compete with his employer or other principal.” (Emphasis added.) Restatement (Second) of Contracts § 188(2)(b), at 41 (1981).

Comment *g* to section 188 states in pertinent part:

“A restraint may be ancillary to a relationship although, as in the case of an employment at will, no contract of employment is involved.” Restatement (Second) of Contracts § 188, Comment *g*, at 45 (1981).

Under the Restatement, the restrictive covenant agreement signed by DeLisle would be ancillary to the employment relationship of the parties regardless of the fact that her employment was at will. We agree with the other districts that Illinois courts should follow this analysis and conclude that an employment relationship should be included in the rule for reviewing ancillarity in restrictive covenant cases.

We therefore hold that the restrictive covenant agreement in this case meets the re-

quirement of ancillarity. As pled, we find the covenant subordinate to the purpose of the parties’ employment relationship. We do not express an opinion as to the additional issues of enforceability (*i.e.*, consideration and reasonableness), but remand to the circuit court for proceedings consistent with this opinion.

[12] We note, however, that Illinois law provides that substantial continued employment may constitute sufficient consideration to support a restrictive covenant agreement. See, *e.g.*, *Lawrence*, 292 Ill.App.3d at 138, 226 Ill.Dec. 331, 685 N.E.2d 434 (little over two years of continued employment after signing restrictive covenant constituted sufficient consideration to support agreement); *Agrim-erica, Inc. v. Mathes*, 199 Ill.App.3d 435, 442, 145 Ill.Dec. 587, 557 N.E.2d 357 (1990) (more than two years of continued employment after signing restrictive covenant constituted sufficient consideration to support agreement); but see *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill.App.3d 63, 71, 183 Ill.Dec. 573, 611 N.E.2d 1221 (1993) (affirming determination that seven months of continued employment did not constitute sufficient consideration). We do not believe case law limits the courts’ review to a numerical formula for determining what constitutes substantial continued employment. Factors other than the time period of the continued employment, such as whether the employee or the employer terminated employment, may need to be considered to properly review the issue of consideration.

Reversed and remanded.

CAMPBELL, P.J., and QUINN, J.,
concur.



Appellate Court of Illinois, First District, Third Division.

WORLD WIDE PHARMACAL DISTRIBUTING CO., an Illinois corporation, Appellee,

v.

Manny N. KOLKEY, Appellant.

Penn Pharmaceutical Distributing Co., an Illinois corporation, Schwimmer & Scott, Inc., an Illinois corporation, and Savoy Drug and Chemical Company, an Illinois corporation.

Gen. No. 46574.

Feb. 23, 1955.

Action for an injunction and an accounting. The Superior Court, Cook County, Frank M. Padden, J., rendered a decree granting a temporary injunction, and one of the defendants appealed. The Appellate Court, Lewe, J., held that written agreement by discharged general manager not to engage for one year anywhere in the United States in mail order business or in manufacture, sale or distribution of any pharmaceutical product to promote growth of the female breast similar to product manufactured and sold throughout the United States by former employer was valid and enforceable.

Decree affirmed.

West Headnotes

Contracts 95  117(2)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k117 General or Partial Restraint

95k117(2) k. Limitations as to Time and Place in General. Most Cited Cases

Contracts 95  117(4)

95 Contracts


95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k117 General or Partial Restraint

95k117(4) k. Entire State or Larger Territory. Most Cited Cases

Injunction 212  61(2)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k61 Contracts in Restraint of Trade

212k61(2) k. Contracts Not to Engage in Particular Business. Most Cited Cases

Written agreement by discharged general manager, as part of settlement of claim against former employer, not to engage directly or indirectly for one year anywhere in the United States in mail order business or in manufacture, sale or distribution of any pharmaceutical product to promote growth of the female breast similar to that manufactured and sold throughout the United States by former employer, was valid and enforceable by injunction.

*201 **309 Lyle, Havey & Gager, Chicago, appellant.

Kaplan & Sparberg, Chicago, for appellee.

LEWE, Justice.

*202 Defendant Manny Kolkey appeals from an order directing the issuance of a temporary injunction restraining him from engaging in the manufacture and sale of a pharmaceutical pill containing an ingredient known as 'Galega' alleged to enlarge the female breast and from advertising any pharmaceutical pill under the name of 'Charm-on' or any other name in newspapers or other publications or through the use of any mailing lists of any other person or company.

The essential allegations of the complaint are as follows: Since March 30, **310 1954 plaintiff, an Illinois corporation, with its principal place of business in

(Cite as: 5 Ill.App.2d 201, 125 N.E.2d 309)

the City of Chicago, has engaged in the manufacture and mail order distribution of a pharmaceutical product called 'Kurvon'. About April 1, 1954, plaintiff sent defendant Kolkey to France as its representative to negotiate contracts with French pharmaceutical 'houses' for the purchase of 'Galega'. All of defendant Kolkey's travel expenses to France, including his salary aggregating \$2,500, were paid by plaintiff. Upon the return of defendant Kolkey to the United States plaintiff launched an extensive advertising campaign to promote the mail order distribution of 'Kurvon' and has expended and is still expending large sums of money for advertising throughout the United States for the specific purpose of making its product known to the general public. The active ingredient contained in 'Kurvon', known as 'Galega' has not been used in the United States as a bust developer prior to plaintiff's manufacture and distribution thereof. In the conduct of its mail order business plaintiff is receiving orders from customers in practically every State in the Union. Plaintiff caused a trade-mark application for 'Kurvon' to be filed with the United States Patent Office.

May 21, 1954 defendant Kolkey was employed by plaintiff upon a salary basis as general manager. He was in charge of plaintiff's mail order business and in *203 his capacity as general manager and supervisor Kolkey acquired an intimate knowledge of the methods and procedures used in conducting plaintiff's business, including the formula used by plaintiff in the making of its product. While employed by plaintiff defendant Kolkey also learned plaintiff's advertising copy, plans, publications, and the names of all of plaintiff's customers.

It is further alleged that on July 21, 1954 plaintiff discharged defendant Kolkey. August 24, 1954 defendant instituted suit against the plaintiff to recover damages for the alleged breach of his contract of employment with plaintiff and for the enforcement of an alleged oral contract for the recovery of certain stock in the plaintiff corporation. Shortly after this suit was brought negotiations were commenced between the parties which culminated in a written agreement on September 3, 1954 between plaintiff and Kolkey. The pertinent paragraph of the agreement reads:

'In addition to the aforesaid release herein executed

by the undersigned, and for and in consideration of the payment to him by the aforesaid corporation of the sum of Four Thousand (\$4000.00) Dollars, and in further consideration of inducing the said corporation to part with the said sum of \$4000.00 being paid to the undersigned this day, the undersigned covenants, warrants and agrees that he will not engage, either directly or indirectly, through himself or through any other person or persons, company, corporations or copartnership, in the mail order business, or in the retail, wholesale distributing, manufacturing or importing business concerning the sale and distribution of any pharmaceutical product connected with the enlargement or growth of the female breast and any pharmaceutical product of a similar kind or nature as 'Kurvon' now being manufactured by the aforesaid corporation and further covenants, warrants and *204 agrees that he will not associate himself with any other person or persons, company, copartnership or corporation in any capacity whatsoever, either as an employee, officer, stockholder, or promoter engaged in the retail, wholesale distributing, mail order, importing or manufacturing business of a product similar or like 'Kurvon', now being manufactured by the aforesaid corporation, all for a period of one year from the date hereof, anywhere in the United States of America.'

August 10th while the parties were in negotiation for the settlement of defendant Kolkey's alleged claim, Kolkey, through his agents, organized the defendant Penn Pharmaceutical Distributing Company, an Illinois corporation, and began to distribute **311 a product called 'Charm-on' which also contained 'Galega' as its principal ingredient. Defendants Kolkey and the Penn Pharmaceutical Distributing Company have used identical bottles and boxes in which to ship its pills with labels and instructions similar to those used by plaintiff. The brochure enclosed in each package of pills mailed to the customer by defendants was identical in form, advertising, copy, and art work with plaintiff's. Simulation of the outer package, bottle, color of pills, and name used by defendants were all intended to cause confusion in the minds of the general public and to divert to defendants the mail order business which would otherwise flow to plaintiff.

In the concluding paragraphs the complaint prays for

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a preliminary and permanent injunction restraining defendants Kolkey and the Penn Pharmaceutical Distributing Company, its officers and agents from engaging in the manufacture and sale by mail order of a pharmaceutical pill containing 'Galega' and for an accounting of the damages and profits accruing as the result of the wrongful conduct of the defendant. No answers were filed to the complaint by any of the *205 defendants. The application for the temporary injunction was opposed on the face of the complaint.

Defendant Kolkey challenges the validity of the agreement executed by him on the grounds that it is in restraint of trade and contrary to the public policy of the State. In support of his position he relies on *Parish v. Schwartz*, 344 Ill. 563, 176 N.E. 757, 758, 78 A.L.R. 1032. There the defendants agreed not to manufacture or sell certain bung-hole appliances for a period of sixteen years, 'either in the United States of America east of the Mississippi river or in any territory in which the company is now selling its products.' The court in holding this contract void as in restraint of trade where it extends to the whole State, said at page 569 of 344 Ill., at page 760 of 176 N.E., in adverting to *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 61 N.E. 1038: "Within its own sphere the state has a public policy as a commonwealth, which the courts of the state regard and enforce, distinct from questions of policy affecting the nation at large. * * * It is against the policy of the state that its citizens should not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen should be compelled to leave the state to engage in his business and to support himself and family. It is true that a contract may be valid which embraces portions of more than one state. Trade and business are not affected by state lines, and a contract might be good in restraint of trade which embraced, within reasonable limits, parts of different states, but an agreement which applies to the whole state is void, and cannot be enforced."

Continuing at page 570 of 344 Ill., at page 760 of 176 N.E., the court, after citing with approval *Tarr v. Stearman*, 264 Ill. 110, 105 N.E. 957, said: "Every contract of this kind must be judged according to its special circumstances, and whether it is reasonable or contrary to public policy is a question of law." * * * It is at once obvious that the above principles are deci-

sive of the question unless there exists such a state of facts that those principles are not properly applicable.'

*206 In a later opinion this court in *Storer v. Brock*, 267 Ill.App. 138, affirmed in 351 Ill. 643, 184 N.E. 868, held that a provision in a contract between two physicians that one will not practice medicine in the City of Chicago independently of the other who agrees to pay the one restricted a sum per month while he is not practicing without the City, is not invalid because unlimited as to time. In that case we recognized that the rule which formerly held restrictive covenants in agreements void has been greatly relaxed and in many jurisdictions abrogated. There are many factual distinctions between the present case and *Parish v. Schwartz*, 344 Ill. 563, 176 N.E. 757, 78 A.L.R. 1032 and the cases cited therein. No decisions of the courts of review of Illinois have been cited in the briefs nor have we been able to find any involving a **312 strictly mail order business nation-wide in scope and confined to the manufacture and sale of a single item, such as a pharmaceutical pill.

In *Voices, Inc., v. Metal Tone Mfg. Co.*, 119 N.J.Eq. 324, 182 A. 880, the complainant was the owner of a number of patents covering sound-producing devices known as 'voices' and 'criers' which were used in dolls and toys. He entered into an agreement with the defendants which provided that they would not manufacture or sell sound producing devices in the United States for a period of eighteen years. The court held that since the business for which protection was sought in the complaint was nation-wide in scope the territory covered in the agreement was not too extensive but was reasonably required for the protection of the complainant, and that the period of limitation was reasonable.

In *Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 App.Div. 556, 179 N.Y.S. 325, one Warren, an employee of Eastman Kodak Company executed an agreement not to disclose any knowledge gained in the course of his employment as to various processes and formulas relating to the making of raw film stock, upon termination, of his employment, for a period of two years, and *207 that he would not engage in the photographic business at any point in the United States. This agreement was held valid.

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The rule announced in *Voices, Inc., v. Metal Tone Mfg. Co.*, 119 N.J.Eq. 324, 182 A. 880, and *Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 App.Div. 556, 179 N.Y.S. 325 and cases there cited has been fully sustained in *Larx Co. Inc., v. Nicol*, 224 Minn. 1, 28 N.W.2d 705. At page 11 of 224 Minn., at page 711 of 28 N.W.2d, the court said: 'The majority of courts recognize the validity of an agreement wherein the seller of a secret process or an employe to whom a secret formula has been disclosed in connection with his employment covenants not to disclose or make use thereof, either directly or indirectly, in competition with his employer or the owner thereof, even though such agreements be unlimited as to time and space. The test applied is the reasonableness of the restraint imposed, and where the business sought to be protected is nationwide a covenant unrestricted as to time and territory is not necessarily unreasonable.'

In the instant case the restrictive covenants of the agreement between the parties expire early in September of 1955. In the meantime the defendant Kolkey is free to engage in any business in this State or elsewhere except the manufacture and sale of a pharmaceutical pill containing 'Galega'. The allegations of the complaint clearly show that all the information defendant Kolkey has about the manufacture and sale of plaintiff's product 'Kurvon', including the secret formula, was acquired while he was in plaintiff's employ, and at its expense. Because of the special circumstances in the case at bar, we are of the opinion that the rule announced in *Parish v. Schwartz*, 344 Ill. 563, 176 N.E. 757, 78 A.L.R. 1032, upon which defendants rely, is not applicable.

In our view the cases heretofore cited, *Voices, Inc., v. Metal Tone Mfg. Co.*, 119 N.J.Eq. 324, 182 A. 880, and *Eastman Kodak Co. v. Powers Film Products Inc.*, 189 App.Div. 556, 179 N.Y.S. 325, are most analogous to the instant *208 case, and are decisive of the issues here. We cannot say that the restraint imposed by the order appealed from is more extensive territorially than is reasonably necessary to protect the plaintiff's business.

For the reasons stated, the decree is affirmed.

Decree affirmed.

KILEY, P. J., and FEINBERG, J., concur.
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