6/29/01

SUPREME COURT OF LOUISIANA

00-C-1695

SWAT 24 SHREVEPORT BOSSIER, INC.

V.

ROBBIE BOND

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF BOSSIER

TRAYLOR, J., dissenting

While acknowledging that the rules of statutory construction require a search for legislative intent, the majority of the court continues to do what initially prompted the legislature to amend the statute in the first place: the court continues to construe the statute so narrowly that effectively no competitive agreements can be enforced, and completely ignores the competitive realities of today's commercial world in fear of some factual scenario that is not before this court.

The exception provided in La. Rev. Stat. § 23:921(C) states:

> Any . . . employee may agree with his employer to refrain from *carrying on or engaging in a business similar to that of the employer* and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.[Emphasis added].

Although the majority correctly concludes that the phrase "carrying on or engaging in a business similar to that of the employer" is susceptible to different meanings, the court fails to conduct an accurate review of the legal background surrounding La. Rev. Stat. § 23:921 to discern the legislature's intent.

Legislative history

Despite the general rule that public policy disfavors noncompetition agreements, the prohibition against noncompetition agreements is a far cry from absolute.

Beginning with the amendments in 1962, the legislature has continued to add exceptions to the general rule against noncompetition agreements. Those exceptions must be construed strictly to comport with the overall prohibition in La. Rev. Stat. § 23:921(A), and public policy concerns against restricting someone's livelihood; at the same time, the exceptions must be given effect within the words of their generally prevailing meaning and honor the legislature's intent in passing the laws.

In 1962, the legislature redrafted the statute to provide for employers and employees to "under certain conditions enter into voluntary contracts and agreements." H. B. 788, 1962 Reg. Sess. (La. 1962). The statute was amended to provide:

> No employer shall require or direct any employee to enter into any contract whereby the employee agrees not to *engage in any competing business for himself, or as the employee of another*, upon the termination of his contract of employment with such employer, and all such contracts, or provisions thereof containing such agreement shall be null and unenforceable in any court, provided that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said *employee will not enter into the same business that employer is engaged* over the same route or in the same territory for a period of two years." [Emphasis added].

LA. REV. STAT. § 23:921 (1962).

The statute remained unchanged until 1989, when a wholesale revision was submitted by Representatives Dastugue and Jenkins, with continued adjustments in 1990 and 1991. The legislature completely redrafted the noncompetition statute in an effort to remedy the flaws emanating from the courts' restrictive interpretation of the 1962 amendment, and to restore the legislature's original intent to the statute. *See Minutes of the Committee on Labor and Industrial Relations*, La. House of Rep., 16th Leg., 1990 Reg. Sess. (June 1, 1990) (statement of Representative

Jenkins)(commenting on the unfortunate situation regarding the courts' reluctance to enforce noncompetition agreements, despite the statutory exceptions).[1] The bill added the exceptions for noncompetition agreements between buyers and sellers in the sale of a business, between partners in dissolution, and between employers and employees. H.B. 1378, 1989 Reg. Sess. (La. 1989). Amendments to add a time limit of two years, and expand the geographical limitations were added by suggestion of the Civil Law and Procedure Committee. *Minutes of the Committee on Civil Law and Procedure*, La. House of Rep., 15th Leg., 1989 Reg. Sess. (May 23, 1989).

In response to suggestions by various business groups, the legislature amended the statute again in 1990, adding corporations and shareholders to the definition of "any person" under the statute, S.B. 196, 1990 Reg. Sess. (La. 1990); and adding an exception to cover computer programmers who work in the software industry, House Bill 1180, 1990 Regular session (La. 1990); in 1991, adding exceptions for franchisors and franchisees, H.B. 1672, 1991 Reg. Sess. (La. 1991); in 1995, expanding agreements to cover independent contractors, S.B. 1373, 1995 Reg. Sess. (La. 1995); and in 1999, to provide for validity of choice of law and forum clauses, S.B. 915, 1999 Reg. Sess. (La. 1999). In the 1991 amendment adding the provisions for franchisor/franchisee agreements, the original bill was amended to add "engaging in any other business similar to the subject of the franchise" in addition to the prohibition against competing with the franchisor.

Although the La. Rev. Stat. § 23:921 exceptions should be narrowly construed, the majority's interpretation strangles the statute, and effectively renders

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[1] The majority suggests that these comments by Rep. Jenkins are irrelevant to the bill passed in 1989. However, the complete redrafting of the statute in 1989, with subsequent amendments to that same statute almost every year, are hardly "irrelevant" to the issue of legislative intent. The meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and placing a construction on the provision in question that is consistent with the express terms of the law and with the obvious intent of the legislature in enacting it. *Stogner*, 98-3044 at p. 2, 739 So.2d at 762.

noncompetition agreements effectively meaningless between an employer and his employee. The rules of statutory construction require that the general intent and purpose of the legislature in enacting the law must, if possible, be given effect. *Radiofone, Inc. v. City of New Orleans*, 93-0962 (La. 1/14/94), 630 So. 2d 694; *Backhus v. Transit Cas. Co.*, 549 So. 2d 283 (La.1989); *Truscon Steel Co. v. B. & T. Const. Co.*, 170 La. 1083, 129 So. 644 (1930). The statute must therefore be applied and interpreted in a manner which is consistent with logic and the presumed fair purpose and intention of the legislature in passing it. *See First Nat'l Bank of Boston v. Beckwith Mach. Co.*, 94-2065 (La. 2/20/95), 650 So. 2d 1148; *Rodriguez v. Louisiana Med. Mut. Ins. Co.*, 618 So. 2d 390 (La. 1993).

In contravention of the intent of the legislature, the majority's interpretation of the statute that limits roles with a new employer to only those that involve solicitation of the former employer's customers is overly restrictive for several reasons. First, the dictionary definitions of "carry on" and "engage," as they relate to employment, are not limited to activities of an individual who founds or starts his or her own enterprise. The majority in this case interpreted the terms "carrying on" and "engaging" to cover only those instances when an employee leaves the employer and starts a business similar to the former employer's business. For the phrase "carry on," this interpretation is arguably supported by the dictionary definition of "conduct, manage (carry on a new enterprise)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 344 (4th ed. 1976). However, "engage" is defined in multiple ways, including:

- to involve or entangle (as a person) in some enterprise
- to provide occupation for (as a person, his interest, or labor)
- to arrange to obtain the services of, usually for a wage or fee
- to enter oneself into an agreement to serve (example: he engaged himself with the company for two years)

Id. at 751. Rather, a plain language interpretation of the term "engage" supports the

opposite finding, namely that individual is engaged in the employ of another.

The majority reasons that the phrase "and/or from soliciting customers of the employer" would be rendered meaningless by an interpretation of the statute that allowed employers to prevent their former employees from working for another employer in any capacity. However, this conclusion erroneously presumes that the only means an employer uses to solicit customers is through its employees. The employer who pays a referral fee, or hires an independent contractor to solicit customers, could prevent a former employee from working to solicit customers though those means to aid a competitor. Most notably, the phrase that involves the prohibition against solicitation of customers lacks the modifier "in a business similar to the employer."

Second, the prior 1962 statute used the language "engage in any competing business for himself, or as the employee of another,. . . ." Considering the legislative intent surrounding the 1989 amendment, it does not follow that, in creating the exception in La. Rev. Stat. § 23:921(C), the legislature intended to further limit employees who compete with former employers to only those who solicit the former employer's customers. Instead, the legislature used broader language in "carry on or engage" and "and/or solicit" and "in a business similar to." Considering the legislative history, a more plausible reading of the statute suggests that the legislature only intended to replace the restrictive "substantial expenses" test, superimposed by this Court in *Foti*, with objective geographical and time limitations.

Public policy supports free competition in the market to encourage businesses to compete not only in what they sell in goods or services, but also in the raw materials, equipment, facilities, and skills and labor in the open market. However, the legislature has determined that competitors can restrict that competition, in a limited

area and for a limited time, under La. Rev. Stat. § 23:921(C). The legislative intent evidenced by the legislature's repeated amendments to broaden the statutory exceptions, and comments by its members on the overly restrictive interpretations given by the courts, support a rejection of the majority's interpretation as overly restrictive in contravention to the legislature's will.

Third, a company can be negatively impacted by an employee who moves to a competitor in roles beyond that of direct solicitation with customers. An employer can be motivated to enforce a non-competition agreement to prevent the loss of significant training and resources spent on the employee, to preserve an employee's specialized skill, or prevent a competitor gaining advantage from a employee's exposure to the former employer's more efficient system of operation. See Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-will: Reformulating the Analysis*, 2 Empl. Rts. & Employ. Pol'y J. 95 (1998) (discussing the change in the American marketplace "from one primarily focused on mechanized industry to one emphasizing highly-technological and service-oriented industries" which has precipitated the accelerated use of post-employment noncompetition agreements, viewed as the best method for protecting valuable confidential information, such as technological advances and customer lists of the employer, from exploitation by former employees with competitors in the new market); Micheal L. Agee, Comment, *Covenants Not to Compete in Tennessee Employment Contracts: Almost Everything You Wanted to Know but Were Afraid to Ask*, 55 Tenn. L. Rev. 341 (Winter 1988) (reviewing the history of restraints against trade in general, starting with early English common law, as a reflection of prevailing political and economic ideas under the guild system , which would deprive the public of a skilled worker at a time when workers were scarce; as political and moral ideas have evolved,

freedom of contract has developed which recognized that “interests of the contracting parties are not necessarily the same as the interests of the Commonwealth").

Without such protection, employers can not afford to invest optimally in product development or in their employees. In addition, the covenants promote freedom of communication within a company, a conduit for optimal efficiency. *See* Harlan M. Blake, *Employee Agreements Not to Compete,* 73 Harv. L. Rev. 625, 627 (1960); *see also* Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 Va. L. Rev. 383, 386-87 (1993) (discussing how "[d]octrinal limitations on enforceability of assignments of human capital threaten to discourage employer investment in employees").

With its decision, the majority continues to preserve the outgrown concepts espoused in *Foti* regarding an individual’s right of freedom and opportunity to better themselves, and the perceived disparity in bargaining power between the employer and employee. *Foti*, 302 So. 2d at 596. As in the *Foti* decision, the majority’s decision today renders the exceptions in the 1989 amendment practically meaningless. The majority’s interpretation of the statute creates narrow distinctions that ignore common business practices and thwarts the legislature’s purpose in enacting the exceptions under La. Rev. Stat. § 23:921.

Rather, like the 3rd and 4th circuits considering the issue, a proper reading of La. Rev. Stat.§ 23:921(C) applies to the situation in which an employee competes with his former employer as the employee of a competitor for two reasons. First, if the legislature had intended the strict interpretation given by the second circuit in *Summit*, the statute could easily have said “engaging or carrying on his *own* business.” *Scariano Bros.*, 719 So. 2d at 134. Second, the economic reality of the market place more often than not involves employee movement working for an employer in the same

job. *Id.*

As revealed by a cursory review of cases in our lower courts, each situation requires a fact-intensive analysis of the parties involved, the agreement's provisions, and the competitive behavior sought to be enjoined. In reality, the commercial world often reflects that the employee has the upper hand, in possessing a specialized skill or access to knowledge, which may be gleaned from that same employer. The employer is motivated to procure the employee's agreement not to compete to preserve that competitive advantage, and in exchange, provides additional compensation, bonuses, and other privileges to the employee. *See Scariano Bros.*, 719 So. 2d at 133 (offering the defendant a promotion to sales manager, a signing bonus, and an increased salary in an effort to prevent the defendant's departure to a competitor); *Dixie Parking*, 691 So. 2d at 1318 (admitting that she [employee] signed the noncompete agreement in order to gain access to confidential information and obtain substantial bonuses, which she in fact did before leaving to work for a competitor). In this case, Bond received a promotion, an increased salary, a bonus plan, and other privileges in signing the agreement that contained the noncompete clause.

Despite these incentives, the majority adopts a paternalistic approach to protect what it perceives to be the downtrodden employee.[2] A better approach to achieve the legislative intent while preserving a balance between employers and employees in the commercial marketplace would consider the words of the contract, whether the employers are competitors, and the employee's position and its impact on the former

[2] In oral argument, several members of the panel seemed particularly concerned about doctors and lawyers. First, lawyers are precluded from signing or requesting one another to execute noncompete agreements by their own code of professional conduct. *See* La. R. of Prof. Cond. 5.6. Second, while the majority's approach helps the doctor employed by the local hospital, it does nothing for the doctor hired as an independent contractor by that same hospital (of which many are) or the doctor who seeks to establish a more lucrative private practice.

employer.

Interpretation of Contractual language in light of La. Rev. Stat. 23:921

A noncompetition agreement is a contract between the parties and should be construed using general rules of construction of contracts provided in the Louisiana Civil Code. The interpretation of a contract is the determination of the common intent of the parties with courts giving the contractual words their generally prevailing meaning unless the words have acquired a technical meaning. LA. CIV. CODE arts. 2045, 2047; *see e.g. Louisiana Ins. Guar. Ass'n v. Interstate Fire & Casualty Co.*, 93-0911, p. 5 (La. 1994), 630 So. 2d 759, 763.

The purpose of noncompetition agreements is to protect business from competitive disadvantage by an employee exploiting skills, knowledge or information acquired while employed by the former employer. However, an employee has a right to ply his trade or profession to sustain his livelihood. Additionally, the employer is typically the drafter of the instrument, which under contract interpretation of ambiguous terms requires construction against the contract's drafter. See LA. CIV. CODE art. 2056. Thus, in accord with Louisiana's strong public policy against restraints on trade, ambiguous provisions must be strictly construed in favor of the employee.

Bond argues that because La. Rev. Stat. § 23:921(C) provides a narrow exception that must be strictly complied with, SWAT's Agreement is overbroad. However, the Agreement specifies that Bond was prohibited from directly or indirectly competing with SWAT in specified parishes for a period of two years. The portion of the clause that prevents Bond from serving "as an officer, employee, director, agent or consultant of any business, which is in direct or indirect competition with SWAT. . ." fits within the exception under the statute that allows employers to prohibit an

employee from "carrying on or engaging in a business similar to the employer." Under a plain reading of the contract provision, Bond is precluded from working as an employee for a business in competition with SWAT.[3]

The question then becomes whether a noncompetition agreement must mirror the words of the statute exactly to be effective, as the agreement did in *Scariano Bros*; or whether the prohibition from engaging in direct or indirect competition with the employer is interpretatively the same as "carrying on or engaging in a business similar to the employer," as the third circuit found in *Moreno*. Under a logical interpretation of the statute, similar businesses would likely be in competition with one another for the same customers and resources. However, in some circumstances, using a plain meaning interpretation of the statute, two businesses could be similar without being in competition. For example, a construction company that specialized in constructing commercial office buildings would arguably not be a competitor of a company constructing residential homes; however, both types of construction companies would be similar. Thus, the fact that the businesses are similar is not dispositive on the issue of whether the businesses are competitors; although the converse is presumably true, i.e., dissimilar businesses are presumptively invalid under the plain language of the statute.

In light of public policy, and the strict construction that must used be against SWAT as the drafter of the agreement, a more workable approach would consider whether both the former and the new employer must be competitive businesses to

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[3] Arguably the term "indirect" could be construed as ambiguous by including businesses that are not competitors. Because NRS, and Bond through his role with NRS, is competing directly with SWAT, no reason exists to address what might be the holding under certain hypothetical situations where an employee is "indirectly" engaged in competition or a business that is in "indirect competition" because those facts are not before us. However, those circumstances, if overbroad, could be remedied by blue-line reformation of the offending phrase. *See Scariano Bros.*, 719 So. 2d at 135; *Henderson*, 707 So. 2d at 482.

satisfy both the contract and the statute. Thus, the first question that must be resolved is whether NRS and SWAT are competitors. According to Bond, NRS does all types of contracting and construction work, including insurance restoration work, which constitutes 20-25% of NRS construction work. Bond defined insurance restoration work as remodeling where "we go in and take old houses or new houses and redo them. . . restore them to what people want," including work after fire or storm damage, including emergency repair during normal work hours. Bond distinguishes SWAT from NRS based on the emergency repair work that SWAT performs beyond normal working hours. Bond's distinction does not establish a difference cognizable under the statute or the contract. Thus, the two business are not only similar, but also competitors.

Role with the New Employer that impacts competition

The second question then arises whether the employee is impacting the former employer's ability to compete in his or her role with the new employer. To give greatest effect to the legislature's intent in enacting La. Rev. Stat. § 23:921(C) as an exception to the rule, while still honoring Louisiana's general public policy against noncompetition agreements between employees and employers, the role of the employee with both the former and current employer is a critical analysis in determining whether the employee will impact the former employer's business. The key factor in evaluating an noncompetition clause's enforceability is the impact on the former employer's ability to compete with the new employer.

SWAT agrees that a noncompetition agreement may not absolutely restrict a person from working for a competitor in any capacity. However, SWAT argues that it is not seeking to prevent Bond from working for a competitor in any capacity, but is only seeking to prevent Bond from working in the same capacity for a competitor.

SWAT points out that in his role at NRS, Bond is directly competing with SWAT; the skills he acquired as a production manager at SWAT are the same skills being used for NRS.

In his role as production manager with SWAT, Bond was responsible for coordinating a construction job upon receiving the job from a salesman, including customer interaction, and supervising up to 40 employees at a time. Crowley also testified regarding Bond's role as production RP, who runs the jobs by supervising the contractors, and production manager, who runs jobs and supervises other RPs who are running jobs.

In Bond's position with NRS, he is involved "running the job from A to Z," including the sale, planning, and actual construction work. He is in charge of preparing bids for customers, meeting with customers to obtain their preferences, and supervising the subcontractors once the construction job is underway . At the time of the deposition, Bond had 15 construction jobs going, 3 of which were flood damage restoration.

Therefore, Bond's role with NRS affected SWAT's ability to compete not only because he retained the same position with NRS that he held with SWAT, but also based on the intrinsic nature of the work itself.[4] Bond's position with both SWAT and NRS involved management duties to ensure safe, financially sound, and timely completed construction projects in the insurance restoration business. In roles with both companies, he was required to control costs, interact with customers, and direct

[4] Neither duties, nor the same position with both companies, is necessarily determinative. An individual could transfer between competitors in the same role, yet not impact the former employer's ability to compete, i.e., the maintenance man in the medical field as suggested in *Summit*. On the other hand, an employee could change roles between the competitors, and in his role with the new employer, significantly impact the former employer. Thus, while a factual determination of duties may be necessary, an employee's transfer in the same position between two competitors creates a strong presumption that the role will have a significant impact on the former employer.

the activities of other employees. These responsibilities, whether considered direct or indirect activities, would allow Bond to have a significant impact on NRS's ability to compete with SWAT.

Additionally, Bond's job with both SWAT and NRS involved solicitation of customers.[5] At his deposition, Bond indicated that he performed sales in his role with SWAT about 15% of the time to handle customer upgrades, overflow, and vacation coverage for co-workers. He was subsequently employed by NRS on July 5th or 6th of 1998 as a Supervisor over operations, production and sales in a much broader role than performed at SWAT. In his deposition, Bond testified that in his work for NRS, he prepared bids for customers the majority of the time, and that he was involved in "the sale, the planning and the construction work itself."

Definition of the business

Bond also argues that an employer must include a definition of the employer's business in a non-compete agreement to avoid overbreadth, relying on the first and fifth circuits. *See Lafourche*, 652 So.2d at 679; *Daiquiri's III*, 608 So.2d at 222.[6] According to Bond, the agreement cited by the plaintiff describes Bond's duties, not the business of the employer SWAT.

In contrast to the first and fifth circuits, the third circuit has held that a specific definition of a company's business is not required based on the statutory language of La. Rev. Stat. § 23:921 and the ability to effect an oral noncompetition agreement. *See Henderson*, 707 So. 2d at 482; *see also Barnett v. Jabusch*, 607 So. 2d 1007 (La.

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[5] Based on oral argument, the majority concludes that solicitation of customers was not at issue. While SWAT did not argue that Bond "intentionally" solicited SWAT's customers, SWAT stated at oral argument that there was evidence in the record, in the form of Bond's deposition that was submitted at trial, regarding Bond's involvement in sales.

[6] The court of appeal not reach the defendant's argument that SWAT's business was not adequately defined in the agreement, rendering it unenforceable.

App. 3 Cir. 1992), *writ denied*, 610 So.2d 820 (La.1993) (upholding an oral non-competition agreement). The plaintiff argues that La. Rev. Stat. § 23:921 on its face contains no express requirement to include a definition of the employer's business to ensure its validity, and thus, a definition is not required. SWAT further argues that in *Daiquiri's*, the fifth circuit did not hold that the business must be defined in the agreement but rather that the definition in the agreement was overly broad.

The Agreement defines SWAT's business as "insurance restoration construction business." The plaintiff alleges that insurance restoration work is a term of art in the construction industry, and clearly understood by Bond. During his deposition and at trial, Bond explained his definition of the term "insurance restoration construction business" and indicated that he understood what the restoration business was and how it differed from conventional construction work. Bond defined insurance construction restoration work as twenty-four hour repair service responding to storm or fire damage.

At the hearing, Cowley testified regarding the nature of insurance restoration work. Insurance restoration construction occurs when any loss or peril occurs, as defined by the applicable insurance policy on the residence. Damage can include anything from traditional storm damage, to vandalism, burglary or a vehicle driven though the home. The work differs from normal construction work because a third party, the insurance company, is involved in the estimating and agreement regarding the necessary repairs. Rather than bidding jobs, the majority of SWAT's work comes from referrals from insurance agents and adjusters.

A definition of the employer's business in order to comply with LA. REV. STAT. § 23:921(C) is unnecessary. However, even interpreting the provision to impose this requirement, the evidence clearly establishes that an appropriate definition of SWAT's

business exists in the non-competition agreement at issue. Complex, cumbersome, and overly detailed definitions are unnecessary to convey to the employee the scope of the job that is being protected from competition; the definition must only serve to demonstrate a common understanding between the employer and employee regarding the nature of the business.

The statutory language of La. Rev. Stat.§ 23:921(C), and the legislative history, support a finding that competitors can restrict their employees from working for a business similar to the employer without limitation to situations only where the employee forms their own business or solicits the former employer's customer. Further, the Agreement between Bond and SWAT meets the statutory requirements under La. Rev. Stat. § 23:921 for a valid and enforceable noncompetition clause. Accordingly, I dissent.