No. 23-255 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

MECKLENBURG ROOFING, INC.,	)	
	)	
Plaintiff- Appellee,	)	From Mecklenburg County
	)	
v.	)	
	)	
JEREMY ANTALL and JOHNSON'S ROOFING SERVICE, INC.,	)	
	)	
Defendants- Appellant.	)	
	)	
JEREMY ANTALL,	)	
	)	
Counterclaimant-Appellant,	)	
	)	
v.	)	
	)	
MECKLENBURG ROOFING, INC.,	)	
	)	
Counterclaim Defendant-Appellee.	)	

****

PLAINTIFF-APPELLANT MECKLENBURG ROOFING, INC.'S OPENING BRIEF

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No. 23-255 TWENTY-SIXTH DISTRICT

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****

PLAINTIFF-APPELLANT MECKLENBURG ROOFING, INC.'S OPENING BRIEF

****

ISSUES PRESENTED

WHETHER THE TRIAL COURT ERRED BY DENYING MECKLENBURG ROOFING, INC.'S MOTION FOR PRELIMINARY INJUNCTION.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT MECKLENBURG ROOFING, INC. FAILED TO MEET ITS BURDEN FOR THE ISSUANCE OF A PRLIMINARY INJUNCTION.

INTRODUCTION

The trial court erred when it denied a motion for preliminary injunction seeking to enjoin Mecklenburg Roofing, Inc.'s former employee, Jeremy Antall, from continuing to violate his employment agreement during the pendency of this case and while employed for a competitor, Johnson's Roofing Service, Inc. Mecklenburg Roofing, Inc. ("MRI") requested that the trial court enjoin Jeremy Antall during the pendency of these proceedings, from violating his agreement with MRI, which prevents him from working as a roofing estimator for another company within one hundred miles of MRI's office. Mr. Antall is currently employed with a competitor, Johnson's Roofing Service, Inc. ("JRS"), within 100 miles of MRI's office. JRS and MRI frequently bid the same projects and the same customers.

STATEMENT OF THE CASE

MRI filed a Complaint, Motion for Preliminary Injunction, and Affidavit of Alexander Ray on 5 October 2022. (R pp 2, 18). Jeremey Antall filed an Amswer and Counterclaim on 17 November 2022 (R p. 27), and JRS filed an Answer on 27

November 2022. (R p 35). They provided affidavits on 10 November 2022 (R p. 2022), and the trial court held a hearing on 14 November 2022, at which it announced it was denying the preliminary injunction. The trial court's order was entered 17 November 2022. (R p. 53). The notice of appeal was filed on 16 December 2022. (R p. 55).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over MRI's interlocutory appeal because the trial court's order affects MRI's substantial right. *See* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)a. This case satisfies the two-part test for interlocutory appeals based on a substantial right: "the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal form final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

MRI has a valid employment agreement structured to be no broader than necessary to protect its legitimate business interests. The denial of the preliminary injunction below, however, permits Jeremy Antall to violate the employment agreement while working for a competitor within the narrow geographic limits proscribed in the agreement. "A preliminary injunction is interlocutory in nature. As a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right

which will be lost should the order escape appellate review before final judgment." *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (citation and quotation marks omitted).

In the instant matter, interlocutory review is appropriate because MRI will lose the benefit of the noncompetition covenant in the absence of prompt review. "In cases involving an alleged breach of a non-competition agreement and an agreement prohibiting the disclosure of confidential information, North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions, holding that substantial rights have been affected." *Pinehurst Surgical Clinic, P.A. v. Dimichele-Manes*, 2013 N.C. App. LEXIS 450, *5 (N.C. Ct. App. May 7, 2013) (quoting *Jeffrey R. Kennedy, D.D.S., P.A. v.* Kennedy, 160 N.C. App. 1, 5-6, 584 S.E.2d 328, 331 (2003)). As in the *Pinhurst Surgical Clinic* case, because the covenants have only a two-year period, the relief sought by MRI could be mooted if Mr. Antall is permitted to continue competing with MRI. *See id. See also Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 24, 373 S.E.2d 449, 451 (1988) (Court found that more than one third of the period had elapsed); *Electrical South, Inc., v. Lewis*, 96 N.C. App. 160, 165, 385 S.E.2d 352, 355 (1989) (substantial right affected where two-year covenant would likely expire during pendency of case).

STATEMENT OF THE FACTS

MRI is a roofing contractor which performs work for commercial, multifamily, and industrial clients, and furnishes roofing labor, equipment, and materials for roofing projects, including but not limited to roof removals, roof retrofits, roof replacements, new construction, and repairs and maintenance. (R p 21) MRI hired Mr. Antall on 3 May 2019, and he worked for over two years in MRI's service department as a Superintendent and Project Manager. (R p 21). In July of 2021, MRI promoted Mr. Antall to the position of Estimator. (R p 21). His promotion came with increased compensation in addition to increased benefits in the form of MRI covering 100% of health insurance premiums and furnishing a company vehicle for both personal and business use. (R p 21). His promotion also came with an agreement, the Employment Covenants Agreement. (R p 21).

The Agreement

As part of the Agreement, Mr. Antall agreed that during his engagement as Estimator, he would "devote Employee's full professional and business related time, skills, and best efforts to the business of the Company and the performance of the duties of Employee's position with the Company…." (R pp 18-19). Further, he agreed that "for so long as Employee is employed by the Company and for two (2) years thereafter, Employee will not, individually or on behalf of any person, firm, partnership, association, business organization, corporation or other entity engaged

in the 'Business' (as defined above), engage in or participate in the actual Estimating or Selling of commercial roofing services, including but not limited to roof removal, roof retrofit, roof replacement, and roof maintenance and repair, the retrofit, renovation, or repair of the exterior building envelope and waterproofing including above and below grade, of commercial or public buildings and other operations incidental to the roofing and construction services described herein and provided by the Company; provided that the restrictions set forth in this section shall only apply within the one hundred (100) mile radius from the Company's office located at 3232 Oak Lake Blvd., Charlotte, North Carolina 28208." (R p 17). The agreement also barred him from soliciting MRI's customers and from using or disclosing MRI's confidential information and trade secrets.

For enforcement of the various provisions, the Agreement provides: "Notwithstanding the parties' Arbitration agreement above, the parties to this Agreement acknowledge that a breach by Employee of any of the terms or conditions of this Agreement will result in irrevocable harm to the Company and that the remedies at law for such breach will not adequately compensate the Company for damages suffered. Accordingly, Employee agrees that in the event of any such breach, the Company shall be entitled to injunctive relief or such other equitable remedy as a court of competent jurisdiction may provide." (R p 18).

Mr. Antall's Duties

The position of estimator is crucial to the success of any construction company, especially those that engage in competitive bidding. In his role as Estimator, Antall estimated over $64,000,000 worth of roofing projects for MRI ranging from new construction to re-roof projects, to repair and maintenance projects. (R p 22). The types of projects estimated by Mr. Antall for MRI constituted the core of MRI's business. (R p 22). In his role as Estimator, Mr. Antall worked closely with MRI's customers and potential customers. (R p 22). Mr. Antall's direct responsibilities for MRI included initial budgeting and pricing, coordinating plans and materials, and value engineering for bidding on business opportunities. (R p 22). Following his promotion to Estimator, Mr. Antall was given increased access to MRI's confidential information and trade secrets, and estimated projects with the benefit of MRI's pricing strategies, gross profit percentage targets, man-hour targets, overhead allocation targets, and net profit percentage targets, and Mr. Antall estimated and calculated these projects knowing MRI's supplier pricing, supplier terms, rebate programs with suppliers, and, most importantly, the percentage targets outlined above. (R p 22).

A little over a year after his promotion, Mr. Antall announced that he was leaving his employment with MRI on 22 August 2022. (R p 22). During his exit interview, Antall informed MRI that he would be going to work as an Estimator for

a direct competitor, JRS, in Fort Mill. (R p 22). Mr. Antall is currently employed as an Estimator for JRS in Fort Mill, 7.23 nautical miles from MRI's office, performing the same duties he performed for MRI. (R p 23).

MRI and JRS bid against each other constantly, aggressively, and are direct competitors in the same market. As a non-exhaustive list of examples, the two companies bid against each other right around the time of the preliminary injunction hearing on various projects:

- Upcoming
    - Rowan County Schools | Charels C. Erwin Middle School | Pre. Bid on 6 October 2022 | Bid Due on 20 October 2022
- Previously Bid against & Customers
    - Exeter Property Group
        - Williams-Sonoma Distribution Center | Proposed 22 August 2022 | $1,197,907.00
        - 1962 SC-160 | Proposed 22 August 2022 | $809,412.00
        - 1966 SC-160 | Proposed 22 August 2022 | $539,119.00
    - REI Engineers
        - CMS Schools
        - Gaston County Schools
        - York County Schools
        - Rock Hill School District
    - Charlotte Douglas Airport | Edifice | Terracon | Roof Solutions, Inc. | Rodger Builders | Samet Construction | Choate Construction | Blythe Construction | Balfour Beatty | Harkins Builders | The NRP Group | Brasfield & Gorrie

(R p 23).

STANDARD OF REVIEW

The standard of review for this appeal is essentially de novo.

> "The standard of review from a preliminary injunction is essentially de novo." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362 (citation and internal quotation marks omitted). Thus, "on appeal from an order of a superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc.*, 308 N.C. at 402, 302 S.E.2d at 760 (citation omitted). "Nevertheless[,] a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362 (citation and internal quotation marks omitted).

Horner Int'l Co. v. McKoy, 232 N.C. App. 559, 562, 754 S.E.2d 852, 855 (2014).

ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE PRELIMINARY INJUNCTION

A Court should issue a preliminary injunction if "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (*quoting Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

In the employment context, a covenant not to compete is valid if it is: (1) in writing; (2) entered into as part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) not against public policy. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 649–50, 370 S.E.2d 375, 380 (1988). In the trial court below, at the hearing on this matter, as revealed in the transcript, JRS and Mr. Antall did not present any argument about any of these five prongs, except some brief argument with respect to consideration. Basically, JRS and Mr. Antall both conceded that all five prongs were met, and, therefore, the covenant not to compete is valid and should be enforced. As to the first and second prongs, the writing is attached to the verified complaint, and the affidavits and agreement itself show that it was entered into as a part of the employment contract for his new position as Estimator. Consideration, the third prong, and the only one challenged by the appellees, is easily satisfied by the increased compensation and benefits that attached to the promotion, constituting *new* consideration to support the agreement. This is not a case of "continued employment." Mr. Antall placed his tax forms into the record, disputing the increase in wage income, but increased overall annual income on a tax form is not the only thing that can constitute consideration. New consideration may be slight, and its adequacy is measured by the parties at the time of contracting rather than the Court later. Courts have held that a raise or other change in compensation is new consideration, *Clyde Rudd &*

Associates, Inc. v. Taylor, 29 N.C. App. 679, 225 S.E.2d 602 (1976); as is a promotion, *Associates, Inc. v. Taylor,* 29 N.C. App. 679, 225 S.E.2d 602 (1876); and additional training, *Safety Equipment Sales & Service, Inc. v. Williams,* 22 N.C. App. 410, 206 S.E.2d 745 (1974); or some other increase in responsibility or number of hours worked, *Whittaker Gen. Med. Corp. v. Daniel,* 324 N.C. 523, 379 S.E.2d 824 (1989). In this case, the affidavits showed an increase in responsibility to a new position, Estimator, with increased responsibilities, a 100% contribution to his health insurance, and provision of a company vehicle for both "personal and business use." (R p 22).

The fourth prong is easily satisfied by the two years limitation on duration and 100 mile geographic limitation. As an initial matter, however, restrictions barring an employee "from working in an identical position" for a direct competitor are valid and enforceable. *See Precision Walls Inc., v. Servie,* 152 N.C. App. 630, 568 S.E.2d 267 (2002) (for one year and in two states). As noted above, Mr. Antall is working in an identical position for JRS, a direct competitor. The time limitation is eminently reasonable. Two years has been upheld, as have longer time periods. "A five-year time restriction is the outer boundary which our courts have considered reasonable, and even so, five-year restrictions are not favored." *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000). *See also Welcome Wagon, Inc. v. Pender,* 255 N.C. 244, 120 S.E.2d 739 (1961). *See also Kennedy v. Kennedy,*160

N.C. App. 1, 584 S.E.2d 328 (2002) (enforcing covenant for a period of 3 years); *Precision Walls,* at 638, 568 S.E.2d at 273 (enforcing 1 year covenant); *Triangle Leasing Co., v. McMahon,* 327 N.C. 224, 393 S.E.2d 854 (1990) (upholding 2 year restriction). The geographic limitation is also reasonable, as Mr. Antall worked on estimating projects for customers over a much larger geographic area than 100 miles from the home office in Charlotte. *Cf. Beam v. Rutledge*, 217 N.C. 670, 673-74, 9 S.E.2d 476, 478 (1940) (the defendant had entered into a non-competition agreement which prevented the defendant from practicing medicine within 100 miles of the town in which they practiced after dissolution of the partnership). This 100 mile restriction is actually much narrower than the geographic area in which Mr. Antall worked, as he estimated projects in the following states: NC, SC, GA, TN, KY, WV, VA, OH, TX, PA and FL, which are the states in which MRI operates.

Factors to determine in deciding whether geographic scope of restriction is reasonable include (1) area or scope of restriction, (2) area assigned to employee, (3) area in which employee actually worked, (4) area in which employer operated, (5) nature of business involved, and (6) nature of employee's duty and his knowledge of business operation. As noted above, the area and scope of the restriction are very narrow. The area assigned to Mr. Antall covered eleven states in the southeast. While Mr. Antall worked in Charlotte, he was responsible for $64,000,000 in estimating across these eleven states, which overlaps with the area in which MRI

operated. The nature of the business was roofing construction, and Mr. Antall was the Estimator, a key person to any construction business, who had in depth knowledge of all aspects of putting together competitive bids for roofing construction and MRI's business practices, especially with respect to the factors that relate to pricing. It is difficult to overestimate how crucial an estimator is to a construction business, and Mr. Antall has been lured to work for a direct and aggressive competitor in violation of his agreement, which MRI is asking this Court to enforce according to its terms.

Finally, the fifth prong is satisfied by MRI's protection of its legitimate business interests. "The protection of customer relations against misappropriation by a departing employee is well recognized as a legitimate interest of an employer." *Farr Assocs.,* at 280, 530 S.E.2d at 881 (citing *Kuykendall*, at 651, 370 S.E.2d at 381).

> The danger of a departing employee "misappropriating" a client is indeed very real, since Farr's Consultants develop not only close relationships with Farr's clients, but gain knowledge of Farr's business practices too. Following *Kuykendall*, we hold that Farr's desire to keep its client base intact when its employees depart is a legitimate business interest.

Id.

As noted above, with the exception of the element of consideration, JRS and Mr. Antall have not disputed whether all five of these elements are met. The

covenant not to compete is therefore valid, and the trial court should have enforced it as written.

THE TRIAL COURT ERRED IN CONCLUDING THAT MRI FAILED TO MEET ITS BURDEN FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION

The arguments put forth by the JRS and Mr. Antall were focused on whether he was in actuality participating in the bids for which JRS and MRI compete, rather than addressing the validity of the employment agreement and the fact that both parties acknowledge that Mr. Antall is violating its terms and that JRS is assisting and contributing to Mr. Antall doing so. *See* R p 17 (Antall agreed not to "engage or participate in the actual Estimating or Selling of commercial roofing services" within the proscriptions of the covenants), and R p. 50, ¶ 6 (JRS admits "[Antall] does estimating and other tasks at JRS"). Mr. Antall is working as an estimator at JRS, a competitor to MRI located within 100 miles of MRI. This is the exact same position that Mr. Antall occupied at MRI, and it is the exact type of work which Mr. Antall is prohibited from performing within the geographic and time restrictions of the covenants. There is no burden at the preliminary injunction stage for MRI to demonstrate that MRI has been monetarily damaged by Mr. Antall's violations of the covenants. MRI's sole burden was to demonstrate that the covenant was valid, and that Mr. Antall was engaging in violative conduct. The record is both clear and undisputed on both of those points. The covenant not to compete is valid, and Mr. Antall and JRS both admitted that Mr. Antall was violating it.

CONCLUSION

MRI is entitled to the grant of a preliminary injunction. The employment agreement is valid under North Carolina law. MRI is likely to prevail on the merits, and issuance of an injunction is necessary for protection of MRI's legitimate rights during the pendency of this litigation. It is undisputed that Mr. Antall is violating the agreement currently by his employment in the identical position of estimator with a direct competitor in the roofing industry that very regularly bids against MRI on projects. He is employed with this competitor within 100 miles of MRI's office in Charlotte. Indeed, he works for JRS in Fort Mill.

This the 23rd day of April, 2023.

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CERTIFICATE OF COMPLIANCE
WITH WORD COUNT LIMITATION

The undersigned counsel hereby certifies that the foregoing document complies with the word count limitation in Rule 28(j) of the North Carolina Rules of Appellate Procedure because it contains no more than 8,750 words, excluding those portions that do not count toward the limit. According to counsel's word-processing software, this brief contains 3952 words, including footnotes and citations.

This the 23rd day of April, 2023.

Electronically submitted
Brian J. Schoolman

Counsel for Appellant Mecklenburg Roofing, Inc.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing is being served on counsel for Appellees by electronic mail, addressed as follows:

Matthew E. Cox
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This the 23rd day of April, 2023.

Electronically submitted
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IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

MECKLENBURG ROOFING, INC. Plaintiff, vs. JEREMY ANTALL, et al., Defendants.	MECKLENBURG COUNTY 22 CVS 17751

TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE HUGH B. LEWIS, JUDGE PRESIDING

Mecklenburg County Courthouse
Via Webex
Charlotte, North Carolina
November 15, 2022

Transcribed by: Tracy D. Daniels, RPR
Notary Public

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Myron Ray, Mecklenburg Roofing
Johnson's Roofing employees

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EXHIBITS

NUMBER	ADMITTED
(NONE)	

PROCEEDINGS

* * * * * * *

THE COURT: Mecklenburg Roofing versus Antall and Johnson's Roofing Service. I see Mr. Schoolman is present. Mr. Cox is present. If the other parties can identify themselves, we'll start with Mr. Ray.

MR. ALEXANDER RAY: Alexander Ray with Mecklenburg Roofing.

THE COURT: Okay.

MR. MYRON RAY: Myron Ray with Mecklenburg Roofing.

THE COURT: Okay. And we also have another group of three individuals that are with Johnson's Roofing, correct?

JOHNSON'S ROOFING: That is correct.

THE COURT: And then we have Mr. Siegel.

MR. SIEGEL: Correct, Your Honor. I'm outside counsel for Mecklenburg Roofing.

THE COURT: Mr. Schoolman, it is your motion. You may proceed.

MR. SCHOOLMAN: Thank you, Your Honor. It wasn't noticed for this particular hearing. We have submitted a motion for admission pro hac vice from Mr. Siegel. I believe that a proposed order was submitted to the Court. I have not received it signed back yet.

In the interim, since we submitted it, I have communicated with Mr. Cox, and he has indicated he has no objection to the motion. If an order has not been entered yet, does Your Honor have any issue with allowing the motion so that Mr. Siegel may argue here today?

THE COURT: Until that pro hac vice is passed on by the senior resident here in Mecklenburg County, he will not be able to speak.

MR. SCHOOLMAN: Understood, Your Honor. Do you know whether the order has been entered?

THE COURT: No, sir.

MR. SCHOOLMAN: All right, Your Honor. The motion for preliminary injunction, which has been filed, is with respect to an employment dispute. Mecklenburg Roofing is the former employer of Mr. Antall. While Mr. Antall was employed by Mecklenburg Roofing, which is a roofing contractor, he was given a promotion, at which point he also entered into a covenant not to compete. The details are included in our memorandum, which I assume Your Honor has.

The details of the covenant include that he is prohibited from engaging in competitive activities relating to the roofing business for a period of two years after the termination of his employment. We have submitted an affidavit from Mr. Ray regarding the details

of his employment, regarding the details of the covenant not to compete, and regarding the activities or believed activities of Mr. Antall since he has entered the employ of Johnson's Roofing Service.

I'll be happy to go into greater detail if Your Honor would like, but we believe we've laid it out in fairly good detail with respect to the issues in the memorandum.

MR. SIEGEL: Your Honor, may I add anything?

THE COURT: No, sir. You have not been admitted pro hac vice yet. I would not wish to expose you to the unauthorized practice of law at this time. Mr. Cox?

MR. COX: Thank you, Your Honor. Can you hear me okay?

THE COURT: Yes, I may.

MR. COX: Your Honor, what is lacking throughout this -- it is acknowledged that Mr. Antall is working for Johnson's Roofing. It is acknowledged that Johnson's Roofing is a roofing contractor and that Mecklenburg Roofing is a roofing contractor.

But as Your Honor is aware, restraint on alienation is not favored in the state of North Carolina. And so what they have to do is they have to provide some evidence that, beyond competition, that there is a legitimate reason for which the injunction is being

sought.

I would direct the Court to paragraph 41 of the Complaint, which says, "Upon information and belief, Antall has violated the terms of the agreement by serving as an estimator for Johnson's Roofing Service, in direct competition with MRI."

So that is their basis, that there's competition, which in and of itself is a violation of public policy to simply prohibit competition. The next paragraph is very telling, Your Honor. Paragraph 42 says, "Upon information and belief, Antall has also, Number 1, solicited MRI customers and used its confidential information and trade secrets in violation of the agreement."

Now, they're coming to this Court asking for injunctive relief, alleging that he has, in fact, solicited MRI, or Mecklenburg Roofing, customers and used confidential information. What is lacking is any specificity, which, as Your Honor is aware, is required under North Carolina law. There is no identification of who, which customers he has allegedly solicited, or how he has used this confidential information that they allege that he has.

In their second cause of relief, which is pertinent also to this injunction, Your Honor, is the

misappropriation of trade secrets, which the only paragraph, again, that they allege any violation is paragraph 51. "Antall misappropriated MRI's confidential information and trade secrets in numerous ways" -- numerous ways -- "including by using them to benefit JRS."

They don't say how. They don't say who. This was their opportunity to come forward with affidavits if they have them. And the only affidavit we have is Mr. Ray. Mr. Ray, his affidavit, Your Honor, if you would review, states in paragraphs 18 that -- or, sorry, in paragraph 17 that Mr. Antall went to work for Johnson's Roofing. He states in 18 that Johnson's Roofing is a direct competitor of MRI.

And then he says in 19 that they were concerned about six bids in particular: Three projects to Exeter Property Group, four projects bid to REI Engineers, Charlotte Douglas International Airport, an anticipated bid in October '22 to Rowan County Schools.

Now, of all of those that are listed in there, if you look at their brief, page 4 of their brief, it states that "MRI and JRS bid against each other constantly, aggressively, and are direct competitors in the same market," and refer to this affidavit.

Well, there's nothing in this affidavit saying that it's constantly or aggressively in those two

particular paragraphs that are cited. What is more telling, Your Honor, is if you look at, in fact, the affidavit of Mr. Antall, as well as the affidavit of Mr. Brashear for Johnson's Roofing and the accompanying exhibit, Mr. Antall only, on behalf of MRI, prepared a bid for the Charlotte-Mecklenburg County Schools.

Johnson's Roofing did not bid any of those projects. The only project that Johnson's Roofing bid out of paragraph 19 was, in fact, Rowan County Schools. And we've provided the bid sheet on that, Your Honor. Mecklenburg Roofing didn't even bid that job. So there was no competition on any of these -- on any of these cases that are listed.

They provided no affidavits from any customers. Mr. Antall indicates that he has not had any crossover since being at Johnson's Roofing. There has not been any evidence that's been brought forth that he's doing anything, sharing anything. Mr. Antall doesn't even know what the trade secrets would be.

This is simply, Your Honor, a simple matter of trying to keep someone from working for a competitor. It is a restraint on competition, not against any trade secret. Mr. Antall doesn't have some secret formula for measuring a roof that nobody else has. He's not aware of any -- some kind of special trade secret that is only

known to Mecklenburg Roofing.

A roof is a roof, Your Honor, and it depends on a couple of different things. It depends on the size and the type of material. And pricing has been volatile in the market in the last two years. So the pricing that somebody had in June of or July of 2021 is not the price they got in July of 2022 and probably is not the price they're getting in November of 2022.

This is simply a relationship between these parties. They're upset that he has left employment. They're trying to keep him from working. He doesn't have any trade secrets. He uses mathematics, which is, to my knowledge, not a trade secret. He uses a computer software program, which is not a trade secret. And we ask that the injunction, for lack of evidence and for the cases cited in our brief, be denied, Your Honor.

THE COURT: Mr. Schoolman, response?

MR. SCHOOLMAN: Yes, Your Honor. Mr. Cox has simplified things beyond what the record actually shows. And the affidavit of Mr. Ray discusses that Mr. Antall had access to, among other things, pricing strategies, gross profit percentage targets, man hour targets, overhead allocation targets, net percentage, supplier pricing, supplier terms, rebate programs with suppliers.

There is a significant amount of particular

information which Mr. Antall had access to, which gives him the ability to engage in competitive conduct that was specifically prohibited by the noncompetition clause. This is not something to prohibit Johnson's Roofing from engaging in competition against Mecklenburg Roofing. They have every right to do that. They have in the past. They probably will in the future.

What this is intended to do is to prevent Johnson's from utilizing the information, the experience that Mr. Antall acquired while he was employed by Mecklenburg Roofing and became subject to the noncompetition agreement, which was supported by a consideration.

Mr. Cox is not putting forward any issues that somehow the noncompetition provisions are overly broad or outside of North Carolina public policy, other than this contention that because it's roofing, that somehow it doesn't apply. But in order for us to succeed, we have to demonstrate that we have a likelihood of success on the merits.

That would be the enforceability of the noncompetition provision. And it satisfies all of the checkmarks under North Carolina law to be enforceable. It was in writing. It was entered into as part of Mr. Antall's promotion. It was supported by consideration.

It is reasonable as to time and to territory, and, therefore, it is not against public policy.

And the reasonable and legitimate business interests of Mecklenburg Roofing are what should be evaluated here. And we can't simply take Mr. Antall and Johnson Roofing at their word that somehow he is excising all of the aspects of his brain and of his experience when engaging in his employment on behalf of Johnson's.

There's no way for us to be sure of every little detail, but we have acted with the information that is available. And, frankly, the fact that there is testimony that Mr. Antall worked on at least one project which was in competition is sufficient to demonstrate that if he is allowed to continue to do so, that the irreparable harm could go forward.

So what we are asking for is, under the law, to utilize the remedy which was available to Mecklenburg Roofing, which was bargained for, contracted for, which Mr. Antall freely accepted, and to have a preliminary injunction entered to prohibit, from this point forward, any engagement of activities that are in violation of the noncompetition agreement.

MR. COX: Your Honor, if I may?

THE COURT: Please understand it is Mr. Schoolman's motion. He'll have the last word.

MR. COX: I understand. Your Honor, in our -- in our affidavit of Mr. Antall, in the attachments he shows that he did not, in fact, receive consideration. His pay actually went down between 2020 and 2021. We've provided his tax returns.

Your honor, in addition -- in addition to the lack of consideration, Mr. Schoolman is incorrect. They cite to these apparent cases that they claim that there was going to be competition, but there was, in fact, no competition. The one that Mr. Antall provided a bid for MRI, Johnson's Roofing never bid. And for the one that, again, Mr. Antall did not provide a bid for Johnson's Roofing, but Johnson's Roofing did bid on the project, you have the public bid sheet. A public bid sheet that shows that Mecklenburg County did not bother to bid that job.

So there was no competition. They make bald, broad-stroke allegations in their complaint, but they don't have any affidavits sitting before the Court that there's been any violation, other than the fact that Mr. Antall is working for a quote/unquote "competitor," and they can't cite to a single -- a single bid or solicitation or customer where they're actually competing currently.

And so for those reasons, Your Honor, again, we do not believe they would be successful on the merits. If

you look at the case law cited, they have to show more than just general allegations. Thank you.

MR. SCHOOLMAN: Your Honor, with respect to the consideration point, there's more than just the wages in Mr. Ray's affidavit. It notes that part of the promotion included an increase in wages, increased the share of payments made by the company to his health insurance premiums to one hundred percent, and furnished a company vehicle for both personal and business use. This satisfies the consideration issue.

Regarding the competition issue, Johnson's and Mr. Antall are trying to parse the things where Johnson competed versus what Mr. Antall participated in versus where they went head to head. But the issue is that there has been competition between the two companies while Mr. Antall has been employed by Johnson's, which indicates there is the possibility of competition that is in the record.

Whether or not Mr. Antall specifically engaged in a particular bid, which is something that John -- excuse me, Mecklenburg Roofing would have no way of knowing except based on the affidavit, there is no question that there has been competition between the two companies since the time of employment. And that is where the entitlement to the preliminary injunction would fall

into place.

THE COURT: Having heard arguments, having reviewed all documents submitted, the Court denies the Motion for Preliminary Injunction.

Mr. Cox, you are responsible for the order. Please circulate it amongst the attorneys, have it reviewed, and then submitted to the 9th floor of the Mecklenburg County Courthouse. Thank you very much.

(THEREUPON, THE HEARING WAS ADJOURNED.)

CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)

COUNTY OF WAKE)

I, Tracy D. Daniels, the officer who transcribed the foregoing audio recording, do hereby certify that the audio was transcribed by me to the best of my ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this interview was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

This the 1st day of February 2023.

_____

TRACY D. DANIELS, RPR
Notary Public # 19922670038

§ 1-277. Appeal from superior or district court judge.

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P.R.; C.C.P., s. 299; Code, s. 548; Rev., s. 587; C.S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

§ 7A-27. Appeals of right from the courts of the trial divisions.

(a) Appeal lies of right directly to the Supreme Court in any of the following cases:

(1) All cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.

(2) From any final judgment in a case designated as a mandatory complex business case pursuant to G.S. 7A-45.4 or designated as a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

(3) From any interlocutory order of a Business Court Judge that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

(4) Any trial court's decision regarding class action certification under G.S. 1A-1, Rule 23.

(5) Repealed by Session Laws 2021-18, s. 1, effective July 1, 2021, and applicable to appeals filed on or after that date.

(a1) Repealed by Session Laws 2016-125, s. 22(b), 4th Ex. Sess., effective December 1, 2016.

(b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.

(2) From any final judgment of a district court in a civil action.

(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

e. Determines a claim prosecuted under G.S. 50-19.1.

f. Grants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly. This sub-subdivision only applies where the State or a political subdivision of the State is a party in the civil action.

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute.

(c) through (e) Repealed by Session Laws 2013-411, s. 1, effective August 23, 2013. (1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704; 1977, c. 711, s. 4; 1987, c. 679; 1995, c. 204, s. 1; 2010-193, s. 17; 2013-411, s. 1; 2014-100, s. 18B.16(e); 2014-102, s. 1; 2015-264, s. 1(b); 2016-125, 4th Ex. Sess., s. 22(b); 2017-7, s. 2; 2021-18, s. 1.)

No. 23-255 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

MECKLENBURG ROOFING, INC.,	)	
	)	
Plaintiff- Appellee,	)	From Mecklenburg County
	)	
v.	)	
	)	
JEREMY ANTALL and JOHNSON'S ROOFING SERVICE, INC.,	)	
	)	
Defendants- Appellant.	)	
	)	
JEREMY ANTALL,	)	
	)	
Counterclaimant-Appellant,	)	
	)	
v.	)	
	)	
MECKLENBURG ROOFING, INC.,	)	
	)	
Counterclaim Defendant-Appellee.	)	

****

PLAINTIFF-APPELLANT MECKLENBURG ROOFING, INC.'S ADDENDUM TO OPENING BRIEF

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INDEX

Pinehurst Surgical Clinic, P.A. v. Dimichele-Manes

Court of Appeals of North Carolina

December 12, 2012, Heard in the Court of Appeals; May 7, 2013, Filed

NO. COA12-830

Reporter
2013 N.C. App. LEXIS 450 *; 227 N.C. App. 225; 741 S.E.2d 927; 2013 WL 1901710

PINEHURST SURGICAL CLINIC, P.A., Plaintiff v. ANDREA TERESA DIMICHELE-MANES aka ANDREA TERESA DIMICHELE, Defendant

Prior History: **[*1]** Moore County. No. 12 CVS 296.

Disposition: Reversed and Remanded.

Core Terms

covenant, trial court, non-compete, preliminary injunction, patients, medical practice, injunctive relief, irreparable, compete, injunction, quotations, merits, equitable, confidential information, restrictive covenant, irreparable harm, instant case, breached, valuable consideration, irreparable injury, liquidated damages, plaintiff's right, termination, restrained, goodwill

Counsel: Cranfill Sumner & Hartzog LLP, by Paul H. Derrick, for plaintiff-appellant.

Doster, Post Silverman & Foushee, by Jonathan Silverman, for defendant-appellee.

Judges: CALABRIA, Judge. Judges BRYANT and GEER concur.

Opinion by: CALABRIA

Opinion

Appeal by plaintiff from order entered 5 April 2012 by Judge Anderson D. Cromer in Moore County Superior Court. Heard in the Court of Appeals 12 December 2012.

CALABRIA, Judge.

Pinehurst Surgical Clinic, P.A. ("PSC" or "plaintiff") appeals from an order denying its motion for entry of a preliminary injunction against Andrea Teresa DiMichele-Manes aka Andrea Teresa DiMichele ("defendant") for violating the restrictive covenants in an employment agreement. We reverse and remand.

I. Background

PSC is a multi-specialty, physician-owned group surgical practice of approximately forty physicians serving a fifteen-county area, with its primary practice located in Pinehurst, North Carolina. Defendant, a physician specializing in Obstetrics and Gynecology ("OB/GYN"), was offered an opportunity to practice OB/GYN with PSC. Defendant signed a Professional Employment Agreement ("PEA") on 4 August 2008. The PEA included, *inter alia*, a restrictive **[*2]** covenant imposing a duty to practice exclusively for PSC, a covenant not to compete ("non-compete covenant"), a liquidated damages clause and an arbitration clause. The non-compete covenant, Section 15(a) of the PEA, prohibited defendant from practicing medicine in competition with plaintiff within a thirty-five-mile radius of its Pinehurst facility for a period of two years after leaving the practice. Defendant's violation of the non-compete covenant authorized PSC to seek liquidated damages pursuant to Section 15(b). Nonpayment of liquidated damages within thirty days after termination of employment authorized PSC to seek injunctive relief under 15(d).

From 15 October 2008, until she took maternity leave on 19 July 2011, defendant treated OB/GYN patients at PSC's Women's Care Center ("the WCC"). After defendant's child

was born, she did not return to the WCC. Instead, defendant's attorney sent a letter of resignation dated 16 November 2011, notifying John Rezen ("Rezen"), PSC's CEO, that she planned to terminate her employment with PSC and included numerous reasons in the letter stating why she believed she was constructively discharged. On 4 January 2012, defendant updated her records **[*3]** with the North Carolina Medical Board to reflect that she was practicing medicine with Carolina Women's Health Center ("CWHC"), a practice located in Sanford, North Carolina.

On 1 March 2012, defendant started treating patients at CWHC, which is located within the thirty-five-mile radius of Pinehurst covered by the non-compete covenant. That same day, plaintiff filed a complaint alleging defendant violated the terms of the PEA. Plaintiff sought a temporary restraining order ("TRO") as well as preliminary and permanent injunctive relief. At that time, the trial court granted the TRO to enjoin defendant from practicing medicine until resolution of the dispute.

On 5 April 2012, at a hearing, plaintiff presented evidence that defendant executed the PEA and that defendant's competition may result in injury to plaintiff. Defendant admitted that patients transferred their medical records from plaintiff's practice to CWHC. The trial court made several findings of fact and entered an order denying plaintiff's motion for a preliminary injunction and dissolving the TRO against defendant. Although the trial court found the non-compete covenant to be valid, it concluded that plaintiff had adequate **[*4]** remedies and failed to prove (1) it would likely suffer irreparable harm if the requested injunctive relief were not granted and (2) that its rights with respect to its property, proprietary and confidential information and its competitive interests would be violated unless defendant was restrained from practicing medicine with a competitor. While plaintiff sought both a preliminary and a permanent injunction, only the denial of plaintiff's preliminary injunction is on appeal.

II. Interlocutory Order

"The denial of a preliminary injunction is interlocutory" and "an appeal to this Court is not usually allowed prior to a final determination on the merits. However, review is proper if such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *Analog Devices, Inc. v. Michalski, 157 N.C. App. 462, 465, 579 S.E.2d 449, 451-52 (2003)*(internal quotations and citations omitted). "In cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information, North Carolina appellate courts have routinely reviewed ***interlocutory*** court orders both granting and denying **[*5]** preliminary injunctions, holding that substantial rights have been affected." *Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy, 160 N.C. App. 1, 5-6, 584 S.E.2d 328, 331 (2003)* (internal quotations and citations omitted). In the instant case, denial of the ***preliminary injunction*** affects a substantial right and is immediately appealable since the ***covenant***'s two-year limitation may expire before a final judgment on the merits. As a result, the relief plaintiff sought would be unavailable if defendant continued practicing medicine in the interim.

III. Denial of Preliminary Injunction

Plaintiff argues that the trial court erred by denying its motion for a preliminary injunction. Specifically, plaintiff claims the trial court erred by concluding that denial of the preliminary injunction would not irreparably harm plaintiff since plaintiff had adequate remedies to address the breach of the non-compete covenant and that its rights with respect to its property, proprietary and confidential information as well as its competitive interests would not be violated unless defendant was restrained from practicing medicine with a competitor. We agree.

On appeal, review of the denial of a preliminary injunction **[*6]** is *de novo,* and thus the appellate court "may weigh the evidence anew and enter its own findings of fact and conclusions of law...." *Id. at 8, 584 S.E.2d at 333*. "However, a trial court's ruling ... is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog, 157 N.C. App. at 465, 579 S.E.2d at 452*.

A preliminary injunction will only be issued

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P. Industries v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (citation omitted). Determination of the second issue is "discretionary and requires the trial court to weigh the equities." *Redlee/SCS, Inc. v. Pieper, 153 N.C. App. 421, 427, 571 S.E.2d 8, 13 (2002)*.

A. Plaintiff's likelihood of success on the merits

In North Carolina, a restrictive covenant is valid and enforceable if it is "(1) in writing, (2) entered into at the time and as a part of the original contract **[*7]** of employment, (3)

based on a valuable consideration, (4) reasonable both as to the time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *U-Haul Co. v. Jones, 269 N.C. 284, 286, 152 S.E.2d 65, 67 (1967)*. In the instant case, the trial court concluded that defendant's covenant not to compete was "(1) in writing, (2) based upon valuable consideration, (3) reasonably necessary for the protection of legitimate business interests, (4) reasonable as to time and territory, and (5) not otherwise against public policy."

Here, defendant challenges the validity of the covenant, arguing that it was not based on valuable consideration. Defendant contends that the language in the PEA separating the non-compete covenant from the remainder of the PEA renders the restrictive covenant a "naked covenant" and relies on *Wilmar, Inc. v. Liles and Wilmar, Inc. v. Polk* to support this contention. *13 N.C. App. 71, 185 S.E.2d 278 (1971)*. Defendant's reliance is misplaced. In *Wilmar*, the defendants were both employed by the plaintiff prior to the execution of a contract of employment with plaintiff. *Id. at 77, 185 S.E.2d at 282*. The *Wilmar* Court held that **[*8]** since the employment preexisted the execution of the covenants not to compete, additional consideration was required to support the covenant not to compete. *Id.* In the instant case, the PEA included a non-compete covenant. Therefore, since defendant entered into the non-compete covenant at the time of the PEA, additional consideration was not required. Defendant's new employment with PSC was adequate valuable consideration. *See Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 597, 632 S.E.2d 563, 571 (2006)* ("the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract." (internal citations omitted)).

Defendant also contends that plaintiff failed to show a likelihood of success because plaintiff breached the PEA. For a breach of contract to prevent a plaintiff from obtaining injunctive relief, a defendant must show that "the alleged breach was substantial and material and goes to the heart of the agreement." *Kennedy, 160 N.C. App. at 13, 584 S.E.2d at 336* (internal quotations and citation omitted). When the breach is not material, then it will not prevent a party from obtaining equitable **[*9]** relief in the form of an injunction. *Id.* The burden of proof is on the defendant to provide evidence that the breach was material. *See id.*

In the instant case, defendant contends that plaintiff constructively discharged her, thus breaching the PEA and relieving her of any obligations under the contract, including compliance with the non-compete covenant that was included in the PEA. The trial court declined to address the issue of constructive discharge, finding that there was "insufficient evidence" to make such a finding. The trial court did find that "[p]laintiff provided [d]efendant with an extensive patient base and the support necessary to maintain a successful medical practice, in addition to [p]laintiff's reputation, name recognition, and goodwill in the community." Defendant has not challenged these findings of fact on appeal, and thus they are binding. *Durham Hosiery Mill Ltd. P'ship v. Morris, 217 N.C. App. 590, 592, 720 S.E.2d 426, 427 (2011)*.

We find that based on the unchallenged findings of fact by the trial court, defendant failed to meet her burden of proving that plaintiff substantially or materially breached the PEA. Plaintiff has shown that the non-compete covenant **[*10]** in the PEA was valid and enforceable and that defendant violated the non-compete covenant. Therefore, plaintiff was likely to succeed on the merits of its case. *A.E.P., 308 N.C. at 404, 302 S.E.2d at 761*.

B. Irreparable Loss/ Protection of Plaintiff's Rights

Although we find plaintiff was likely to succeed on the merits of its case, the trial court denied plaintiff's motion for injunctive relief. The trial court concluded that plaintiff failed to prove it was likely to sustain irreparable harm. Therefore, we must determine whether "plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Id. at 401, 302 S.E.2d at 759-60* (citation omitted).

"[I]njury is irreparable where the damages are estimable only by conjecture, and not by any accurate standard." *Id. at 407, 302 S.E.2d at 762* (internal quotations and citation omitted). In *A.E.P.*, the trial court denied the plaintiff's motion for a preliminary injunction, finding that although the plaintiff would likely succeed on the merits, the plaintiff failed to establish a *prima facie* case **[*11]** of irreparable harm. *Id. at 404-05, 302 S.E.2d at 761*. Our Supreme Court reversed the decision, referring to the language in the noncompetition agreement expressly acknowledging that "remedies at law for the breach of any of the restrictive covenants contained in the immediately preceding paragraph shall be deemed to be inadequate and that A.E.P. Industries, Inc. shall be entitled to injunctive relief for any such breach." *Id. at 406*; 408, *302 S.E.2d at 762-63*. The *A.E.P.* Court also recognized that "[t]he focus in cases . . . is not only whether plaintiff has sustained irreparable injury, but, more important, whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law." *Id.* "[I]n a noncompetition agreement, breach is the controlling factor and injunctive relief follows almost as a matter of course; damage from the

breach is presumed to be irreparable and the remedy at law is considered inadequate." *Id.* (internal quotations and citation omitted). The plaintiff is not required to "show actual damage by instances of successful competition, but it is sufficient if **[*12]** such competition, in violation of the covenant, may result in injury." *Id.* (internal quotations and citation omitted).

In *Kennedy*, the plaintiff sought a preliminary injunction after the defendants breached a covenant not to compete by opening a dental office in violation of the covenant. *160 N.C. App. at 3-5, 584 S.E.2d at 331*. The Court determined that the plaintiff had "established irreparable harm through a showing that a substantial portion of its patients have followed [the defendants] to the new practice" and found that there was "no equitable reason why the injunction should not issue." *Id. at 15-16, 584 S.E.2d at 337*; *see also Robins & Weill v. Mason, 70 N.C. App. 537, 542, 320 S.E.2d 693, 697 (1984)* (finding irreparable injury where the defendants started a company in competition with the plaintiff and had access to the plaintiff's customers and determined that denial of the "preliminary injunction would essentially serve to foreclose much of the relief the plaintiff sought" by having defendants sign valid covenants not to compete); *QSP, Inc. v. Hair, 152 N.C. App. 174, 179, 566 S.E.2d 851, 854 (2002)* (finding irreparable loss where (1) the defendant violated the covenant **[*13]** not to compete by soliciting the plaintiff's customers; (2) the defendant misappropriated the plaintiff's confidential information; and (3) irreparable injury would occur if the defendant was not restrained from further violating the covenant not to compete).

In the instant case, defendant's violation of the non-compete covenant authorized PSC to seek liquidated damages pursuant to Section 15(b). Nonpayment of liquidated damages within thirty days after termination of employment authorized PSC to seek injunctive relief. Defendant failed to pay $100,000.00 to plaintiff for breach of the non-compete covenant within thirty days of termination of employment. Defendant chose to forego the benefit of the clause, an expedited settlement between the parties.

Plaintiff sought a preliminary injunction to restrain defendant from continuing to violate the terms of the PEA. The non-compete covenant prohibits defendant from practicing medicine within a thirty-five-mile radius of plaintiff's Pinehurst office for a period of two years. Defendant breached this covenant only four months after her resignation from PSC by practicing medicine with CWHC located within a thirty-five-mile radius. Plaintiff **[*14]** presented evidence that the parties entered into a valid PEA that included a non-compete covenant and that defendant breached that covenant. Therefore, "injunctive relief follows almost as a matter of course; damage from the breach is presumed to be irreparable and the remedy at law is considered inadequate." *A.E.P., 308 N.C. at 406, 302 S.E.2d at 762*. As recognized in *A.E.P.*, to find irreparable injury, it is not essential to show that the injury cannot be compensated "in damages, but that the injury is one *to which the complainant should not be required to submit or the other party permitted to inflict*, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Id. at 407, 302 S.E.2d at 763* (internal quotations and citation omitted). Furthermore, the "contention that [a] plaintiff is not entitled to injunctive relief because the contract provision for liquidated damages provides an adequate remedy at law is untenable." *U-Haul, 269 N.C. at 287, 152 S.E.2d at 67*.

Plaintiff contended it would be irreparably harmed by:

> a. Dissemination and use of PSC's patient identities and other confidential information by a direct competitor;
>
> b. Loss of **[*15]** patients, loss of confidence and trust of patients, loss of goodwill, and loss of business reputation;
>
> c. Damage to corporate stability and the enforcement of reasonable contracts; and
>
> d. Present economic loss, including from loss of patients, which is unascertainable at the present time, and future economic loss, which is presently incalculable.

The trial court made findings of fact addressing the harm incurred by plaintiff:

> 9. As a practicing physician and director of [p]laintiff, [d]efendant was responsible for developing close working relationships with other physicians and staff of the practice, with patients, and with third parties who dealt with [d]efendant and other individuals at [p]laintiff during the course of any given period of time.
>
> 10. Plaintiff has invested many years of time and resources creating, developing, and protecting all aspects of its practice and cultivating relationships with patients, employees, and various entities in the region in which it does business.
>
> 11. The patients served by [d]efendant and others on [p]laintiff's behalf were developed at great expense over a number of years. Because [p]laintiff is a medical practice, its patients are critical to its **[*16]** business, and the practice incurs significant annual expenses to develop and maintain a loyal patient base and goodwill in the community.
>
> 12. During the course of [d]efendant's affiliation with [p]laintiff as an employee, owner, and director, she was provided with extensive confidential information regarding all aspects of [p]laintiff's medical practice and business affairs. Possession and use of that information was critical to the successful performance of

> [d]efendant's duties as an employee and of her role as a shareholder and director.
>
> 13. Plaintiff provided [d]efendant with an extensive patient base and the support necessary to maintain a successful medical practice, in addition to [p]laintiff's reputation, name recognition, and goodwill in the community.

Although defendant admitted that patients transferred their medical records from plaintiff's practice to CWHC and thus plaintiff presented evidence that defendant's competition may result in injury, the trial court found that plaintiff could reasonably calculate the loss not only of clients, but also the value of a physician with defendant's specialty. However, we find that the trial court's findings of fact 9-13, unchallenged on **[*17]** appeal by defendant, show that plaintiff suffered irreparable harm. Therefore, the trial court's conclusion that plaintiff did not suffer irreparable harm is unsupported by its findings.

Finally, defendant contends that plaintiff is not entitled to equitable relief because it has "unclean hands." "Our courts have long recognized that a party seeking equitable relief, such as injunctive relief, must come before the court with 'clean hands.' Those who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, 160 N.C. App. at 15, 584 S.E.2d at 337* (internal quotations and citation omitted). In *Kennedy*, where the trial court did not address the defendants' equitable defenses and the defendants failed to either cross-assign "as error the trial court's failure to address its equitable defenses as an alternative basis for denying the injunction," or present the arguments on appeal, this Court found that the issue was not preserved for appeal. *Id.*

In the instant case, again we note that defendant has failed to challenge any of the trial court's findings of fact. Finding of fact 13 stated that "[p]laintiff provided [d]efendant **[*18]** with an extensive patient base and the support necessary to maintain a successful medical practice, in addition to [p]laintiff's reputation, name recognition, and goodwill in the community." In addition, the trial court found that there was "insufficient evidence" to find constructive discharge and concluded that the restrictive covenant met the requirements in *U-Haul*. These unchallenged findings and conclusion of law are inconsistent with defendant's defense of unclean hands. Since defendant has not specifically argued that the trial court erred in making these findings or conclusion of law or cited authority suggesting error by the trial court, we, like the Court in *Kennedy*, conclude that the defense of unclean hands is not properly before the Court.

IV. Conclusion

The trial court properly concluded that plaintiff's non-compete covenant in the PEA executed by defendant was a valid and enforceable covenant. Nonpayment of the liquidated damages clause within thirty days after termination of employment authorized PSC to seek injunctive relief. Plaintiff has established a likelihood of success on the merits, has sustained irreparable injury and the issuance of the injunction is necessary **[*19]** for the protection of plaintiff's rights. The trial court, therefore, erred in denying plaintiff's motion for a preliminary injunction. This case is reversed and remanded to the trial court to grant a preliminary injunction enforcing plaintiff's non-compete covenant.

Reversed and Remanded.

Judges BRYANT and GEER concur.

Report per Rule 30(e).

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