No. 2006-CA-02019

IN THE SUPREME COURT OF MISSISSIPPI

JOHN RAINES	APPELLANT
VS.	2006-CA-02019
THE BOTTRELL INSURANCE AGENCY, INC.	APPELLEE

On Appeal from the Chancery Court of
Madison County, Mississippi
Cause No. 2005-635

BRIEF OF APPELLEE THE BOTTRELL INSURANCE AGENCY, INC.

Oral argument is not requested by appellee.

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JOHN RAINES	**APPELLANT**
VS.	**2006-CA-02019**
THE BOTTRELL INSURANCE AGENCY, INC.	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. **Appellee/Plaintiff:** The Bottrell Insurance Agency, Inc.
2. **Counsel for Appellee/Plaintiff:** William F. Ray, Brian C. Smith; Watkins & Eager PLLC
3. **Appellant/Defendant:** John G. Raines
4. **Counsel for Appellant/Defendant:** John H. Downey; Downey & Caldwell
5. **Trial Judge:** The Honorable William J. Lutz, Chancellor, Madison County, Mississippi, Retired
6. **Other Interested Parties:** Trustmark National Bank, Inc. – Parent company of appellee/plaintiff The Bottrell Insurance Agency, Inc.

Brian C. Smith

Brian C. Smith

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This is a fact-driven case, and the Chancery Court of Madison County carefully considered the evidence before deciding the facts. The record clearly supports the chancellor's decision. The evidence at trial was overwhelming that Raines intentionally breached his contractual obligations. Moreover, Raines's argument on appeal relies upon his own testimony at trial, which the chancellor expressly declared to be untruthful and unreliable. Bottrell therefore does not believe that oral argument is necessary.

STATEMENT OF THE ISSUES

Insurance agent John Raines entered a contract as part of his 12-year employment relationship with the Bottrell Insurance Agency, agreeing that if he left Bottrell he would not take any Bottrell customers for two years. He deliberately breached that agreement. After a trial on the merits, the chancery court ruled that Raines's breach was inexcusable, and awarded Bottrell actual and punitive damages plus fees and expenses of litigation.

Raines's brief lists eight "issues," more concisely stated as follows:

ISSUE 1: **Is the agreement enforceable?**[1]

ISSUE 2: **Was Raines's admitted breach of the agreement somehow excused?**[2]

ISSUE 3: **Did the chancellor properly determine and award actual damages, punitive damages, attorney fees and expenses in the total sum of $994,604.68?**[3]

ISSUE 4: **Did the chancellor err in implicitly rejecting Raines's $6,450.00 counterclaim for "vacation pay" and "expense reimbursements?"**[4]

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[1] Issue 1 encompasses Raines's stated issues no. 1 ("public policy," a legal question reviewed *de novo*), and no. 2 ("mutuality" and "lack of consideration," which are based on fact decisions that must be affirmed unless "manifestly wrong" or "clearly erroneous").

[2] Issue 2 encompasses Raines's stated issues no. 3 (alleged "reduction in pay") and no. 4 (alleged "unequal enforcement" of restrictive covenant), which are based on fact decisions that must be affirmed unless "manifestly wrong" or "clearly erroneous").

[3] Issue 3 encompasses Raines's stated issues no. 5, 6 and 7, all of which are fact-based and subject to the "manifestly wrong" or "clearly erroneous" standard and/or "abuse of discretion" review.

[4] Issue 4 encompasses Raines's stated issue no. 8, which is fact-based and subject to the "manifestly wrong" or "clearly erroneous" standard of review.

I. STATEMENT OF THE CASE

A. Nature Of The Case

This case involves insurance agent John Raines's breach of a "Confidentiality, NonPiracy and NonSolicitation Agreement" (the "Agreement," Ex. 2; R.E. pp. 1-4).[5] Raines signed the Agreement as a condition of his employment with plaintiff Bottrell Insurance Agency, Inc. ("Bottrell"); he had signed similar agreements since Bottrell first hired him in 1993. In the Agreement, Raines promised to refrain from taking any customers from Bottrell for two years after leaving the agency.

Beginning in 2004, Raines began secret discussions with a competitor of Bottrell's, Marchetti, Marchetti, and Robertson, Inc. ("MM&R").[6] Documents obtained in discovery show that Raines intended to breach the Agreement, and that Raines and MM&R expected Raines to be sued. Immediately after leaving Bottrell, Raines took a number of large Bottrell accounts, representing over two-thirds of the total business he had handled at Bottrell. (R.E. pp. 5-6; Ex. 11.)

B. Course Of Proceedings And Disposition In Court Below

On July 14, 2005, Bottrell filed its complaint against Raines for breach of the Agreement, misappropriation of trade secrets, breach of fiduciary duty, and tortious interference with business relationships. The case was tried September 25 and 26, 2006. At trial, Bottrell proved that Raines breached the Agreement by soliciting, accepting business from, and providing insurance advice to

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[5] We cite the page-numbered record as "R. __"; the supplemental record as "Supp. R. __"; the trial transcript as "T. __"; trial exhibits as "Ex. __"; and the appellee record excerpts as "R.E. ___".

[6] The Marchetti, Marchetti, and Robertson, Inc. agency is part of the Boyles Moak Brickell Marchetti Insurance Agency, Inc. While Raines's paychecks are from Boyles Moak, the entity that actually employs him is MM&R. Boyles Moak is a "reverse holding company" comprised of four insurance agencies, including MM&R, which share expenses and marketing channels. (T. 19-20; Ex. 65, Dep. pp. 11-15.) Raines's negotiations were with MM&R, where he now works. In the interests of clarity, we will refer to Raines's employer as MM&R.

former Bottrell clients. (R. 180-81.) Bottrell presented expert testimony concerning the reasonableness and economic justification for the Agreement, and calculating Bottrell's damages resulting from Raines's breaches. The court found the Agreement was reasonable and economically justified, and that enforcing the Agreement did not infringe on the rights of the public. (R. 176-77.) The chancellor concluded that the Agreement was enforceable, that Raines breached the Agreement, and that Raines was "untruthful" at trial as he attempted to avoid liability. (R.E. pp. 41-42.) The court entered judgment against Raines for $994,604.68 plus post-judgment interest. Raines appealed.

II. Facts

A. Description of The Bottrell Insurance Agency

Bottrell[7] is a full-service insurance agency with a highly specialized concentration in insurance and bond products for the construction industry and other commercial customers. Bottrell sells more construction bonds than any other insurance agency in Mississippi, and is second in the property and casualty insurance market. (Ex. 31; T. 175.) Bottrell has been selected as a "Best Practices Agency" for many years. (T. 173-74.)[8]

Construction is a specialized subset of the insurance business. In order to succeed in selling bonds and insurance products to construction companies, an agent must have a thorough

[7] The Bottrell agency was founded in 1936 by Dan Bottrell. (R. 56.) In 1999, the agency was purchased by Trustmark National Bank. (Ex. 27; T. 114.) The current Bottrell Insurance Agency, Inc. is the successor to the original "Dan Bottrell Agency." (Ex. 27- 28; T. 114-15.)

[8] The "Best Practices Survey" is conducted by the Independent Insurance Agents of America, and identifies the top 30 insurance agencies in five different size categories throughout the country. Being nominated as a Best Practices Agency is an honor. Being selected as a Best Practices Agency means that the organization is a leading agency in the country. (T. 173-74.)

understanding of construction companies and the specialized products they need. A very small percentage of insurance agents and agencies have this specialized knowledge and expertise. (R. 57.)

B. Raines Joined Bottrell As An Untrained, Unlicensed Beginner And Became Successful Through Bottrell's Investment and Training

John Raines began working for Bottrell in 1993. Before he worked at Bottrell, he had no experience in the insurance or construction business and did not have an insurance license. He had never sold an insurance policy; he had no insurance customers. (T. 22.) His only other post-college job experience was a brief stint as a pharmaceuticals salesman. (T. 21.)

Upon joining Bottrell, Raines began extensive training necessary to give him the requisite knowledge and skill to succeed as an insurance producer.[9] (*See generally* Ex. 20-23.) According to Bottrell's expert, Van Hedges,[10] Bottrell's training of Raines was the best available. (T. 180) Typically, it takes two years for a producer to be brought "up to speed" to the extent he is capable of handling commercial insurance accounts. (T. 179.) The cost to an insurance agency to train an agent was from $100,000 to $150,000 in 1993, and up to $250,000 today. (T. 183-84.) Bottrell funded Raines's training with salaries, training allowances and other benefits not tied to personal sales production. (T. 24-25; R. 60-61.)

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[9] The term "producer," which is used by Bottrell, is synonymous with the term "insurance agent."

[10] Bottrell's expert witness, Van Hedges, was tendered and accepted as "an expert in insurance agency operations, management and finance, including the use of and reason for non-solicitation, [and] non-piracy agreements." (T. 170.) Mr. Hedges has been a licenced insurance agent in Mississippi since 1972, has been active in the independent agency business since 1977, and has a Masters of Insurance degree. He has owned, operated, bought, and sold dozens of independent insurance agencies during his career. He has obtained numerous professional designations, which are listed on his resume. (*See* R. 123-26.) Mr. Hedges currently serves as president of Southern Insurance Consulting, as Adjunct Professor of Insurance at the University of Mississippi, and as a director of a number of professional insurance organizations. (*See id.*)

Raines falsely claimed he "trained himself." (T. 24; R. 27-28.) Bottrell retained documents reflecting Raines's training. For example, Raines's calendars from 1993 and 1994 (Ex. 20.) show that Raines was trained in all areas of Bottrell's business, and was allocated significant time, on Bottrell's payroll, to study for and take his insurance agent licensing tests. Raines's own memos documented areas in which he had been trained by Bottrell employees. (Ex. 23.)

Bottrell always paid Raines's license fees and continuing education costs. (T. 30.) Through its connections in the insurance industry, and at agency expense, Bottrell arranged for Raines to obtain on-site training in the offices of insurance carriers, including Aetna, The Home, and USF&G.[11] (Ex. 22.)

Raines struggled in his early years. Exhibit 18 includes three memos, from 1994 and 1996, documenting errors and deficiencies in Raines's performance. Nonetheless, Bottrell continued paying Raines a salary, reimbursing his expenses, and supporting his efforts until he finally generated enough sales to support himself with commissions. (*See* Ex. 19, Raines's compensation and pay package summaries.)

Bottrell's extensive investment in John Raines is documented. Raines advanced in the insurance profession because of Bottrell's investment in him, and because of his association with

[11] Significantly, Raines attended a 2-week insurance school in Maryland, operated by USF&G, in 1994. Bottrell paid all of his expenses. (T. 29.) While Raines was reluctant to admit the extensive nature of the 2-week school (T. 30), his personnel record contains the school's itinerary and curriculum lists. (Ex. 22, pp. Raines 179-189) Raines was sponsored by a local USF&G representative, who recommended Raines for the school "although John does not have two years in the business, [because] his eight months experience has been filled with intensive training including AAI course work. We feel that he is ready for this opportunity." (Ex. 22, p. Raines 175.) The USF&G school "typically would not even allow a producer to come until they had two years experience, because they felt like it took that long just to learn the basics." (T. 179.)

Bottrell.[12] Bottrell had an interest in protecting the return on that investment - - the business Raines helped develop while on Bottrell's payroll.[13]

C. The "Confidentiality, Non-Piracy, and Non-Solicitation Agreement" Imposed Minimal Restrictions On Raines

Bottrell required Raines and other producers to enter into the Agreement (R.E. pp. 1-4) as a condition of employment. The Agreement is much narrower than a true "non-compete." It does not prevent Raines from selling insurance or bond products in any territory. Rather, the Agreement precludes Raines from soliciting or accepting business from Bottrell customers for two years.[14]

The Agreement states that upon leaving Bottrell "for any reason," Raines will not "use in any way" information about Bottrell customers (even "memorized"information). (R.E. p. 2.) Raines agreed that, for twenty-four months after leaving Bottrell, he would not:

> (1) Contact any Corporation customer, policy holder, insured or other person for the purpose of inducing or attempting to induce such customer, policy holder, surety account, insured or other person to cancel, lapse or fail to renew an insurance policy, bond or other contract issued through Corporation;
> ....

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[12] E.g., during his training Raines documented that Aetna viewed Bottrell as "an elite agency, one of three in the state," and that Bottrell was Aetna's "largest agency as far a premium dollars, so they try to help us out in any way." (Ex. 22, pp. Raines 143-44.)

[13] Raines contends that he "developed" all but one of the clients he took from Bottrell. (Appellant Br. at 36.) As discussed above, Bottrell provided Raines with many resources including support staff, equipment and facilities, and an expense budget which contributed significantly to the development of the accounts he serviced. One client, BOEP, was developed by a different Bottrell agent and given to Raines. (T. 34; Ex. 25.) Another client, Carroll Construction, was referred to Bottrell by an insurance carrier, and Bottrell assigned Raines to the account. (T. 261-62.) For Raines to contend that he "developed" this book of business all by himself is simply not accurate. Indeed, Bottrell "developed" Raines, who studied for the insurance agent exam, took the exam, and gained on-the-job training, all on Bottrell's payroll and at Bottrell's expense.

[14] Such agreements, and more restrictive "non-compete" agreements, are standard in the industry. Notably, John Marchetti, the 30(b)(6) deponent for Raines's new employer, MM&R, stated that MM&R also uses similar agreements for their producers and that it expects that any departing producers will adhere to them. (Ex. 65 at Dep. p. 24.) Raines's own expert witness likewise confirmed that his own agency uses similar agreements, and enforces them. (T. 311-12.)

(3) Call on, solicit, attempt to obtain, accept, or in any way transact insurance or bond business with any of the customers of Corporation having a policy or bond issued through Corporation, nor, directly or indirectly, aid or assist any other person or entity in the solicitation of such customer, nor shall he serve as an insurance advisor, consultant or risk manager for any such insured or customer; or

(4) Take any other action which shall be directly or indirectly competitive with Corporation with respect to customers of Corporation at the time of Employee's termination of his employment or other relationship with Corporation.

(R.E. p. 3, emphasis added.)

In signing the Agreement,[15] Raines acknowledged that Bottrell "is engaged in a personal service business involving confidential information and personal relationships with insureds, the success of which is in large part due to the exclusive retention of confidential information and continuation of such personal relationships with insureds ...." (R.E. p. 1.) Raines also agreed that Bottrell, not Raines, owned the customers' accounts. (R.E. p. 2.)

D. Raines Consciously Planned To Leave Bottrell, Take Customers, And Get Sued

Beginning in 2004, Raines began discussions with the management of MM&R concerning possible employment. (Ex. 15 & 37; T. 85-86.) Both Raines and MM&R retained counsel; their attorneys met on December 13, 2004. (Ex. 65 at Dep. pp. 61-62; R.E. pp. 21-22.) Raines gave his attorney a copy of the Agreement for review during deer season in fall of 2004. (T. 60-61.)

MM&R knew about Raines's Agreement, but refrained from obtaining a copy. (Ex. 65 at Dep. pp. 78-79.) During the discussions, Raines told MM&R that the agreement prohibited his

[15] Raines admitted at trial that he had been subject to some form of Confidentiality, Non-Piracy and Non-Solicitation Agreement ever since joining Bottrell in 1993. (T. 52-53.) He signed the 1999 Agreement after Bottrell was acquired by Trustmark. The Agency's name was changed later. (Ex. 27-28.) At trial, Raines claimed that he did not read the Agreement or know what he was signing in 1999 because his daughter was sick, and he was traveling for her treatment when he was supposed to review it. (T. 51-52.) To counter that testimony, Bottrell proved Raines signed an effectively identical version of the Agreement in 1995. (Ex. 1.) Raines did not "recall" any personal stress contemporaneous with his signing of that contract, or others. (T. 53.) The trial court found that "Raines consented to and had full knowledge of the ... Agreement signed on April 9, 1999." (R. 172.)

"soliciting" Bottrell clients, but did not disclose he could not "accept" business from Bottrell clients -- a distinction that MM&R recognizes to be material. (Ex. 65 at Dep. pp. 98-99.) Raines falsely told MM&R the Agreement empowered him to "buy out" business from Bottrell. (Ex. 65 at Dep. pp. 82-82.) Raines told MM&R that, per his attorney, the Agreement was "unenforceable" because it was "one sided." (Ex. 65 at Dep. p. 76.) MM&R undertook to ensure that the coming litigation was Raines's problem, not MM&R's, by requiring strong indemnity commitments from Raines. (Ex. 65 at Dep. p. 99.)

Raines and MM&R exchanged several proposed employment "term sheets." Throughout those exchanges, MM&R sought to protect itself from being sued by Bottrell. (Ex. 65 at Dep. pp. 94-107; Ex. 15.) MM&R first proposed that Raines not "solicit, directly or indirectly, any current customer of [Bottrell] for two years from the date of his termination of employment there." Raines rejected that proposal. (Ex. 65 at Dep. pp. 99-104; R.E. pp. 15, 35-40.) Both Raines and MM&R proposed that MM&R "share in no commissions or trade secrets acquired by Raines" from Bottrell, for two years. (R.E. pp. 36, 39.) They eventually orally agreed that (1) Raines receive 100% of all commissions from any Bottrell customers Raines brought with him, and MM&R receive none of those ill-gotten funds (T. 49-50); (2) Raines receive 50% of any commissions paid by new, non-Bottrell customers (T. 49); (3) Raines receive 30% of any commissions for renewals by non-Bottrell customers (*Id.*); (4) Raines a salary of $90,000[16] in addition to any commissions (Ex. 65 at Dep. p.

[16] MM&R explained that the $90,000 salary was originally intended to enable Raines "to live" for two years without taking any customers from Bottrell. Raines responded that he was "really confident from talking with my attorney that, either through striking a deal with Bottrell, or if it has to be litigated through litigation that I'm not going to have to wait two years to get my customers." (Ex. 65 at Dep. pp. 101-03.) In the end Raines got the $90,000 salary (Ex. 65 at Dep. p. 108), and 100% of the commissions from customers taken from Bottrell (rather than the usual agent's share of commissions).

108); and (5) Raines indemnify MM&R in any legal action to enforce the Agreement. (Ex. 65 at Dep. p. 107; Ex. 15.)

Events of spring 2005 are obscured by MM&R's assertion of the attorney-client privilege. (Ex. 65 at Dep. pp. 86-87.) Raines resigned from Bottrell on June 6, and started work at MM&R on June 13, 2005. Bottrell's attorney promptly mailed letters reminding Raines of his obligations under the Agreement, and informing MM&R of the Agrement. (Ex. 4, 5.)

E. Raines Left Bottrell And Immediately Began Taking Bottrell Customers And Breaching The Agreement

Immediately after Raines left, the largest and most profitable Bottrell customers that he had serviced began switching to Raines's new agency. Raines testified he did not call on or solicit any customers. He claimed the customers sought him out after learning he had left Bottrell. Raines claimed that he advised them that he could not "solicit" their business, but they insisted that he remain their insurance agent. Raines rationalized that he could "accept" customers, as long as he did not "solicit" them - - a false and groundless interpretation of his Agreement he expressed during MM&R negotiations, *supra*, and continued to espouse at trial. (T. 56-58.)

Other evidence sharply disputed Raines's account. Raines's and MM&R's phone records prove that he called profitable Bottrell clients shortly after starting work at MM&R. On June 17, 2005 (the same week Raines started with MM&R), in nine minutes Raines called F&F Construction; CAMO Construction Inc., and Dirtworks, Inc. (*See* T. 75-77; Ex. 39.) These were three of the largest Bottrell accounts serviced by Raines. (*See* Ex. 9 & 11; R.E. pp. 5-6.) That same day, Dirtworks and CAMO sent Agent of Record ("AOR") letters to their insurers, switching agents from Bottrell to MM&R. (Ex. 24.) F&F Construction switched agents three days later. (*Id.*) Most Bottrell customers taken by Raines switched within two weeks of Raines joining MM&R. (*Id.*)

At trial, Raines admitted that not all of the customers who switched to MM&R had any pressing insurance needs, such as expiring policies or the need for a bid bond for a project, necessitating they contact Raines. (T. 74.)[17] Raines admitted "somebody" at his new agency must have sent form AOR letters to some of these companies (T. 71); MM&R testified that Raines himself sent the form letters to the customers (Ex. 65 at Dep. p. 115). The chancellor found that Raines himself was responsible for sending out the AOR letters. (R. 180-81; "The Court is convinced that Raines's actions of calling Bottrell clients and providing form Agent of Record Letters violated the ... Agreement.") All of these facts are contrary to Raines's claims that the customers contacted him first and demanded that he remain their insurance agent - - even while Raines's version of those facts would not relieve him of liability under the contract. Raines's testimony was false, was rejected by the chancellor, and would not have helped him anyway.

F. Bottrell's Damages Were Established At Trial

The elements of Bottrell's damages, summarized on Ex. 33 [corrected] (R.E. p. 8), are as follows:

1) Commission income from business taken by Raines: Bottrell calculated the annual income lost to Raines was $ 326,000. (T. 200-01.) The chancellor accepted the lower figure of $306,862.51, *as asserted by Raines*, and based his damages award on that figure. (T. 372; R. 182, n.1; Ex. 29.)

2) Retention rate/ reduction of future losses: Bottrell acknowledged it would expect to lose about 8% per year (a 92% "retention rate") of the business at issue. This number was based on Bottrell's own statistics, and on comparable industry standards. (T.

[17] Raines's new employer acknowledges that it is unusual for a customer to change agents "mid-term." (Ex. 65 at Dep. pp. 116-18.) There was no immediate reason for the customers to seek Raines out.

207.) Raines argued the retention rate was 80% or less (T. 334, T. 368); his expert offered no alternate figures (T. 297-303). The chancellor found Bottrell would have retained 86% during the 2-year period under the Agreement, but only 60% per year after two years, when Raines could compete for those customers). (R. 181-82.) This was the only factor that Raines seriously questioned.[18]

3) "Terminal growth rate": This factor accounts for normal growth in customer business and resulting commissions. (T. 203-04; 217-18.) Bottrell submitted evidence of a 3% terminal growth rate, a "very conservative figure," which the chancellor adopted. (T. 204; R. 182.) Raines presented no contrary evidence.

4) Contingency income: Insurance companies pay successful agencies a "contingency" or bonus, based on the agency's success. (T. 202-03.) Bottrell proved that a 7%

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[18] Bottrell's expert Van Hedges testified that, based upon his research and experience, a large "Best Practices Agency" like Bottrell would be expected to retain approximately 92% of its clients when a producer departs. (T. 207.) Hedges noted research stating that there is a much higher retention rate for large commercial accounts, especially bonding accounts, compared to retention rates for personal lines of insurance. (T. 206.) In fact, a recent Best Practices survey found that larger, top-performing regional firms in the Southeast, such as Bottrell, could expect to retain 97% of their commercial accounts. (Ex. 68.) Raines's expert witness testified that the Best Practices Guide is a publication he reviews and relies upon. (T. 307-09.)

Moreover, Scott Woods, Trustmark's Insurance Services Manager, testified that Bottrell conducted its own analysis and determined that Bottrell would have retained 91% of the clients serviced by Raines had he honored the Agreement, based on Bottrell's actual experience when agents departed. (T. 121-22.) At trial, Raines agreed that an accurate retention rate would be approximately 80%. (T. 368.) However, neither Raines nor his expert Shearer presented any evidence to support that amount.

Given Bottrell's status as a Best Practices Agency with a specialization in construction insurance and bonding (which made up a large percentage of the accounts serviced by Raines), the trial court's 86% retention rate finding is reasonable and conservative. Both Hedges' expert testimony and the Best Practices survey – the only evidence supported by research and analysis – support an even higher retention rate. In sum, there is ample evidence in the record to support the chancellor's finding regarding business retention. Raines does not contest the other findings related to damages that were made by the chancellor. Accordingly, the chancery court's damages calculation was conservative and supported by the record evidence.

contingency factor - - Bottrell's actual rate - - should be applied. Raines did not dispute that factor, and the chancellor used the 7% figure.

5) Discount rate: Future profits were discounted to present value at 6% (R. 182), which was Bottrell's actual cost of capital (T. 210). Raines provided no alternate.

6) Duration: Bottrell contended, with strong evidentiary support, that its losses would continue for at least ten years. (T. 211; R.E. p. 8; Ex. 33 (corrected).) The chancellor limited Bottrell's recovery to a conservative five years. (R. 182-83.)[19]

The chancellor applied a "standard" methodology for determining the value of different types of business. (T. 211-12.) Raines suggested no alternate method. The damages calculations was a matter of fact-finding for the various inputs: retention rate; terminal growth; contingency income; and the discount rate. The resulting award of actual damages was $814,092 - - far less than the $2,100,825.00 sought (and proven) by Bottrell. While this award was disappointing, we recognize (as Raines should) that these fact findings were not "clearly erroneous" or "manifest error."

From Raines's perspective no smaller award could be justified. Raines was allowed to keep 100% of the Bottrell customer commissions because MM&R was afraid of being sued. (T. 50.) MM&R segregated Bottrell customer commissions from others, and Raines placed the "Bottrell" commissions in a segregated brokerage account. (T. 50-51.) Raines profited greatly from this system. In 2004 (his last full year at Bottrell), Raines had employment income of $145,546. (R.E. p. 9; Supp. R. 37.) During 2005, half of which was spent in the employ of MM&R, he received $231,274 in income. (Ex. 26.) During 2006, all spent at MM&R, Raines received $388,659 in

[19]Van Hedges testified that the large commercial accounts, especially construction bonding accounts, that formed a large percentage of Raines's book of business generally have a much longer agency life than smaller accounts. (T. 211.) Hedges testified that these accounts could be expected to remain with an agency for at least ten years. (*Id.*)

salary and commissions. (R.E. pp. 13-14; Supp. R. 40-41.) This increase of over $240,000 *per year* in his employment income is directly attributable to his theft of Bottrell clients, and his retention of 100% of those clients' commissions rather than an individual agent's share.

G. Raines's After-The-Fact Excuses Were Properly Rejected By The Chancellor

At trial and on appeal, Raines claimed he was relieved from the Agreement because Bottrell allegedly "reduced his compensation." In fact Bottrell merely changed the *timing* of paying its producers; *considered* implementing a proposal made by a consulting firm; and recouped *unearned* money that was mistakenly overpaid to Raines. The chancellor weighed the evidence and rejected Raines's specious excuses as a matter of fact. (R. 179.)

1. "Pay-When-Paid" vs. "Paid-When-Booked:" Under the "pay-when-booked" method, a producer's commission is paid as soon as a sale is "booked." If a customer fails to pay the premium for a policy, the commission is backed out of the producer's pay. Under the "pay-when-paid" method, a producer is paid when the premium is received from the customer. The benefits of pay-when-paid are obvious. This system avoids paying commissions only to reverse those payments, and encourages producers like Raines to ensure that their customers promptly pay their premiums.

Around November 2004, Bottrell switched from pay-when-booked to pay-when-paid. Although the change did not affect producer compensation rates, the change would temporarily delay receipt of producer compensation, i.e., commission income was deferred until the premium was received. Bottrell offset this temporary effect by increasing producer "draws,"[20] but producers still complained about the change. (T. 115-19.) Bottrell therefore abandoned the pay-when-paid method

[20] A "draw" is a regular monthly payment to a commissioned agent, credited against his future commissions. (T.83.) Raines's pay at Bottrell was 100% commission income. (T. 360.) His "draw" was effectively an interest-free loan against future commissions.

in the spring of 2005. (T. 119.) It recalculated the commissions producers would have received under the pay-when-booked method and brought all producers current, i.e., paid them what they would have received under the old method. (*Id.*) The change was made to simplify Bottrell's accounting for producer compensation and was not a reduction of producer compensation. (T. 116-17.) Bottrell's expert testified that, in his experience, use of the pay-when-paid method does not result in financial hardships on insurance producers. (T. 214.)

Raines misrepresents the effect of the change, claiming the switch to pay-when-paid would have reduced his compensation to $144,000. (Appellant Br. at 5.) Raines inaccurately testified that he earned $230,000 in employment income from Bottrell in 2004, his last full year at Bottrell (T. 346-47), supposedly based on his tax return and W-2. (T. 361.) His assertion is refuted by the W-2. In 2004 he received $145,546.47 in "wages, tips, and other compensation." (R.E. p. 9; Supp. R. 37.) [21] He testified that Bottrell increased his draw to $12,000 a month; therefore he would be paid $144,000 a year. (T. 346-47.) Accordingly, by increasing Raines's draw, Bottrell negated the temporary effect of the switch. Under the new pay-when-paid method, Raines would get 99% of his monthly pay received under the pay-when-booked method, and exactly the same pay over the long run. In any event, this irrelevant change did not cause Raines to leave Bottrell. As the chancellor found, "Raines had already contacted the [MM&R] ... firm about possible employment in October

[21] When asked by Bottrell earlier at trial how much he made in 2004, Raines stated: "I don't know." (T. 91.) Raines had previously testified that he "knew that [], for instance, fourth quarter of '04, my commission income was about $189,000 ...." (T. 83.) This is also an obviously inaccurate statement; Raines contends that he made more in the fourth quarter of 2004 than he made for the entire year. This is but one example of the inaccurate and inconsistent testimony provided by Raines at trial. (*See* T. 420-21.)

2004."[22] Finally, Bottrell abandoned the change in compensation methods and brought everyone current under the previous method before Raines tendered his resignation. (R. 178.)

In sum, Raines greatly exaggerates the effect the switch would have had on his income; Raines had already begun negotiations with MM&R before he learned of the switch; and the change was abandoned and reversed before he tendered his resignation. Raines's argument is a false, after-the-fact excuse, and the chancellor so found. (R. 178-79.)

2. The "Marsh Berry Proposal:" Raines complains about a proposal made by Marsh Berry Consultants, but never implemented by Bottrell, that producers drop the bottom 20% of their accounts. Hedges testified that this policy is often implemented in the insurance business, for the benefit of both the producer and agency: "The theory being that a lot of these small accounts require just as much of his time and effort as some of the larger. The larger the account, the more profitable, both for the producers and the agency. And it pushes that average up and over the long term. It should be much more profitable for the producer." (T. 214-15.)

Bottrell never adopted or even announced the proposal. (T. 119-20.) Concerning this claim, the chancellor found: "The Court is convinced that Raines was not [a]ffected by this proposal as it

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[22](R. 178 (emphasis added); *see also* R.E. p. 16 (internal MM&R email, establishing Raines had begun discussions with MM&R by October 25, 2004).) "[T]he 'pay when paid' method was implemented in November 2004." (R. 178.)

At trial, Raines first said he was notified of the change in November 2004. (T. 79.) Later Raines repeated that statement. (T. 84-85.) This was consistent with the testimony of Scott Woods. (T. 117.) After it was pointed out that he was already negotiating with MM&R by that time (T. 86), Raines backtracked and tried to revise his testimony, stating "I guess the rumor mill was starting to churn a little bit, in mid-October." (T. 342.) Raines thus swore to three stories of learning about the switch to pay-when-paid: (1) it was announced in November 2004 (T. 79, 84-85); (2) he was not sure when it was announced (T. 86); and (3) he first heard about the change through the "rumor mill" in mid-October 2004 (T. 342). Inexplicably, his appellant brief contends that "Raines' undisputed testimony was that he heard of the change in mid-October before he spoke to Marchetti." (Appellant Br. at 5; emphasis by Raines.) As demonstrated above, this statement is disputed by Raines's own testimony, and Scott Woods's.

was never implemented and he had turned in his resignation before he heard of the proposal." (R. 179.) It is undisputed that Raines was negotiating with MM&R long before he heard of the Marsh Berry proposal; Raines had obviously already decided to leave Bottrell. These informal discussions about never-adopted policies do not justify Raines's breaches.

3. The "BCAM Billing" Issue: Raines also complains about having to reimburse funds that were erroneously paid to him. Raines admits that, because of accounting errors, he was paid twice for the commissions he had earned on the "BCAM" account. (T. 88-90.) The overpayment was withheld from later commissions. Raines's complaint is, again, limited to timing. He was allegedly told by Bottrell's comptroller that the reversal of payments would occur over a 12-month period (Raines did not document that statement), but they were instead recouped in one quarter. (T. 341-42.) The entire issue is irrelevant. Raines does not claim he was entitled to keep the overpayment, and cannot seriously contend that Bottrell "reduced his compensation" by recouping the funds.[23]

III. ARGUMENT AND AUTHORITIES

Summary of the Argument

Under Mississippi law, restrictive covenants are enforceable if they are reasonable and economically justified. Bottrell's Agreement with Raines meets those requirements.

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[23] Due to Bottrell's commission matrix (Ex. 60), Raines benefited from repaying the overpayments at once. If the overpayment was subtracted from his commissions over twelve months, each reduction would have been at his highest commission rates. We are confident that Raines would have objected in hindsight if a more gradual reimbursement had arithmetically lowered his total commissions.

Bottrell made a substantial investment in Raines, enabling him to become a successful producer and to develop personal and professional relationships with customers. The Agreement is standard in the industry, and is critical for protecting the agency's business interests.

The Agreement is not void for public policy. Voiding a contract based upon public policy is an extraordinary remedy available only upon a clear showing of illegality. Public policy favors enforcement, not violation, of contracts. The Mississippi Supreme Court has acknowledged that an insurance agent's agreement not to "accept" business from former clients can be enforced.

The chancellor's damages calculation was clearly supported by the record. Raines benefitted from very conservative findings by the Court. Since no expenses or overhead were saved by Raines's departure from Bottrell, the trial court did not err in calculating Bottrell's damages based in part upon Raines's gross commissions from former Bottrell clients. Bottrell's damages certainly should not be reduced by the "agent's share" of commissions, which would unjustly enrich Raines. His arrangement with MM&R allows him to keep 100% of Bottrell customers commissions. Reducing damages by the agent's share would pay Raines a commission for stealing Bottrell's business.

The trial court did not abuse its discretion in awarding punitive damages and attorney's fees. Mississippi law clearly supports such an award in cases of bad faith breach of contract. Raines's misconduct was blatant and gross, and the chancellor's award was very modest.

A. Standards of Review

Issues of law are reviewed *de novo*. *Lowe v. Lowndes County Bldg. Inspection Dept.*, 760 So. 2d 711, 713 (Miss. 2000). The only issue of law is Raines's "public policy" argument.

The remaining issues on appeal turn on fact findings by the chancellor.

> When considering the enforceability of restrictive employment agreements, we review the entire record and "**the evidence which supports or reasonably tends to support the findings of fact made**

> **below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact, must be accepted**." *Sta-Home Health Agency, Inc. v. Umphers*, 562 So. 2d 1258, 1263 (Miss. 1990) (quoting *Culbreath v. Johnson*, 427 So. 2d 705, 707 (Miss. 1983)). We will not disturb the findings of the lower court when they are supported by substantial evidence unless the Chancellor has abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Bowers Window & Door Co. v. Dearman*, 549 So. 2d 1309, 1312-13 (Miss. 1989) (citing *Culbreath*, 427 So.2d at 707-08). *Bullard v. Morris*, 547 So. 2d 789, 791 (Miss. 1989).

Kennedy v. Met. Life Ins. Co., 759 So. 2d 362, 364, (¶ 3) (Miss. 2000) (emphasis added). "[T]he trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses. Where there is conflicting evidence, this Court must give great deference to the trial judge's findings." *City of Jackson v. Lipsey*, 834 So. 2d 687, 691 (¶ 14) (Miss. 2003) (internal quotations omitted, emphasis added).[24]

The chancellor's award of punitive damages is reviewed for abuse of discretion, *Precision Interlock Log Homes, Inc. v. O'Neal*, 689 So. 2d 778, 780 (Miss. 1997), as are the decision to award attorney fees and the determination of the reasonableness of the fees. *Microtek Med., Inc. v. 3M Co.*, 942 So. 2d 122, 130 (Miss. 2006).

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[24] On appeal, Raines relies heavily upon his own trial testimony in attacking the chancellor's findings. As noted *supra*, the chancellor found Raines provided "untruthful testimony" at trial. (R.E. pp. 41-42; T. 420-21.)

B. The Agreement Is Enforceable

1. Under Mississippi Law, A Restrictive Covenant Is Enforceable If It Is Reasonable And Economically Justified

Various restrictive covenants have been enforced in this state for at least 70 years.[25] Mississippi law is well established regarding restrictive covenants:

> Regarding a covenant not to compete, our supreme court has stated that restrictive covenants are in restraint of trade and individual freedom and are not favorites of the law, but will be enforced when reasonable. *Frierson v. Sheppard Bldg. Supply Co.*, 247 Miss. 157, 172, 154 So.2d 151, 156 (1963). The power of the court to enforce a restrictive covenant is invoked by the contract and the legal necessity that contracts be honored. Id. "[I]t is the contract the parties themselves made that measures the restriction, both as to scope and time." *Id.* However, only when a covenant in restraint of trade is reasonable will it be upheld by this Court. *Empiregas, Inc. of Kosciusko v. Bain*, 599 So.2d 971, 975 (Miss. 1992). The employer bears the burden to prove that the restriction is reasonable in light of the economic interest sought to be protected. *Thames v. Davis & Goulet, Ins., Inc.*, 420 So.2d 1041, 1043 (Miss. 1982). Covenants in restraint of trade are to be strictly interpreted. *Id.* (quoting *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E. 2d 685, 693 (1952)). "The validity and therefore, the enforceability of a non-competition provision is largely predicated upon the reasonableness and specificity of its terms, primarily, the duration of the restriction and its geographic scope." *Empiregas*, 599 So.2d at 975. Non-competition agreements are valid only "within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent." *Id.* (quoting *Wilson v. Gamble*, 180 Miss. 499, 510-11, 177 So. 363, 365 (1937)). To determine the validity

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[25] *See, e.g., Texas Road Boring Co. v. Parker*, 194 So. 2d 885 (Miss. 1967) (non-compete for manager of contractor; two year duration within 100 miles of city where employee worked); *Redd Pest Control Co., Inc. v. Heatherly*, 248 Miss. 34, 157 So. 2d 133 (1963) (non-compete for exterminator; 2 year duration within 50 miles of Tupelo); *Bagwell v. H.B. Wellborn & Co.*, 247 Miss 564, 156 So. 2d 739 (1963) (non-compete for insurance adjuster; 2 year duration within 70 miles of Meridian); *Frierson v. Sheppard Build. Supply Co., Inc.*, 247 Miss. 157, 154 So. 2d 151 (1963) (non-compete for building supply company manager; 2 year duration within 50 miles of Jackson); *Donahoe v. Tatum*, 242 Miss. 253, 134 So. 2d 442 (1961) (non-compete for employment counselor; duration of 5 years within Hinds County); *Wilson v. Gamble*, 180 Miss. 499, 177 so. 363 (1937) (non-compete for two doctors; 5 year duration within 5 miles of Greenville); *Redd Pest Control Co., Inc. v. Foster*, 761 So. 2d 967 (Miss. App. 2000) (non-compete for exterminator; 2 year duration within former territory); *Union Nat'l Life Ins. Co. v. Tillman*, 143 F. Supp. 2d 638 (N.D. Miss. 2000) (non-compete for insurance salesman; one year duration within two counties); *Taylor v. Cordis Corp.*, 643 F. Supp. 1242 (S.D. Miss. 1986) (non-solicitation agreement for pacemaker salesman; duration of one year for former employer's customers).

> of a covenant in restraint of trade, we look to the respective rights of the employer, the employee, and the public. *Empiregas,* 599 So.2d at 975.

Cain v. Cain, No. 2005-CA-00251-COA, (¶ 13) (Miss. App. June 26, 2007).

> It is the law's function to maintain a reasonable balance in this area. This requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as by unreasonable oppression by an employer. The circumstances of each case will be carefully scrutinized to determine whether it falls within or without the boundary of enforceability.

Donahoe v. Tatum, 242 Miss. 253, 261, 134 So.2d 442, 44-5 (1961).

In *Donahoe*, this Court enforced an employment agency's non-compete agreement. The facts closely match the present case (except the *Donahoe* agreement completely prohibited competition): The employer trained the employee, who developed into a highly skilled employee. "Repeat business" was essential to the plaintiff agency. Several large clients left plaintiff to do business with the employee at her new agency. The employee "knew the terms of the contract when she signed it, but she thought its terms were unreasonable," and denied taking confidential information from the former employer. This Court affirmed the chancellor's decision to enforce the non-compete agreement, prohibiting Ms. Donahoe from working as an employment counselor for five years in Hinds County:

> Mrs. Donahoe's employment with appellee was of such character as to inform her of its business methods, confidential information, and trade secrets. These facts, if brought to the knowledge of a competitor, would prejudice the interests of the employer. She acquired confidential knowledge and acquaintance with the employer's clientele .... These factors indicate the reasonableness of the agreement from the point of view of the employer.

Id. at 444.

2. The Chancellor Correctly Concluded That The Agreement Is Reasonable And Economically Justified

The primary considerations as to reasonableness are "the restriction with respect to the nature of the employment, the duration of the period of restraint, and the scope and extent of the restriction, territorially." *Donahoe,* 242 Miss. at 259, 134 So. 2d at 444. Regarding the first consideration, the *Donahoe* court looked to whether the employee's employment was of a nature to inform him of the company's business methods, confidential information and trade secrets, and whether enforcing the agreement would cause undue hardship, i.e, whether the employee could "earn a living ... during the period of the covenant." *Id.* It is undisputed that Raines had access to Bottrell's business methods, confidential information and trade secrets. In fact, this is a fact to which Raines expressly agreed in signing the Agreement.[26]

An agency's book of business is the largest component of its value. (R. 66.) A "book of business" includes customer account information, policy expiration information, the right to renew coverage and all supporting data required to write a customer's insurance. (T. 171-72.)[27] Raines undisputably had access to the above information, as well as other critical customer information, as part of his employment with Bottrell.

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[26] *See* R.E. p. 1 ("WHEREAS, the Corporation is engaged in a personal service business involving confidential information and personal relationships with insureds, the success of which business is in large part due to the exclusive retention of confidential information and continuation of such personal relationships with insureds, and Employee will have access to certain books, records, documents and customer information of Bottrell ..., as well as information concerning [Corporation's] trade secrets, business methods and procedures and other materials and matters which are the property of the Corporation and which enable Corporation to compete successfully in its business.") (emphasis added).

[27] Van Hedges testified at trial that "[a]bsent an agreement to the contrary, it is a well-established standard in the insurance industry that an agency has ownership and control of all its producers' books of business." (T. 172.) This standard is reflected in the Agreement. (*See* R.E. p. 2.)

Enforcing the Agreement will not cause undue hardship. Raines has demonstrated that he is a successful insurance producer who will be able to earn a living regardless of whether he solicits and accepts business from former and current Bottrell customers. Raines's current employer testified that Raines would most likely be a successful producer "regardless of whether, long-term, he sells insurance to former Bottrell customers." (Ex. 65 at Dep. p. 91.) Since joining MM&R, Raines has written "high quality, good business" to customers other than former Bottrell customers. (Ex. 65 at Dep. p. 90.) Raines's list of clients from MM&R for September 1, 2005 to August 31, 2006 contains 34 redactions, deleting Raines's new, non-Bottrell customers. (Ex. 29.) Raines can earn a living without breaching his contractual obligations under the Agreement.

The Agreement does not prohibit competition in <u>any</u> territory.[28] The Agreement only prevents Raines from calling on, accepting business from, or giving insurance advice to Bottrell's customers. Bottrell, the leading bonding agency in the state, has only 17% of the Mississippi bond market and 3% of the property and casualty insurance in Mississippi. (Ex. 31.) Raines could sell to 83% of the Mississippi bond market and 97% of the property and casualty insurance market.

The two-year duration of the Agreement is clearly reasonable (the period has already expired). Mississippi courts have repeatedly upheld agreements with similar or longer durations. *See* case references in n. 25, *supra* p. 19. As the trial court concluded, "Bottrell needs time to allow another agent to connect with their clients as Raines had done." (R. 180-81.) Raines's own expert agreed that the 2-year period would be helpful to the agency in conserving business. (T. 310-11.)

In determining reasonableness, the court must also decide whether enforcement of the covenant will harm the public by creating a monopoly. *Foster*, 761 So. 2d at 973. The insurance

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[28] We are not aware of any Mississippi precedent striking down a non-solicitation/piracy agreement (as opposed to a non-<u>compete</u> agreement) on grounds that it was unreasonable in scope.

business is competitive and diverse. Although Bottrell is a large and prestigious bonding agency, there are many other agencies who can and do write construction bonds regularly. Enforcing the Agreement will not create a monopoly in the area of construction bonding or insurance. (T. 193-94.) The trial court found that "[n]o evidence was presented that enforcing the ... Agreement would present the danger of a monopoly for Bottrell." (R. 176-77.) All factors thus support the Agreement's reasonableness. The trial court did not err, much less commit "manifest error," in finding the Agreement reasonable.

The Agreement is economically justified. An employer has an interest in protecting "its goodwill and its ability to succeed in a competitive market." *Empiregas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 976 (Miss. 1992). "The primary right of the employer is that of 'protecting the business from loss of customers by the activities of the former employees who have peculiar knowledge of and relationships with the employer's customers.'" *Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (quoting *Heatherly*, 248 Miss. at 43, 157 So. 2d at 136). Raines's current employer readily agreed that a departing agent would have substantial advantages over his competition, if he attempted doing business with his former customers. (Ex. 65 at Dep. pp. 43-46.)[29]

This Court recognizes that "the money and time involved in training employees as another key economic justification." *Foster*, 761 So. 2d at 973. As shown above, Bottrell invested heavily in producers' (and Raines's) development.

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[29] The well-known case, *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 691 (Ohio Ct. C.P. 1952), listed 41 factors for considering the economic justification and reasonableness of restrictive covenants. *Arthur Murray* has been cited approvingly by this Court in cases concerning the validity of non-compete contracts. *See Empiregas*, 599 So. 2d at 976. Those factors clearly favor enforcement of Bottrell's Agreement.

Within the insurance agency business, restrictive covenants are not only economically justified, they are critical to the long-term survival of agencies like Bottrell. (T. 215.) The "vast majority" of non-owner insurance producers are subject to some type of restrictive covenant. (T. 190.) Raines's current employer admitted during its deposition that it uses similar non-solicitation agreements with its producers "[t]o protect the investment that we have in them." (Ex. 65 at Dep. p. 24.) Raines's expert, Mr. Shearer, admits that agreements like Bottrell's are "customary" in the industry. His agency uses them, and when an agent breached his agreement "we had our lawyer warn him and he quit doing it." (T. 211-12.)

Failure to enforce the Agreement would pose a great threat to Bottrell and other independent agencies and the independent agency system itself. (T. 190.) It would be impractical for an agency to hire, train and support a new producer when at any point he could become a competitor and take the agency's business with him. Without this basic protection for an agency's book of business, then the only real asset of an insurance agency owner is taken away. (*Id.*) A purchaser of an agency (like Trustmark here) could have its business stolen overnight by employees, in breach of their contracts.

The trial court issued detailed findings supporting its conclusion that the Agreement is reasonable and justified. (R. 173-77.) Those findings are correct. They are certainly not "manifestly wrong" or "clearly erroneous."

3. "Public Policy" Does Not Render The Agreement Unenforceable.

Raines contends that "public policy" would be served by declaring the contract void, and letting Raines keep the profits of his deliberate breach. To the contrary, public policy requires that Raines be held fully responsible for his misconduct. Raines makes this argument to promote his interests, not the public's.

Raines overlooks the fact that Mississippi's case law already accounts for the public interest. Unlike other contracts, restrictive covenants must be justified in order to be enforced. As shown above, plaintiffs must prove such agreements are reasonable, necessary and economically justified. This additional requirement exists because restrictive covenants "restrain trade," at least in some degree. "The rights of the public" have always been considered in determining whether a restrictive covenant is reasonable. *Texas Road Boring Co. of Louisiana-Mississippi v. Parker,* 194 So. 2d 885, 888 (Miss. 1967). However, "the public will not be viewed to have been harmed by a covenant not to compete when ample services are available and a monopoly is not created." *Redd Pest Control Co., Inc. v. Foster,* 761 So. 2d 967, 973 (¶ 21) (Miss. App. 2000) (citing *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363, 365-66 (1937)). These established rules provide adequate protection to the public.

This Court has stated that "[t]he power to invalidate contracts or agreements on the ground that they violate public policy is far reaching and easily abused, and this court is committed to the doctrine that the public policy of the state must be found in its constitution and statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials." *Heritage Cablevision v. New Albany School Elec. Power Sys.*, 646 So. 2d 1305, 1313 (Miss. 1994) (quotation omitted). "The right to contract and have contracts enforced is a basic one guaranteed by the Constitutions. The function of the courts is to enforce contracts rather than enable parties to escape their obligation upon the pretext of public policy. This Court has adjudged contracts void only when the illegality is clearly shown." *Smith v. Simon*, 224 So. 2d 565, 566 (Miss. 1969).

No provision of the Mississippi Constitution or Code negates a contract preventing a departing insurance agent from doing business with the customers of his former employer. In fact,

this Court has already acknowledged that, if the contract is clear, an insurance agent may be prohibited from taking customers from his former employer. In *Kennedy v. Metropolitan Life Ins. Co.*, 759 So. 2d 362 (Miss. 2000), Kennedy was an insurance agent, who as a condition of his employment entered into a non-competition/non-solicitation agreement. *Id.* at 365. The agreement stated, in part:

> 1. During and for 18 months following my voluntary or involuntary termination of employment with Metropolitan, I will not directly or indirectly perform any act or make any statement which would tend to divert from Metropolitan any trade or business with any customer, be it a person, a company, or an organization, to whom I previously sold insurance offered by or through Metropolitan; nor will I advise or induce any customer of Metropolitan, be it a person, a company or an organization, to reduce, replace, lapse, surrender or cancel any insurance obtained from or through Metropolitan.

Id. at 365 (¶ 5). Kennedy left Met Life and began to work for a competitor. Kennedy accepted business from approximately 22 Met Life customers after he left.

Met Life filed suit to enforce the non-solicitation agreement. Met Life noted that the agreement was less restrictive than a normal non-compete "in that it does not forbid him from selling insurance at all, but merely limits his right to sell insurance to his former Met Life customers." *Id.* at 366 (¶ 11). At trial, former Met life customers testified that they changed their business "of their own volition and without the advice or encouragement on [Kennedy's] part." *Id.* Kennedy claimed the agreement violated public policy. *Id.* at 365 (¶ 5). The Chancellor rejected that argument and awarded damages to Met Life for lost premium income, as well as attorney's fees. *Id.*

One issue on appeal was "[w]hether the trial court erred in finding that the non-competition portion of the Agreement was reasonable, was not violative of public policy and therefore enforceable and in finding that the Appellant violated said non-competition provisions." *Id.* at 364. This Court "**agree[d] with Met Life that a non-compete provision which prohibits an ex-**

employee from accepting business with his former customers may, in appropriate cases, constitute a reasonable and enforceable non-compete provision." *Id.* at 367 (¶ 14) (emphasis added) (citing *James S. Kemper & Co. Southeast, Inc. v. Cox & Assoc., Inc.*, 434 So.2d 1380, 1383 (Ala. 1983) and *Girard v. Rebsamen Ins. Co.*, 685 S.W.2d 526 (Ark. 1985), both enforcing agreements that prohibited insurance agents from "accepting" business from former customers). Notably, the chancellor held that the provision did not violate public policy, and the Supreme Court refrained from adopting Kennedy's public policy argument. *See also James S. Kemper*, 434 So. 2d at 1383-84 (holding agreement not to accept business from former customers does not violate public policy).

In *Kennedy*, this Court found that the non-solicitation agreement was ambiguous because, unlike the Bottrell Agreement, it did not expressly prohibit Kennedy from "accepting" business from his former customers. *Id.* at 367. The Court construed the ambiguity against Met Life and reversed the judgment of the chancery court. Raines's Agreement expressly prohibits him from accepting business from former Bottrell customers – the very language suggested by this Court in *Kennedy*. (*See* R.E. p. 2; stating that employee will not "[c]all on, solicit, attempt to obtain, accept, or in any way transact insurance or bond business with any of the customers of Corporation having a policy or bond issued through Corporation") (emphasis added). As previously discussed, the absence of the term "accept" was the only deficiency noted by the Supreme Court in the agreement in *Kennedy*. Thus, under the *Kennedy* case the contractual provision at issue does not violate Mississippi's public policy.[30]

[30] If the law turns on who solicited whom, it rewards gamesmanship and cuteness, and elevates form over substance. It is easy to picture the discussion between the departing agent and the customer: "I cannot solicit your business, and will not do so, but I could accept your business if you ask me to . . . ."

The other Mississippi case cited by Raines, *Thames v. Davis & Goulet*, 420 So. 2d 1041 (Miss. 1982), does not help Raines. In that case, the employer agency "offered no proof of its economic need for the post-employment restraint imposed by the contract, or its reasonableness, or any circumstances or background to the execution of the contract supporting such restraint." *Id.* at 1042. This Court dissolved an injunction against the agent because of that lack of essential proof, stating "this Court is committed to the general rule requiring the ex-employer in a case such as this to demonstrate to the trial court the economic justification, the reasonableness of the restraint which is sought to be imposed." *Id.* at 1043. As discussed *supra*, and as found by the chancellor, Bottrell met that burden. Moreover, unlike the agent in *Thames*, Raines had no insurance experience or clients when he joined Bottrell.

This Court has never entered a blanket prohibition against restrictive covenants in any industry or profession, including medicine,[31] which involves such close and confidential relationships that communications with patients are privileged. Certainly insurance agents should not be freed from contracts they enter.

Raines tries to justify his "public policy" theory on the fact that certain customers are loyal to Raines. Of course the customers would identify with Raines, as he was the only person from Bottrell with they had face-to-face contact. Bottrell paid Raines to develop these relationships.

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[31] *Wilson v. Gamble*, 177 So. 363, 366 (Miss. 1937) (enforcing non-competition agreement against two doctors for a period of five years within a five-mile radius of Greenville). Attorneys are prohibited, as a matter of ethics, from entering such contracts. *See* MISSISSIPPI RULE OF PROF'L CONDUCT R. 5.6 (precluding a lawyer from making or participating in "a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship ....") A dissenting Justice suggested that public policy should preclude non-completes between doctors. *See Field v. Wayne T. Lamar, M.D., P.A.*, 822 So. 2d 893, 900 (¶ 33) (Miss. 2002) (McRae, J., dissenting) ("Non-competition agreements between medical doctors are unenforceable, as they are in conflict with the public policy of patient choice."). The majority in *Field* decided the case on procedural grounds without reaching the issue of whether non-competition agreements are enforceable against doctors. *See Field*, 822 So. 2d at 899.

There was no evidence at trial that these customers would suffer hardships if the Agreement were enforced. As found by the Chancellor, the Agreement is necessary to "give the former employer an opportunity to re-connect with their clients when the agent, with whom the client has developed a close working relationship, leaves the company." (R. 175.)

Raines's citation to New York case law is meaningless. Contrary to Raines's assertion, the law in Mississippi in this area is well developed. New York law imposes different requirements in order to enforce restrictive covenants. For example, a New York plaintiff is required to demonstrate that an employee's services are unique in order for the covenant to be enforced. *See Willis of New York v. DeFelice*, 750 N.Y.S.2d 39, 41 (N.Y. App. 2002). Mississippi has no such requirement. Moreover, the cases cited by Raines are clearly distinguishable. In *Willis* and in *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 393 (N.Y. 1999), restrictive covenants were not enforced because the customers were developed by the defendants before they joined the plaintiff companies, without substantial plaintiff investment. *Investor Access Corp. v. Doremus & Co., Inc.*, 588 N.Y.S.2d 842 (N.Y. App. 1992) was based on the trial court's fact finding that the defendant did not breach the agreement.

Finally, Raines's "public policy" argument does not fit the facts of this lawsuit. Raines pretends to promote the interests of insurance customers. But the customers in this case did follow the "agent of their choice," without restriction. Raines's liability for damages is a different question. Had Raines been enjoined, his argument (while unsound) would at least fit the facts. But since no customer was prevented from buying insurance from Raines, the argument has no application.

Instead, a different "public policy" should govern this case. It would violate public policy to allow any party to sign an agreement, benefit from the resulting relationship, and then profit by breaching the agreement. Raines should not be allowed to keep one penny of his ill-gotten gains.

4. Raines's Continued Employment With Bottrell Was Sufficient Consideration For The Agreement

Raines contends the Agreement is unenforceable for lack of consideration or "mutuality." Raines claims that because he began employment in 1993 and did not sign the current version of the Agreement until 1999, the Agreement had to be supported by additional consideration in order to be enforceable. In support of this proposition, he cites only an article from a legal encyclopedia. Raines fails to cite a single Mississippi case, since under Mississippi law continued employment is sufficient consideration for a restrictive covenant. *Frierson v. Shepard Bldg. Supply Co.*, 247 Miss. 157, 154 So. 2d 151, 154 (1963) compels a conclusion that Raines's continued employment and compensation was sufficient consideration for the Agreement.

In *Frierson*, a building supply company's manager sought to avoid a non-compete clause for lack of consideration. The manager was hired in 1955 but was not required to sign the non-competition agreement until 1957. *Id.* at 152. The manager was fired in 1962. He opened a similar business and took a number of his old employer's customers. *Id.* at 154.

This Court phrased the issue as "whether the retention of an employee in the same position is sufficient consideration for a restrictive covenant against competition." *Id.* at 154 (emphasis added). This Court stated that if the manager had been terminated shortly after signing the restrictive covenant, then it would probably not have enforced the agreement. *Id.* However, the manager was employed for four years after signing the agreement. The court held that "the actual continuation of employment and the ... receipt of sums of money as compensation" were sufficient consideration. *Id.*

The facts in this case are even more compelling than those in *Frierson*. In contrast to *Frierson*, Raines has always been subject to a non-solicitation agreement; he signed the most recent

agreement in April 1999 (R.E. 1-4; Ex. 2); it was effectively the same as the agreement he signed in 1995 (Ex. 1). He worked at Bottrell for over six years after signing the most recent version of the Agreement, and was paid well for his services. Raines's "consideration" defense fails as a matter of law.

Raines also contends that the Agreement is unenforceable as a matter of law, because of a lack of mutuality of obligations. "Mutuality" is just a restatement of the "consideration" defense. Again, Raines's argument contradicts long-settled Mississippi Supreme Court precedent. In *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363 (1937), two physicians began employment with a medical clinic in Greenville in 1926 pursuant to an oral contract. *Id.* at 364. In 1929, they entered into a written employment contract containing a non-compete covenant. *Id.* at 365.

After leaving the clinic, the doctors sought to have the non-compete covenant voided, *inter alia*, for lack of mutuality. In rejecting the physicians' contention, the Court stated:

> This objection to the enforceability of the contracts, if there can be such, disappears here for the reason that the appellants entered into the services of the appellees thereunder, and with the consent of the appellees continued therein for eight years; consequently, there is no inequity in holding the appellants to the performance of their promise not to engage in their profession within the territory and for the time specified.

Id. at 366. Raines continued his employment with Bottrell for over six years after signing the Agreement.

The Supreme Court in *Frierson* also discussed the *Gamble* case and "mutuality:"

> the question involved where mutuality is discussed is whether one party to the transaction can by fair implication be regarded as making any promise; but this is simply an inquiry whether there is consideration for the other party's promise. Thus, in the Gamble case[,] the inquiry was the same as in the present case, and it is no distinction that in one the right of the employer to terminate the

> employment at will is called lack of mutuality, and in the other the same thing is called lack of consideration.

Frierson, 154 So. 2d at 154.

Raines received the benefit of his bargain; Bottrell did not. It would be "non-mutual" for Raines to escape the contract after profiting from it. Raines's "consideration" and "mutuality" defenses are completely without merit.

C. Raines's Breaches Are Not Excused By Any Conduct Of Bottrell

Raines claims that Bottrell breached its "employment contract" with him by unilaterally reducing his pay, and that he is therefore relieved of his duties under the Agreement. That argument is not candid. As discussed above, Raines's pay was never reduced. After the fact, Raines tried to rationalize his own misconduct by exaggerating the "pay when paid" policy, the "BCAM billing" issue, and the agency's discussion of the "Marsh Berry proposal." The chancellor addressed each of these and found as a matter of fact "that Bottrell did not breach the contract by unilaterally reducing compensation." (R. 177-79.) That conclusion is supported by ample evidence in the record, as explained above.

Redd Pest Control Co., Inc. v. Foster, 761 So. 2d 967 (Miss. App. 2000) is directly on point. In *Foster*, the employer imposed new sales goals requiring that each employee generate $7,500 per month in revenues. The employer stated that failure to reach those goals would cause positions to be eliminated and consolidated. Two employees promptly left. They attempted to defend their breach of non-compete contracts by claiming the sales goals imposed "intolerable conditions" on their employment. They testified they did not believe they could meet the sales goals, and felt compelled to resign. *Id.* at 970-71. The chancellor agreed with the employees, and excused their breach of the non-compete clauses; the Court of Appeals reversed that decision, finding "there was

no substantial evidence to support this conclusion." *Id.* at 972 (¶ 17). Instead, "the testimony disclosed that it was a practical business-wide approach to obtain profitability." *Id.* The Court of Appeals stated, "In order for a constructive discharge to have occurred the employer must have made conditions so unbearable that the employee feels compelled to resign." *Id.* at 971 (¶ 12). The employees had not given the new rules a chance to succeed, and "neither employee remained to see if additional help would be forthcoming." *Id.* at 972 (¶ 17). The Court of Appeals found that the chancellor "was manifestly wrong in his factual findings and abused his discretion" in concluding that the sales goals justified the employees' breach.

The *Foster* analysis negates Raines's bogus excuses. No "constructive discharge" occurred at Bottrell; conditions were not "unbearable;" the decisions and discussions about which Raines complains were "practical business-wide approaches to obtain profitability." The chancellor in *Foster* abused his discretion by reaching too far to excuse a breach. The chancellor in the present case was correct in rejecting Raines's excuses.[32]

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[32] Raines "defies" Bottrell to distinguish it *Matheney v. McClain*, 248 Miss. 842, 161 So. 2d 516 (Miss. 1964). In *Matheney* the 200-mile, 2-year non-compete clause was part of a contract that also specified the employees' compensation level. The employer unilaterally cut compensation over 25%. "The chancellor heard the testimony and at the conclusion of the evidence entered a decree finding as a fact that the [employer] breached the contract." *Id.* at 518. Since the employer breached a "vital part" of the contract, the employees were "discharged" from performing their obligations. *Id.* at 519-20. In this case the chancellor heard the evidence and ruled Bottrell did not breach its Agreement with Raines. Therefore Raines was not relieved of his obligations under the Agreement.

Raines briefly contends it would be inequitable to enforce the Agreement against him because, he claims, Bottrell has not enforced it against other departing producers. Raines cites no case or statutory authority in support of this contention and thus has waived the point under this Court's authority. *Graves v. Dudley Maples, L.P.*, 950 So.2d 1017, 1021 (Miss. 2007). Further, Raines based that argument on his blatant misstatement of Scott Woods's testimony. Raines falsely contends that Woods admitted Bottrell had decided not to sue two producers who left and took a few small Bottrell accounts. As to one producer, Bottrell "wrote them a letter telling them to quit and they quit." (T. 146.) Moreover, Bottrell did sue the other producer to enforce the Agreement. (T. 146.) That case was eventually settled. Raines's misconduct was far worse, and he refused to desist. Raines even continued accepting business from Bottrell customers after this suit was filed. (*See* Ex. 24; *e.g.*, AOR Letters from Lee Air Conditioning and Williams Paving Co., LLC.)

D. The Chancery Court Correctly Awarded Actual Damages, Punitive Damages, Fees And Expenses

The chancellor made detailed, clearly explained findings of Bottrell's damages. "The manifest error standard applies to review of damages awards by a chancellor." *Mason v. Southern Mortg. Co.*, 828 So. 2d 735, 739 (¶ 19) (Miss. 2002). There is no ground for reversal.

1. Actual Damages Were Properly Based Upon Total Commissions Collected By Raines From Bottrell Clients.

Raines wants this Court to let him collect commissions on the stolen business. That is, he claims the chancellor was required to calculate damages based on "net" commissions, subtracting the "producer's share" from the collections. Raines also argues that damages must be based on a "net profit" analysis. Raines not only seeks an inequitable result; he is again wrong as a matter of fact and law. In this case, the gross commissions usurped by Raines equal Bottrell's damages.

As mentioned above, Raines's employment agreement with MM&R allows him to retain 100% of all commissions received from former Bottrell clients. Yet Raines still claims that damages should have been based on "net commissions." That argument must be rejected for procedural and substantive reasons.

Procedurally, Raines's complaint about damages must fail because Raines never specifically objected to Bottrell's damages calculation on grounds that they were based on gross, instead of net, commissions. Instead, Raines merely objected to the retention rate being used in the damages calculation, claiming it was "speculative." (*See* T. 201-02; 212.) "In order to assign error on appeal, the issue must be raised at the trial level or it is waived." *Prestridge v. City of Petal*, 841 So. 2d 1048, 1054 (¶ 27) (Miss. 2003) (citation omitted). This Court does not tolerate such "efforts to

sandbag" trial courts. *Moore v. Moore*, 558 So. 2d 834, 838 (Miss. 1990) (quoting *Read v. State*, 430 So. 2d 832, 841 (Miss. 1983)). Failure to object at trial waived the issue.

Substantively, Raines's claim is meritless. Raines cites *Lovett v. E.L. Garner, Inc.*, 511 So. 2d 1346 (Miss. 1987), claiming that overhead, depreciation, and taxes should have been deducted. *Lovett* (*see id.* at 1353) relied on a damages treatise, DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS, §§ 6.4 – 6.9 (3d ed. 1987) (hereinafter "DUNN"). DUNN supports Bottrell's position that damages were properly calculated, stating "[g]ross profits may be recovered if they are the same as net profits, that is, if it is proven that the particular contract involved no added expense." DUNN, § 6.2 (emphasis added; citations omitted).

DUNN recognizes "that terms like 'overhead,' used for different purposes or in different contexts, mean many different things." *Id.*, § 6.5 (citing *Oakland Cal. Towel Co. v. Silvils*, 126 P.2d 651 (Cal. App. 1942)). For example, "overhead" can be either "fixed" or "variable". Variable overhead (also called "direct costs") includes expenses that are directly linked to the production of goods or services. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55-56 (Mo. 2005) ("[V]ariable expenses, not fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profits damages. These variable expenses are expenses that are tied directly to the unit of business or property damaged as a result of the defendant's actions."). Fixed overhead includes continuous expenses whose total does not change in proportion to the production of a business. *Id.* "The weight of authority ... holds that fixed overhead expenses need not be deducted from gross income to arrive at the net profit properly recoverable." DUNN, § 6.5 (emphasis in original).

At trial, when questioned why damages were calculated using gross commissions, Bottrell's expert testified, consistent with DUNN, that deducting fixed costs would be improper:

> Q. You don't take out of that the expenses of running the insurance agency?
>
> A. Well, that wouldn't be proper, anyway. You wouldn't take out any fixed costs. I mean Mr. Woods' pay didn't go down when they lost the accounts. There is a tremendous amount of fixed costs there.
>
> Q. Yes, sir. But you need a certain number, if you got more or less business, you need more or less CSR's and people like that working for you, don't you?
>
> A. I don't believe any CSR's were fired because of Mr. Raines.

(T. 219; emphasis added.) After this testimony, Raines's counsel began a new line of questioning and did not return to the topic. There was clearly sufficient evidence to support the chancellor's calculation of damages without deducting fixed overhead.[33]

Lovett involved a breach of a gasoline supply contract and facts which are not analogous to this case. In the insurance business there is no "cost of goods sold," i.e., there is no inventory of policies and bonds which have a cost value that must be deducted from commission income to reach "net commissions income." The contract in *Lovett* clearly involved variable overhead expenses, such as shipping gasoline to the customer, which were saved because the contract was not

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[33] In addition to overhead, Raines's brief (p. 43), citing *Lovett*, mentions "depreciation and taxes." The "better approach would be to keep depreciation out of damages calculations entirely, unless there is an identifiable expense related, for example, to equipment that must be replaced during the term of a contract." DUNN, § 6.7. There is no record evidence of any such identifiable depreciation expenses. Concerning taxes, "[t]he rule is clear that a recovery of damages for lost profits is taxable as income." DUNN, § 6.8 (citations omitted). Although future earnings are generally taxable, "a personal injury damages award is not." *Id.* The current case is not a personal injury case; therefore, all damages received by Bottrell will be taxable income. Accordingly, "taxes are not properly to be considered in computing lost profits damages." *Id.*

Finally, although Raines does not raise the issue in his brief, DUNN states that inflation may properly be accounted for indirectly through the use of a discount rate. DUNN, § 6.9. The chancellor's damages calculation discounted all future commission income to present value. Accordingly, DUNN supports the damages calculation made by the chancellor.

performed. This Court's main concern in *Lovett* was that the damages award was inconsistent with the contract:

> In the instant case, Garner utilized past profits, but in a way that was misleading. Indeed, as Lovett points out, he was entitled to a four cent per gallon guarantee. As such, Garner was not necessarily entitled to one-half of the net profits per month. Instead, Garner was entitled to what was left over after Lovett received his four cent per gallon guarantee, regardless of whether that constituted one-half of the net profits or not. Accordingly, although Garner based its projection of future profits on its past profits, such projections were misleading and resulted in inaccurate amounts for future profits.

Lovett, 511 So. 2d at 1353. No such inconsistency is alleged here. Unlike *Lovett*, the chancellor in this case did discount to present value. Furthermore, unlike *Lovett*, the chancellor accounted for the fact that commission income would not remain constant. The court applied a retention rate which reduced the retained commissions by 14% per year for the first two years, and 40% per year in the next three. Accordingly, *Lovett* is factually distinguishable.

This Court has never addressed specifically whether fixed overhead expenses such as salaries for administrative personnel, depreciation of office equipment, and utility bills should be deducted to arrive at net profit damages for a breach of contract. The vast majority of courts hold that such items are not properly deductible in arriving at lost profits damages.[34] For example:

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[34] *See Ctr. Info. Fin. Servs., Ltd. v. First Nat. Bank of Decatur*, 471 N.E.2d 992, 999 (Ill. App. 1984) ("[S]ince overhead is fixed and nonperformance of the contract produced no overhead savings, no deduction from profits should result.") (quotation omitted); *King Feature Syndicate v. Courrier*, 43 N.W.2d 718, 726 (Iowa 1950) ("We think the proof here of damages for loss of profits was reasonably certain and the cost of performance figure, used to diminish the gross payments due, did not need to include what might be termed overhead or fixed expenses as argued by defendants."); *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 440 N.E.2d 29, 48 (Mass. App. 1982) ("The prevailing rule is that damages for such profits must be reduced by any direct expenses that would have been incurred in making the lost sales, but fixed overhead expenses need not be deducted unless they were, or would have been, changed by the receipt of the lost business."); *Covington Bros. v. Valley Plastering, Inc.*, 566 P.2d 814, 818 (Nev. 1977) ("When overhead expenses are saved as a result of a breach of contract, the proper measure of recovery is net, not gross, profit. Where such expenses are constant, however, and no saving occurs, the rule is otherwise."); *SHV Coal, Inc. v. Cont'l Grain Co.*, 545 A.2d 917, 924 (Pa. Super. 1988) ("The overhead expenses, which defendant insists

> 'Where the contract is one involving sales commissions, the measure of damages for loss of profits is gross commissions less expenses that would have been incurred but for the breach.' *Om-El Export Co., Inc. v. Newcor, Inc.*, 154 Mich. App. 471, 398 N.W.2d 440, 444 (Mich. Ct. App. 1986). Fixed overhead expenses, however, which are not reduced because of the breach, are not considered in calculating the plaintiff's damages. *See F. A. Bartlett Tree Expert Co. v. Hartney*, 308 Mass. 407, 32 N.E.2d 237, 240 (Mass. 1941); *Roblin Hope Indus. v. J. A. Sullivan Corp.*, 11 Mass. App. Ct. 76, 413 N.E.2d 1134, 1136-37 (Mass. App. Ct. 1980). The rationale for this rule is to prevent the illogical result of reducing a plaintiff's damages for fixed overhead costs that would remain constant, regardless of the particular transaction at issue. *Vitex Manufacturing Corp. v. Caribtex Corp.*, 377 F.2d 795, 798 (3d Cir. 1967).

John A. Cookson Co. v. New Hampshire Ball Bearing, Inc., 787 A.2d 858, 865 (N.H. 2001) (emphasis added). At least one federal court in Mississippi applying federal common law has found that fixed overhead should not be deducted in arriving at lost profits. *See Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc.*, 388 F. Supp. 1362, 1371 (N.D. Miss. 1975) ("[T]he better view, in our opinion, is that overhead or fixed expenses, which are not affected by a breach of contract, should not be deducted in calculating the lost profits attributable to the breach. This is so because such expenses remain constant, irrespective of the breach, and nonperformance of the contract produces no overhead cost savings.").

Neither Raines nor his own expert identified any expenses saved by Bottrell connected with the business taken by Raines. No employees were laid off and no salaries were reduced because of Raines's departure. (T. 219.) There is simply no record evidence that the departure of Raines

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should be added as a cost of manufacture, were constant in character, and would not have been affected by the performance of the additional work. There was no proof that these necessary corporate costs would have increased had the ... contract been completed, and such sums cannot therefore be used to reduce the damage allowable."); *see also Schubert v. Midwest Broad. Co.*, 85 N.W.2d 449, 452 (Wis. 1957); *Houston Chronicle Publ'g Co. v. McNair Trucklease, Inc.*, 519 S.W.2d 924, 932 (Tex. App. 1975); *S.A. Breding v. Champlain Marine & Realty Co., Inc.*, 172 A. 625, 627-28 (Vt. 1934); *Oakland Cal. Towel Co. v. Sivils*, 126 P.2d 651, 652 (Cal. App. 1942) (Prospective profits not reduced by "fixed expenses" that "neither increased nor decreased as a consequence of the nonperformance of the contract. . .").

resulted in any cost reductions whatsoever. It is clear, however, that Bottrell suffered a significant and quantified decrease in *revenue* as a result of Raines's breach of the Agreement. Without any corresponding offset in cost savings, the loss of each dollar in revenue decreased Bottrell's profits by the same amount. *See* DUNN, § 6.2. The chancellor did not commit manifest error in calculating damages.[35]

The only "expense item" attributable to production of insurance commissions is the individual producer's personal commission (about 31%, see Ex. 60). Raines states (Br. p. 42) that failing to reduce damages by that amount is "worse still and more obvious" than the omission of "overhead" reductions. But deducting such commissions from damages would pay Raines for stealing the business. Other courts that have enforced these types of Agreements have awarded damages based on gross amounts received by the breaching party. For example, in *Girard v. Rebsamen Ins. Co.*, 685 S.W 2d 526, 530 (Ark. App. 1985) (discussed in this Court's *Kennedy* opinion), an insurance agency was awarded damages based on the total premiums received by the departing employee from the agency's former customers.

As the chancellor found, Raines conducted a calculated risk-benefit analysis before deciding to leave Bottrell, and concluded that "[t]he high-income producing accounts [he] stole were worth losing two years of commissions/ income to secure ... . " (R. 184.) Considering this willful and calculated breach of the Agreement, allowing Raines to keep any of his ill-gotten gains would result in his being unjustly enriched by his own wrongful conduct. As a matter of equity, Bottrell should

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[35] According to the DUNN treatise, § 6.3, miscalculation of damages would require a new trial. Bottrell respectfully submits that in light of the evidence, any error in the damages calculation would be so minuscule and immaterial that it would not justify the time and expense of a new trial on damages. Raines argues that failure to provide a "net" damages calculation would justify reversing *and rendering* the damages award. Nothing could be more unjust, especially where Raines did not raise this objection in the court below. Certainly remand for re-calculation of damages would be the only equitable result, if Raines's argument found favor with this Court.

not have to pay Raines a commission for stealing its business. Such a result would eviscerate the deterrent effect such Agreements are intended to have. If Raines were allowed to keep the commissions as if he had stayed at Bottrell, then enforcement of the Agreement would not have any effect on his earnings, i.e., he would steal Bottrell's business without losing a nickel. That unjust result would completely undermine the economic justification and purpose of the Agreement, and of all such agreements in the insurance industry.

Beyond the net-vs.-gross argument, Raines merely claims the damages award is "grossly speculative." As explained in the fact discussion of this brief, the chancellor's fact-finding was meticulous and conservative. This Court has stated that:

> [W]here it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances, all that can be required is that the evidence--with such certainty as the nature of the particular case may permit--lay a foundation which will enable the trier of fact to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.

Cain v. Mid-South Pump Co., 458 So. 2d 1048, 1050 (Miss. 1984) (emphasis added). Bottrell's damages were based upon actual commissions collected by Raines from Bottrell customers, on case-specific data, and on authoritative, published data from the insurance industry. The chancellor relied on production figures prepared by Raines himself. (R. 182; damages based in part on handwritten production calculations by John Raines contained in trial exhibit 29). The damages calculation is straightforward, as explained *supra* and as detailed in the chancellor's opinion.

2. The Punitive Damages Award Was Proper

In additional to actual damages, the chancellor awarded punitive damages of $12,000.00, that is, $1,000.00 "for each year Raines was employed by Bottrell, each year Raines was trained, groomed, educated to be the type of agent he is today." (R. 184.) "The law in Mississippi is settled that punitive damages are recoverable in an action for breach of contract." *Polk v. Sexton*, 613 So. 2d 841, 845 (Miss. 1993). In *Polk*, the chancellor's award of punitive damages was affirmed, where the defendant's breach of contract was found to be "gross and willful." *Id.*

The chancellor's fact findings on punitive damages (R. 183-84) were clear. He found that "Raines willfully, and with calculated intent, violated the ... Agreement." That finding was based on clear evidence. The chancellor found that "the contractual language in the ... Agreement was not contradictory or vague, and that

> Raines weighed his options and accepted the risk. Raines could strictly adhere to the ... Agreement and start from scratch at a new agency, hoping that in two (2) years his former Bottrell clients would be willing to hire him; or he could go ahead and steal these clients, guaranteeing that they would remain his clients. Raines anticipated being sued, as evidenced by the fact he held his former Bottrell client commissions in a separate account. The Court is convinced that Raines anticipated that a court might well rule against him; that he would have to pay Bottrell those amounts. The high-income-producing accounts Raines stole were worth losing two (2) years worth of commissions/ income to secure.

The chancellor concluded "that Raines is a highly intelligent employee who used his position, and the confidential, classified information that came with his position to turn against his employer, Bottrell." As the chancellor found, we submit that this Court "cannot allow Raines' actions to go unpunished." This Court has long recognized that such bad-faith breaches of contract should be punished, to deter others from repeating the misconduct. The chancellor correctly realized that "to allow Raines' actions to go unpunished would be to encourage others to undermine their contractual

obligations, to encourage other agents, similarly situated, to violate contracts after conducting a cost/benefit analysis."

In *Mickalowski v. American Flooring, Inc.*, No. 2005-CA-01864-COA (May 29, 2007, petition for rehearing pending), the Mississippi Court of Appeals recently affirmed a punitive damages award for just such a bad-faith breach of a non-compete clause. The trial court found that "the Defendants executed the agreement and deliberately engaged in a course of misconduct." (*Id.* at ¶ 24). Like Raines, the defendants in *Mickalowski* created a bad-faith rationale for their actions, and "elected to totally disregard the covenant not-to-compete . . . ." *Id.* The Court of Appeals stated, based on those findings, that "the trial judge demonstrated that this was an extreme case warranting punitive damages . . . ." *Id.* As in this case, "the trial judge's opinion was based on substantial, credible and reasonable evidence and thus cannot now be disturbed on appeal." (*Id.* at ¶ 25).

The evidence at trial overwhelmingly supports the chancellor's finding that Raines's breach of the Agreement was "willful." (R. 183.) Significantly, Raines has shown no recalcitrance for his calculated theft of Bottrell accounts. Therefore, the chancellor did not commit clear/ manifest error in finding Raines "willfully and with calculated intent, violated the ... Agreement." (R. 183.)

The only argument that Raines makes concerning the award of punitive damages is that "he had talked to his lawyer before acting as he did." (Appellant Br. p. 43.) Advice of counsel is not an absolute defense. *See Flippo v. CSC Assocs. III, LLC*, 547 S.E.2d 216 (Va. 2001). In order for that defense to be available, the evidence must show, *inter alia*, that full disclosure of the situation was made to counsel and "under some authority, that the advice was not based on improper legal research." 22 Am. Jur. 2d, Damages § 566 (citing *GAI Audio of N.Y., Inc. v. Columbia Broad. Sys., Inc.*, 340 A.2d 736 (Md. App. 1975). The record is devoid of evidence on both points. In fact, rather than justify the advice, Raines's counsel objected. (T. 61-62.)

Raines contends that counsel informed him the Agreement did not preclude him from accepting business from Bottrell customers, something that is contradicted by the plain language of the Agreement itself. (*See* R.E. at p. 2.) He cites only *Murphree v. Federal Insurance Co.*, 707 So. 2d 523, 533 (Miss. 1997) in support of his claim that good faith reliance upon counsel will prevent imposition of punitive damages. (Br. at 43.) But the *Murphree* opinion actually states:

> [G]ood-faith reliance upon advice of counsel may prevent imposition of punitive damages. *See Henderson v. United States Fidelity & Guar. Co.*, 695 F.2d 109, 113 (5th Cir. 1983). But it is simply not enough for the carrier to say it relied on advice of counsel, however unfounded, and then expect that valid claims for coverage can be denied with impunity pursuant to such advice.

Id. (emphasis added). The authorities cited in this brief show that any such advice was "unfounded." Raines does not cite to any record evidence demonstrating that his reliance upon counsel in breaching his unambiguous contractual obligations was reasonable; he certainly submitted no expert testimony that the advice was reasonable or had any basis. This is not a situation in which Raines can claim "good faith" reliance.

Raines clearly intended to injure Bottrell by stealing its customers. Raines was involved in extensive negotiations with MM&R in which the two parties agreed to terms for the accounts which Raines would steal. This demonstrates without a doubt that Raines intended to steal the largest accounts he serviced well before he actually left Bottrell. (T. 49-50; R.E. at pp. 37-40.) The evidence is overwhelming that Raines never had any intention of honoring the agreement. Moreover, he has played fast and loose with the facts, under oath, in trying to justify his theft of the Bottrell accounts. Such behavior cries out for punishment. As noted by the chancellor, "[t]o allow Raines' actions to go unpunished would be to encourage others to undermine their contractual obligations, to encourage other agents, similarly situated, to violate contracts after conducting a

cost/benefit analysis." (R. 184.) Accordingly, the chancery court did not abuse his discretion in awarding punitive damages. (Raines has not appealed the amount of punitive damages.)

3. The Chancery Court Did Not Abuse Its Discretion In Awarding Bottrell Attorney's Fees And Expenses

Raines also claims that the Court improperly awarded attorney's fees because there is no attorney's fee provision contained in the Agreement. A trial court's decision to award attorney's fees is reviewed for abuse of discretion. *See, e.g., Missala Marine Servs., Inc. v. Odom*, 861 So. 2d 290, 296 (Miss. 2003).

Attorney's fees are available in cases where punitive damages are awarded. *E.g., Pride Oil Co., Inc. v. Tommy Brooks Oil Co.*, 761 So. 2d 187, 192 (Miss. 2000). Because the Court awarded punitive damages to punish Raines's wrongful conduct, it was within its discretion to award attorney's fees. Moreover, the amount of the attorney's fees were found to be reasonable after a hearing on the matter. (T. 420.) Indeed, the court found that much of the attorney's fees incurred by Bottrell were due to Raines's lack of cooperation during discovery. (T. 420-21.)

The court found that the attorney's fee amount was reasonable (R.E. 41-42) and awarded Bottrell fees and expenses of $118,318.05. The court also awarded Bottrell expert fees and expenses in the amount of $20,549.60. Post-judgment interest was set at 6%. (R. 185-86.) Raines complains about the amount of the award, stating there was a "total failure to prove reasonableness and necessity of the amount awarded." (Appellant Br. p. 44.)

Bottrell submitted its attorney's affidavit explaining the reasonableness and necessity of the fees, including a detailed summary of the efforts undertaken by counsel. Bottrell also submitted as well as an itemization of the expert fees it incurred. (T. 378; *see* summary attached as Ex. "A" to

Aff. of William Ray.)[36] Raines's counsel cross examined Bottrell's counsel at length concerning the work performed and the fees paid. (T. 384-419.) Bottrell's counsel provided explanations for each item that Raines questioned him about. Indeed, Bottrell, and Raines in turn, benefitted from unilateral, significant discounts from the fees before bills were sent. (T. 380-81.)

In the end Raines simply disagrees about the sufficiency of the evidence on fees and expenses. Raines has overlooked the controlling authority.[37] MISS. CODE ANN. § 9-1-41, *Evidence as to attorney fees reasonableness*, states:

> In any action in which a court is authorized to award reasonable attorneys' fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

(Emphasis added.)

Bottrell clearly proved its fees and expenses in detail, although it was not required to do so. The trial court did not abuse its discretion by awarding attorney's fees.

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[36] As explained by Bottrell's counsel, William Ray, during the attorney's fees hearing, the monthly bills submitted for payment contained details concerning mental impressions, strategies, and privileged communications. (T. 380.) To prevent waiving the attorney-client privilege, as well as not advising Raines as to its trial strategy, Bottrell submitted a detailed summary of its fees and expenses to the chancery court.

[37] Raines selectively quotes from *A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276, 1283 (Miss. Ct. App. 2000), claiming Bottrell was required to submit its attorney fee bills in order to be awarded fees. *A & F Properties* involved a contractual attorney fees provision which allowed only for the recovery of fees "for enforcing the specific contract provisions on which they prevailed." *Id.* (¶ 22) In *A & F Properties*, at trial both parties prevailed on certain contractual claims and each were awarded attorney's fees. *Id.* at 1282. Neither party attempted to identified the specific fees expended on the claims on which they prevailed. In this case, Bottrell was the sole party that prevailed at trial, and the entire trial concerned whether Raines violated the provisions in the Agreement which prevented Raines from either accepting or soliciting business from former Bottrell clients. Accordingly, *A & F Properties* is clearly distinguishable.

E. The Court Properly Rejected Raines's Counterclaim.

Finally, Raines contends the chancery court improperly "ignored" his counterclaim for accrued vacation pay and $450 in unreimbursed expenses. Raines claims he was entitled to vacation pay even though as a producer, who was paid solely by commission, he did not receive vacation pay:

> Q. All right. So your testimony is that you never received vacation pay above commission from Bottrell; right?
>
> A. You did not get it above commissions, that is true.

(T. 361.) Accordingly, Raines counterclaimed for vacation pay which he had never received, and was not entitled to. Concerning the claimed unreimbursed expenses, Raines provided no itemization of that amount or why he is entitled to them. Therefore, the court properly rejected Raines's counterclaim.

CONCLUSION

Raines profited by breaching the Agreement. He scoffed at his obligations, and he continues to do so before this Court.

To allow Raines to profit from his deliberate, calculated breach would truly be a miscarrige of justice. Any other result would send a message to insurance agents, and other professionals, that they may steal business, in breach of clear contracts, with impunity. Bottrell deserves the judgment awarded. Raines deserves the judgment, including the minor punishment he received. The chancellor's decision was correct in all respects, and should be affirmed in all respects.

DATED: October 2, 2007.

Respectfully submitted,

THE BOTTRELL INSURANCE AGENCY

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing "Appellee Brief of the Bottrell Insurance Agency, Inc.," has been filed in the office of the Clerk of the Supreme Court of the State of Mississippi, and a true and correct copy of the same has been served upon counsel for John Raines by placing same in the U.S. Mail, postage prepaid, to his usual place of business:

John Downey
P.O. Box 412
Madison, MS 39130-0412

and upon the Honorable William Lutz, Chancellor, Retired, Post Office Box 444, Canton, MS 39046.

This the 2nd day of October, 2007.

Brian C. Smith

Brian C. Smith (MSB # 101566)