NO. 2006-CA-02019

IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

JOHN RAINES
Appellant

v.

THE BOTTRELL INSURANCE AGENCY, INC.
Appellee

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

REPLY BRIEF OF APPELLANT JOHN RAINES

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases Cited

Other Authorities

INTRODUCTION

We have expended most of our ammo in Raines' Appellant's Brief and will try to keep this Reply short. Bottrell uses a lot of phrases such as "stolen business" and "ill gotten gains" and states that Raines "misrepresents" the evidence. Its brief is encumbered with the weight of 67 authorities. Nevertheless, though it is full of sound and fury, it signifies nothing. This is not because counsel are mentally challenged. Far from it. They have made an impressive argument with no foundation in fact or law. Some of their authorities are good law which simply does not apply in this case and some are badly misconstrued. In an effort to conserve space, we will try, after a short opening, to respond to Bottrell's arguments in the order in which they are made.

Bottrell's essential claim is that the Chancellor may not be reversed since he made findings of fact which justify his judgment. Of course, the corollary to this argument is that there must be a basis in the evidence from which the fact may be found. The Chancellor ignored the most fundamental legal issue - whether a post employment restrictive contract may be enforced when it deprives third parties of the right to obtain complex professional services (which can make their businesses fail or prosper, according to the third party witnesses and Bottrell's expert as well). The Court basically determined that Raines went to the Marchetti Agency with a plan to "steal" his clients, and that this conduct was unjustified by any pay changes, which the Chancellor found contrary to undisputed evidence were not made before Raines' first contact with Marchetti.

He found that the plan to make producers give up to the agency their bottom 20% of business was irrelevant because the agency changed its mind after Raines left. He also found that Raines had resigned before he learned of the plan (R179) when the undisputed testimony was that he had heard of it and had been told by the agency president that it was being adopted. R 130,349-351 He found that in his first week at Marchetti, Raines solicited the business of several of his best clients based on cell phone records apparently showing he had returned their calls, although Raines and six of his clients testified without dispute that newly assigned Bottrell producers had first contacted them, thus provoking them to call Raines' cell phone because he had not told them he was leaving - and of course the cell phone bill contains no record of incoming calls but does record calls returned. The Chancellor found that Bottrell had made a large investment in training Raines when in fact the current Bottrell whose contract is in issue had merely inherited Raines as an employee (indentured servant?) of Dan Bottrell, Inc.

In short, it is true that the Chancellor's opinion contains findings of fact to undergird his judgment; however, these facts are contrary to the evidence.

Probably the most logical way to reply to Bottrell's brief is simply to follow their format, responding to each of their points in turn.

FACTS

A. Description of Bottrell Agency

We agree Bottrell is a large, well-known agency with something of a specialty in construction, though based on some of the testimony, it appears that

since its purchase by Trustmark, it has not always performed up to its inherited reputation. (Carroll testimony, R264-5; Fayard testimony, Dep 34-5; Knowles testimony, Dep 32-6.)

B. "Bottrell's" Investment in Raines

We agree Raines learned the insurance business while on the payroll of Dan Bottrell, Inc. and that Dan Bottrell, Inc. funded his trips to insurance schools, etc. Trustmark Bottrell's expert Hedges, whose resume, we have already noted, says he earns his living testifying, did claim that an "average" cost to train a producer in 1993 was $100,000 to $150,000. However, Raines' undisputed testimony was that he brought in commissions of twice his salary in his first year and that the agency withheld educational costs from producer's salary/commission. R324-5 In any event, he learned his job in 1993 working for Dan Bottrell, R22, and is sued on a 1999 agreement he signed in favor of Trustmark Insurance Agency, Inc. which subsequently changed its name to the Bottrell Agency Exh. 2, RE1-4

C. The "Confidentiality, Non-Piracy, and Non-Solicitation Agreement"

The agreement speaks for itself and, it is true, does not prohibit Raines from engaging in his profession after leaving Bottrell. As we have noted, it is silent as to compensation and "does not in any way alter the rights of the Corporation".

D. Raines Consciously Planned to Leave Bottrell, Take Customers,

and Get Sued?

Every business or professional action a person takes is conscious. Raines began talking to Marchetti in late October, 2004 when Bottrell producers learned their employer was changing from "pay when booked" to "pay when paid". R347-8 It was a difficult decision to make, and he did meet several times with Marchetti and counsel before finally deciding to leave Bottrell, but until he finally quit in June he was not certain he wanted to leave Bottrell and had not closed the door to reconciliation. R 351 He concluded after talking to his lawyer that he should not solicit any Bottrell client or give competing premium quotes, R355, but that if people followed him and were going to leave Bottrell anyway, he would accept their business. R56 Certainly he and Marchetti considered the fact he might get sued. After all, the bank's agency manager Scott Woods had circulated a memo telling producers they could not "buy their business" (Exh R146,) and told Raines he could not negotiate the purchase of any of his clients.R352-3 His considering his options with the help of legal advice may not fairly be characterized as an underhanded plot to violate a contract. Some clients did follow him and were going to leave Bottrell even though he may have encouraged them to stay (Carroll, R267Bowman, R 283-5) and in fact, he did get sued.

E. Raines Left Bottrell and Immediately Began Taking Bottrell Customers

The clients with whom Raines spoke all testified they called him first. Three were personal friends who talked to Raines frequently on his cell phone

(Camo Construction, R 236-8, Dirtworks, Moran Dep 20), Specialty Metals/Bowman, R 274-7). A fourth was about to go to an Alabama agent for a bond till his secretary ran down Raines through his cell phone, Fayard Dep R 34-6. Carroll rejected Raines' offer to straighten out her problems with Bottrell. R 267 Knowles called Raines after receiving some sort of nonrenewal notice. Knowles dep. 26, 32-3 The Chancellor had no factual basis for rejecting the undisputed testimony of these people who had no interest in anything beyond their personal reliance on Raines to manage complicated insurance and bond needs which Bottrell's expert testified could not be handled by every agent and, if mishandled, could result in serious business loss. R175

F. Bottrell's Damages

Raines' main point on this issue is that Bottrell presented, and the Chancellor computed damages based on, gross rather than net profit, which is a failure of proof requiring reversal and rendering in favor of Raines. We certainly do not invite this Court to consider nickel and dime calculations and doubt the Court wishes to do so, but we will respond briefly to the Damages discussion in the Fact section of Bottrell's brief, as follows.

1. We agree Raines wrote $306,862.51 annual premium volume of former Bottrell accounts.

2. We covered in Appellants' Brief the fact that Bottrell presented inflated figures for its anticipated retention, projecting retention rates based on accounts left by a producer who died and one who remained an "independent contractor"

connected with the agency, R123-4, and failing to note that it had lost a couple of accounts Raines personally knew had been written by others. We mention these facts simply because opposing counsel several times criticizes Raines' testimony as "inaccurate". Perhaps when one is considering a million dollar judgment against an individual, it is picayune to argue about 10 or 20% anyhow, but the fact is that Bottrell, who controlled the production of its retention figures, claimed it had retained clients which Raines knew had been lost to others than himself.

3 and 4. Terminal growth rate and contingency income. These items, as their very names imply, are speculative and were projected by Bottrell's expert who admitted he made a $500,000 error in his damages calculation, but Raines did not offer contrary evidence.

5. Discount rate. We don't disagree.

6. Duration. The Chancellor grabbed figures out of the air because, obviously, he thought Bottrell's projections unreasonable. As to Raines having "profited greatly" from the fact Marchetti took no part of commissions generated from Raines' former clients, as we said in our original brief, Woods' parting words were to tell Raines he could not negotiate purchase of all or part of his book, leaving him to choose between continuing to help those who relied on him at risk of being sued by Bottrell or abandoning them when it was doubtful they would have stayed with Bottrell anyway. Bottrell complains about having to lie in the bed it made; and as far as Raines' great profit is concerned, he has had to pay Marchetti's lawyers as well as his own and, in truth, has suffered a good bit for

what he has got. It must be remembered that the Chancellor's calculations are based on the agency's gross commissions received, as Bottrell produced no proof tending to show net profit. Further, the Chancellor projected damages for lost accounts 3 years beyond the time protected by the contract and popped Raines with more than double the 150% penalty provided in the contract even though he held it (the penalty provision) was unenforceable.

G. Raines' "After-The-Fact Excuses" Were Not "After-The-Fact" And Were Legitimate

1. "Pay When Paid" v. "Pay When Booked"

The Chancellor bought Bottrell's (Woods') argument that the changes it made in compensation were insignificant, were reversed before Raines left or never took place and thus could not constitute justification (breach of contract) so as to preclude it from enforcing its restrictive contract. This argument is a gross misconstruction of the undisputed facts, and we are at a loss to understand why the Chancellor bought it. The "pay when paid" vs. "pay when booked" change had been done but not formally announced in October '04 when Raines first spoke to Ray Robertson of the Marchetti Agency. R347-8 Bottrell argues that the change was "only a matter of timing" and affected no one, though they admit that "producers still complained about the change", so that Bottrell abandoned it "in the spring of '05"' (Bottrell brief, p 13-14.) If he were inclined to think producers' complaints were baseless, the Chancellor must have totally ignored management committee member Horner's April 28, '05 memo to Woods (Exh 40, R129)saying the change was "major", "could be the missile to sink the ship," that

Bottrell could "lose every producer from 40's down," and that "anything could change and we can't do much about it - you could come in and say o.k. everyone your pay is cut in half..." etc. Bottrell claims Raines "misrepresents the effect of the change" and that his assertion his income would have been reduced was "inaccurate" because his '04 W-2 showed receipt of $145,546.47 in "Wages, tips and other compensation" while Bottrell was increasing his '05 draw to $12,000 a month. Frankly, the undersigned is uncertain exactly how Raines calculated he had earned $230,000 in '04, because commissions generated in the 4th quarter of a year would be computed and paid at the 1st of the next year, R361, but Bottrell's argument based on the "Wages, tips and other compensation" line of the '04 return ignores the fact that the "Medicare wages and tips" line which follows shows $153,498.82 income, and if Raines had matching 401K money paid him, this could total $10,000 or 11,000 more in additional receipts.[1] When one considers that $32,000 was suddenly backed out for overpayments on BCAM commissions which Raines, like other producers, had received over a 3 year period, this bumps his would-have-been income up toward $200,000. In any event, the sudden backing out of BCAM overpayment cost Raines $16,000 in fourth quarter '04. He testified that whereas he would have gotten a $ 32,000 check for the 4th quarter of '04, he only received $ 18,000. The change in crediting producers' accounts from "pay when booked" to "pay when paid" exacerbated the situation. It was adopted in various stages between October '04 and concluding in January '05. This put Raines'commission account in the hole $25,319.

[1] At trial, Bottrell's counsel questioned Raines abut the "Medicare wages" line on his '05 W-2 form to demonstrate as much 05 income as possible. In its brief, it uses the "Wages" line to minimize income.

Raines testified to this explaining that its effect was to lower the commission percentage he would receive and effectively insure that his income would be limited to the $12,000 monthly draw Bottrell had fixed. Raines testified this would reduce his income between 1/3 and 1/4. (Raines testimony, R 344-7) These figures given by Raines are confirmed on p. 4 of exhibit 58, commission income statement for 1st quarter of '05 . Not only Raines, but other producers suffered substantial pay reductions because of these changes in compensation. The Agency's president Veazey's pay was cut $100,000, R346; management committee member Horner said his compensation had been greatly reduced through agency mismanagement and proposed changes from the "pay when booked" scheme and predicted that younger producers would quit because Bottrell could reduce their pay at will. Exh.40. Though the agency had temporarily increased draws to somewhat ease the pain, this increase was slated to end the 3rd quarter of '05. The agency was considering cutting producers' draws the 3rd quarter of '05,and no one could predict at what point the new way of crediting commission would catch producers up to their original level of pay. R347 We do not know why the Chancellor did not hear this evidence. If any of it were false, why did Bottrell not call Veazey or Horner or its trial representative to dispute it?

2. <u>The Marsh Berry Proposal</u>

Yes, the Chancellor found "that Raines was not affected by this proposal as it was never implemented and he had turned in his resignation before he heard of [it]." R179 But like other facts found, this finding that Raines resigned before hearing of the plan is

directly contrary to the proof, which we do not here reiterate, as we have already discussed it. (Appellant's Brief, p. 8 citing testimony R349,351,130) After Raines resigned, Bottrell apparently did realize the plan would not be well received and decided against it, as they reverted to "pay when booked", but it is undisputed that when he made his final decision to resign, it was hanging over him like the last straw about to break the camel's back.

3. The BCAM billing issue. This is intermingled with the "pay when booked" vs. "pay when paid" issue and has been discussed above. Raines' complaint was that after he brought to the agency controller's attention the fact that the accounting department had caused him and others to be overpaid, Trustmark promised to get its money back over a year to "ease the pain" and reneged. According to Horner's memo, (Exh 4) this "accounting error" cost him "$40m in commission backed out" (i.e. a loss of whatever his commission percentage of $40,000 would have been).

Law

Basically, the authorities cited by Bottrell are good law misconstrued and misapplied to the undisputed facts of this case. As we did above, we will track Bottrell's points in the order argued.

A. Standards of Review.

We agree that this Court reviews issues of law de novo and reviews issues of fact only to see if they are supported by substantial evidence, giving the chancellor the right to weigh witnesses' credibility and make any reasonable inferences which may be drawn from the evidence; but as stated in Appellant's Brief, this rule is subject to the principle

that evidence which is not inherently improbable, impeached or contradicted must be accepted as true and is binding on the Chancellor. Wilson v. Blanton, 130 Miss.390,94 So.2d 214,216 (1992), Stewart v. Coleman, 120 Miss.28, 81So.2d653 (1919).

B. The Agreement Should Be Held Unenforceable

We have stated before and here repeat that we do not expect this Court to suddenly reverse its past rulings that though restrictive covenants in employment contracts are not favored by law, they are, in proper cases, enforceable. The Court will not want us to rehash Point One of our Appellant's brief and the authorities cited therein. We simply urge that in a case involving complex professional services, the quality of which can seriously affect the business or personal wellbeing of the client, it should be against public policy to enforce a post-employment restrictive agreement which deprives third parties of the right to choose the person with whom they wish to deal. And this Court has not enforced such an agreement in a professional context since Wilson v. Gamble, 180 Miss.499,177 So.363 (1937). Raines was not running a pest control or LP gas route, and it would serve no purpose to force Fred Fayard to go to a Birmingham agent for a needed bond (Fayard dep. 38-40) or tell Christy Carroll she had to continue dealing with an agency which mailed her a cancellation notice while she was waiting for her new producer to straighten out a previous overcharge. R265-7 If it does not, it should offend public policy to tell William Anderson of Camo Construction that he is precluded for 2 years from dealing with a man he credits with helping expand his business and is so close to that his company has taken Raines to Canada goose hunting. R240-1. But if the Court does not want to venture off into the public policy area, we will

understand, and there is certainly ample other legal reason to reverse and render the judgment in this case.

2. The Chancellor's Conclusion The Agreement Is Reasonable and Economically Justified

The fact the contract is commonly used in use in insurance agency contexts does not mean it is reasonable, economically justified, or enforceable. Thames v. Davis & Goulet Insurance, Inc., 420 So.2d 1041 (Miss.1982). In the context of this case, the contract is unfair and not economically justified because:

(1) Raines did not steal lists of all Bottrell's clients and go after them like the pharmacist in Fred's Stores of MS, Inc. v. M&H Drugs, Inc., 725 So.2d 902 (Miss.1998) He took no confidential information or trade secrets and did not solicit or even notify his clients he was leaving. They had to find him and ask him to continue as their agent before they went elsewhere.

(2) As stated above, Raines was not running a service route or selling no. 2 2x4's or 6 penny nails in competition with his former employer but was helping people who relied on his individual skills. One more short quote from Fred Fayard's deposition:

> I need John Raines or either I need a John Raines clone, or I need another insurance agent that can take care of this insurance business.....Well the guy who called me from Jackson didn't understand it. Dep. 139-40

Was it reasonable for Trustmark's insurance manager to tell Raines he could not "buy" his business and require him to neglect those who trusted and relied on him?

(3) With one exception, Raines himself developed all the clients who followed him, and they were not given to him by the agency.

(4) The "investment" made in training Raines is greatly exaggerated as stated

above and in Raines' Appellant's Brief (p.17); and such as it was, it was made by Dan Bottrell, Inc. in 1993, while Trustmark Bottrell sues on a 1999 agreement. Trustmark seems to feel it bought Raines along with Dan Bottrell's other business assets; if it had, it wouldn't have needed a new agreement based on future compensation to be paid.

(5) Bottrell's expert witness testified that failure to enforce "Non-piracy" agreements would destroy the insurance business. Lots of other businesses invest in training employees and help them make and maintain business contacts - banks with loan officers, law firms with associates, auto repair shops with mechanics. These businesses prosper without the benefit of restrictive post employment contracts.

3. Public Policy - We have addressed this above but will comment briefly on the authorities Bottrell cites for this point. Bottrell's public policy argument is restricted to the issue of whether agreements of the sort in question deprive the general public of the benefits of free competition by tending to create a monopoly. That is not our argument; of course there is plenty of competition in the insurance field. The public policy issue Bottrell overlooks is whether it is proper to prohibit Raines' serving his clients' vital business needs when they rely on his peculiar capabilities. The issue is more complex for each individual than whether he will buy his similar whole life policy from Metropolitan or Mass Mutual or his number 2 pine 2x4's from Shepard Building Supply or Frierson. Suppose William Ray and Brian Smith had left Watkins & Eager before this case was appealed and Bottrell had to turn its business over to a new man assigned to its case by a senior partner? Of course that could not happen, because our Rules of Professional Conduct won't let Watkins & Eager make a restrictive post employment agreement, no

matter how much the firm may have invested in "training, grooming, educating" Ray and Smith to be the good lawyers they are, no matter who developed Trustmark as a client.

Bottrell actually maintains that Raines has no public policy argument anyhow, since he accepted some of his clients' business, and thus "no customer was prevented from buying insurance from Raines."[2] This reasoning is so flawed that we probably should not waste paper replying, but we will. The "Non-Piracy" agreement Raines signed provided that if he wrote any former Bottrell business within two years, he would pay 150% of the annual premium. Raines objected to enforcement of this provision as a penalty. Trustmark's insurance services' manager, former corporate lawyer Scott Woods, originally characterized it as such at his deposition. Bottrell's president Veazey signed interrogatory answers calling it an "assessment". The Chancellor agreed and at trial said "it's just a real non-incentive to do what [Raines] did". R195 So instead of being assessed a $450,000 penalty, the Chancellor popped him with a judgment twice that size. To adopt Bottrell's argument would be the same as saying that criminal statutes don't really prohibit an act; the perpetrator goes ahead with his plan; he merely goes to prison or pays a fine as a consequence.

4. Raines' Continued Employment As Sufficient Consideration. Mutuality of Obligation.

Bottrell complains that Raines merely cited a legal encyclopedia and "fails to cite a single Mississippi case" to support his contention that an "illusory promise" of future consideration which may be given or not at the will of the promisor is not sufficient

[2]Bottrell did sue for an injunction but never brought its motion on for hearing.

consideration to support a covenant not to compete. The undersigned for some reason failed to cite Krebs v. Krebs, 419 So.2d 178(Miss.1982) which is the perfect analogy to the case at bar. Mr. Krebs, insured under an auto liability policy, had in mid-policy term signed an endorsement excluding coverage for student operators other than his child in the belief that his insurer would otherwise not renew his policy at the end of the term. This Court held the endorsement unenforceable for lack of consideration since Krebs' insurer had not obligated itself to renew at expiration date and might or might not as it pleased. So now Raines has cited a Mississippi case and not just an Am Jur article.

Frierson v. Shepard Bldg. Supply Co, 247 Miss. 157, 154 So.2d 151 (1963) does on the surface bear a vague resemblance to the instant matter, but a serious reading of it demonstrates that it is utterly inapropos because of the following grossly different facts: (1) Frierson was the general manager and a shareholder in Shepard's corporation when friction between him and an assistant manager, resulting in a fight, caused Shepard to consider firing him. The parties renegotiated duties and stock options, and Shepard fired the other employee and retained Frierson who, in consideration of these significant concessions, agreed to a 2 year non-competition clause. (2) Shepard did not reduce Frierson's compensation. In this case the non-mutuality and lack of consideration of Trustmark Insurance Agency's contract with Raines allowed it to change producers' pay, which it did despite their protests and contrary to Horner's memo warning Woods that they might quit. Frierson's compensation simply grew significantly as the business expanded. (3) After Frierson left, he opened a competing business, actively solicited Shepard customers, took a significant number of Shepard employees, and even painted

his trucks the same color as Shepard's.[3] (4) Frierson and Shepard sold building materials, not professional services.

As for the mutuality issue, we will only repeat that Bottrell's contract left if free to alter compensation and that it did so. Had it not, Raines would not have left, and we would not be writing this brief.

5. "Raines Breaches Are Not Excused By Any Conduct of Bottrell"

Bottrell cites Redd Pest Control Co., Inc., v. Foster, 761 So.2d 967 (Miss. App. 2000) and argues that Bottrell's conduct did not amount to "constructive discharge" of Raines. We do not say it did. Bottrell changed its method of computing compensation so as to significantly reduce pay, and Bottrell planned future reductions which Raines knew about and agency president Veazey admitted, as acknowledged by Bottrell's trial representative(R130) and the Chancellor's holding to the contrary is without any evidence to support it. The only differences between this case and Matheney v. McClain, 248 Miss. 842, 161 So.2d 516 (Miss 1964) are (1) that Matheney's contract did fix employees' pay, while Bottrell's contract obligates it to nothing, and (2) that Matheney did not try to undo the damage after his employees decided to leave and convince the Chancellor that therefore the pay reductions were irrelevant.

D. The Damages Issue. Bottrell's Own Authorities Demonstrate The Judgment Must Be Reversed And Rendered

Even if this Court rejects all Raines' other arguments and concludes that he is the despicable thief that Bottrell claims, it must reverse and render on the damages issue

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[3]We recognize this is questionable argument, but perhaps some older members of the Court will recall that Shepard and Frierson trucks were a bright lavender color.

alone, as it did in Fred's Stores of Mississippi, Inc., v. M&H Drug, Inc., 725 So.2d 902 (Miss. 1998), where the offending defendant had actually stolen a confidential customer list and actively solicited its competitor's entire customer base.[4]

1. Actual Damages

Bottrell argues that Raines is procedurally barred in this appeal from arguing its failure to prove net profit loss because "Raines never specifically objected to Bottrell's damages calculations on grounds that they were based on gross, instead of net, commissions" and cites two cases which have nothing to do with the issue. Bottrell takes from Prestridge v. City of Petal 841 So.2d 1048, 1054 (Miss. 2003) the quote: "In order to assign an error on appeal, the issue must be raised at the trial level or it is waived." Prestridge v. Petal was an appeal from an annexation decision, and the quoted language deals with the fact that, on appeal, the objectors alleged for the first time "that Petal raised its water and sewer rates after stating to the court that it had adequate financial sources to fund its proposed improvements". The rate increase was alleged to have occurred after trial of the case, and there was nothing in the record regarding the issue. Moore v. Moore, 558 So.2d 834-838 (Miss. 1990) is a contempt case in which the exhusband, found guilty of contempt in part because of his own admissions when called as an adverse witness, claimed for the first time on appeal that the Chancellor had a duty to advise him of his privilege against self-incrimination. His lawyer had made no objection when he was called adversely, and of course was not allowed to put the court in error for not

[4]The dissenting opinion in Fred's v. M&H in no way argues that an injured business is not required to prove net profit loss; it argues that M&H did prove it with reasonable accuracy under the circumstances.

granting him a privilege he did not claim at trial. Read v. State, 430 So.2d832, 841 (Miss. 1983) involved a claim of ineffective counsel, and this Court actually held that the defendant was not required to first present the claim to the trial judge before raising it on appeal. We will shortly comment on the fact that Bottrell's main authority (Dunn, Recovery of Damages for Lost Profits) guts its argument, but the issue here is more fundamental than Bottrell admits. Proof of damages is an essential part of a suit for recovery of same; the burden is on the plaintiff, and a party has never been required to point out during the progress of a trial that his adversary is failing to prove an essential element of his case.

Bottrell argues essentially that since its expert testified that it would be improper to deduct "fixed costs" of running its agency, this means that the gross commissions lost are the same as net profit and Bottrell cites Dunn, Recovery of Damages for Lost Profits, 3d Ed. as authority. We pointed out in our Appellant's Brief that the witness (the one whose resume says he testifies for a living) was cross examined about two things: (1) Did he deduct any expenses of running the agency? to which he replied that it would be improper to deduct fixed costs; and (2) Did he deduct that part of commissions which would have been paid the producer? to which he replied with a simple "no"! Bottrell quotes Dunn to the effect that if net and gross profits are the same - that is, if there are no expenses attributable to obtaining the gross profit claimed by a plaintiff - proof of gross profit may sustain a judgment. But as noted above, the burden is on the plaintiff to prove his damages, and Dunn says this and cites Mississippi law to support his conclusion. He says :

I. NET AND GROSS PROFITS

Sec. 6.1 Net Profits

> Lost profits damages are usually defined as lost net profits; all costs must be deducted. For breach of contract, this means the contract price less cost of performance, or cost of completion, or, as it is sometimes put, "expenses saved" as a result of plaintiff's being excused from performance by the other party's breach.

Sec 6.2 [T]here are situations in which gross profits are recoverable: Gross 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.

> Sec. 6.3 C. Burden of Proof
> Plaintiffs occasionally argue that proof of expenses is a matter of mitigation of damages, and that the burden of coming forward with the evidence is on defendant. This is wrong. The evidence is part of plaintiff's case and plaintiff must prove it. A judgment in favor of plaintiff based on gross income or calculated without proper proof of all expenses must be reversed for a new trial; a judgment against plaintiff on these facts must be sustained.

After citing numerous case authorities from various jurisdictions, Dunn concludes Sec. 6.4 thus:

> Proof of net profits therefore means proof by plaintiff of both gross receipts and all allocable expenses. Without adequate evidence of expenses, plaintiff has not made out a prima facie case of damages. If only gross profits are proven, absent unusual circumstances, plaintiff has not made out its case.

The pocket supplement to sec. 6.3 of Dunn states:

> The burden of proving the expenses to be offset against gross profits to derive net profits is on the plaintiff. See Leard v. Breland, 514 So. 2d 778,784 (Miss. 1987) (citing and quoting the text)...

Leard v. Breland, supra, involved a claim brought by a dispossessed tenant against the landowner who entered and cut a growing bean crop for hay, contending that the tenant had failed to utilize proper land use practices per the written lease. The Chancellor found for Breland, the tenant, and awarded damages which included both the costs he had spent improving and preparing the entire tract of land and the gross profit an expert

projected he would have earned from so many acres of beans at the projected price per bushel. Breland failed to produce any figures for the cost it would have taken to complete cultivation, harvest and sale of the beans, so this Court reduced the judgment by the entire amount of damages awarded for lost profit. The Court cited Lovett v. Garner, 511 So.2d 1346 (Miss.1987) which we noted in our original brief points out that when a party sues for lost profit and does not meet his burden of proving net profit, judgment in his favor will be reversed and rendered against him. In so doing on the lost profits claim, the Leard court cited Dunn, supra, and stated:

> [R]ecovery of lost profits will be allowed only if their loss is proved with reasonable certainty. (Citing Lovett, another case, Dunn, and Am.Jur.) This Court can only speculate even as to whether any profit at all remains after deduction of expenses saved because those expenses have not been proved.]

We do not know, of course, exactly what expenses Bottrell did not provide in its effort to obtain the maximum possible judgment against Raines, but it is obvious that an insurance agency could hardly expect to make 100% profit on commissions lost to a departing producer. Bottrell suggests that because its expert said a couple of its costs were fixed, [5] its net profit was the same as its gross, but it is obvious that significant expenses would have to come out of every premium dollar lost because Raines refused to turn away some of his former clients; for example: producer's commission of whatever percentage the "matrix" formula would fix at the time for that particular producer assigned the account, employer's share of FICA, and unemployment taxes, 401K contributions, expense payments to the departed producer, corporate income taxes, group

[5] He said Scott Woods' salary was not reduced and he did not know if any customer service representative was laid off because Raines left. R219

insurance, bonuses and other expenses, travel, convention and continuing education fees, phone charges for a line no longer needed, fewer supplies bought, to name some of the most obvious. Though Bottrell produced no current expense figures, its own February '04 report about its general condition (Exh. 56) gives an example (unnumbered page 24) of one month's income for Dec. 2003. This shows gross commissions of $1,547,794 and "Direct Non-Interest Expense" of $1,127,780. We do not know how typical this month might be, but it is obvious that Bottrell's gross commissions are far from its net income.

2. Punitive Damages and Attorney's Fees

We will not bore the Court repeating our earlier argument on these points. Of course, with no recoverable actual damages, a judgment for punitive damages and attorney's fees cannot be sustained. And of course without proof of reasonableness and necessity, attorney's fees could not be recovered even had Bottrell proved Raines' conduct justified it. But we will make one final comment about Bottrell's brief on the subject. Mickalowski v. American Flooring, Inc., No. 2005-CA-01864-COA (May 29, 2007, petition for rehearing pending) not only constitutes no authority, but involves such dissimilar facts that one is mystified as to why opposing counsel cited it. Without discussing all the details, it is sufficient to point out that the appellant, against whom the trial judge enforced a non-competition agreement, not only sold his business to the plaintiff-appellee for $329,227 but also was paid an extra $90,000 as specific consideration for the covenant not to compete. Such an agreement would even be enforceable against a lawyer under Rule 5.6, Miss. Rules of Conduct. Polk v. Sexton, 613 So. 2d 841, 845 (Miss. 1993) is palpably unrelated to our situation, involving a man

who contracted to sell a tenant space in a building anticipating she would install expensive improvements, then decided he had not made a good deal and refused to sell while trying to keep the benefit of the large sum of money the tenant had spent. To aggravate the Chancellor further, the landlord fabricated a specious excuse for not selling and was impeached by the man he claimed knew the facts.

Conclusion

Bottrell's brief conveys a sense of outrage and implies that this State's entire insurance system will fail if its "Non-Piracy Agreement" is not enforced, but this did not happen after Thames v. Davis & Goulet, Ins., 420 So.2d 1041 (Miss. 1982) or Kennedy v. Metro.Life Ins. Co., 759 So.2d 363 (Miss. 2000). Auto damage appraisal firms are still in business 43 years after Matheney v. McClain, 248 Miss. 842, 161 S.2d 516 (1964). Law firms train young lawyers and hand them clients constantly without the protection of any kind of non-competition or "non-piracy" contracts. [6] Except for its incorrect claims that it made and threatened no significant changes in compensation, Bottrell ignores the underlying undisputed fact which gave rise to this suit - the fact that when Raines resigned, Trustmark's insurance services manager Woods sent him out the door advising that he should not think he could "buy [his] book, in whole or in part", and made him choose between a rock and a hard place. He could either refuse to serve clients and friends who would not have stayed with Bottrell anyway or be sued if he complied with their wishes. Bottrell ignores the rights of these third parties and the moral obligations

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[6] Bottrell argues that our rule is merely one of "ethics". (Appellee's brief, p. 28) Are we the only profession with ethical duties to our clients?

Raines owed them.

Bottrell's contract in restraint of trade should not be enforceable under any circumstances, and certainly not in the context of this case. It is a contract of adhesion, a contract lacking consideration and mutuality. Trustmark Bottrell actually has the temerity to argue the "value of its investment in Raines" in 1993 when Trustmark Insurance Agency, the employer named in the contract, did not even know Raines before 1999.

The undersigned has been around too long and written too many briefs to think the odds favor this Court making new law in the public policy area (though we urge it to). But John Raines, an excellent professional agent needed and valued by his clients, should not be clobbered with a million dollar judgment because he responded to their requests when Bottrell left him no alternative. And this Court has followed the law of damages even for arrogant, unfair landlords like Leard who cut his tenant's growing crop for hay and corporations like Fred's Stores of Mississippi who have criminally stolen competitor's property. When a plaintiff fails in his burden to prove damages, a judgment in his favor is reversed and rendered. Lovett v. Garner, Supra.

This, we respectfully submit, should be the result here. The judgment of the Madison County Chancery Court is contrary to established law and public policy, is based on no evidence, and should be reversed, and judgment rendered here for John Raines.

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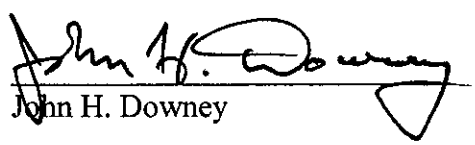
Respectively Submitted,



John H. Downey

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** has been filed in the office of the Clerk for the Supreme Court of the State of Mississippi, and a true and correct copy of the same has been served upon counsel for The Bottrell Insurance Agency, Inc., by placing same in the U.S. Mail, postage prepaid, to their usual place of business:

Mssrs. William F. Ray and Brian C. Smith
Post Office Box 650
Jackson, Mississippi 39205

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

This the 19th day of October, 2007.

JOHN H. DOWNEY, MSB [redacted]