SUPREME COURT OF MISSISSIPPI
Case # 2009-CA-00980

TIMBER LAKE FOODS, INC. — APPELLANT

VS.

STEPHANIE ESTESS — APPELLEE

APPEALED FROM THE
CIRCUIT COURT OF
LEE COUNTY, MISSISSIPPI
CAUSE NUMBER CV-08-177

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Defendant/Appellee, Stephanie Estess, hereby certifies that the following listed persons 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. Timber Lake Foods, Inc., Plaintiff/Appellant
2. Joe Estess, owner of Timber Lake Foods., Inc.
3. Stephanie Estess, Defendant/Appellee
4. Berkley Huskison, Mitchell, McNutt and Sams, P.A., Attorney for Appellant
5. John A. Ferrell & J. Deborah Martin of Ferrell & Martin, P.A., Attorneys for Appellee
6. Hon. Paul S. Funderburk, Trial Court Judge

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SUPREME COURT OF MISSISSIPPI
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RESPONSE TO STATEMENT OF FACTS

In its brief, Timber Lake Foods, Inc., Appellant (Timber Lake) sets forth certain alleged facts concerning the issues in this case. The Appellee, Stephanie Estess, (Stephanie) will throughout this brief make reference to certain facts but would add at this point in her brief the following factual information.

Stephanie was born on September 18, 1983 and at the time of her employment with Timber Lake in January of 2003, was 19 years old. (Tr. 14) (Ex. P-2)

Her prior work experience consisted of being a waitress in the restaurant industry. (Tr. 72) (Ex. P-2)

The nature of the business in which Stephanie was engaged at Timber Lake consisted of her putting together people who wanted to purchase chickens with people who wanted to sell chickens. (Tr. 15)

Stephanie acknowledged signing the employment agreement that is the subject of the litigation but signed it along with several other documents and was not familiar with the specifics of its terms. (Tr. 14)

She underwent limited training for the job and made her first sale after only having been employed there for some two weeks. (Tr.73)

She had no training but on the job training and could carry on the job with a telephone and computer. (Tr. 33, 73-74)

Her duties at Timber Lake never changed from her first day to her last (Tr. 74) and it was her personality and drive that made her a successful employee at Timber Lake. (Tr. 37,49) These attributes were brought by her to the job and were not the result of any training at Timber Lake. (Tr. 49)

Ultimately, Stephanie married the boss's son (Tr. 18) and continued in her employment with Timber Lake.

The business of Timber Lake is similar to the business of thousands of other entities who broker chickens, (Tr. 47) there are thousands of customers and hundreds of entities who process chickens. (Tr. 46)

The prices of the chickens change daily and are available to anyone using the Urner-Barry service which is the industry standard for obtaining daily quotes about chickens. (Tr. 54)

There are no exclusive suppliers to Timber Lake nor are there any exclusive customers of Timber Lake. (Tr. 75)

Everyone in the industry has basically the same information, everyone knows who the "big players" are in the industry and the "bible" for pricing that is put out on a daily basis is the Urner-Barry Report. (Tr. 54, 76-77)

Ultimately, in spite of her being an excellent employee, Stephanie was fired by Joe Estess because she was getting a divorce from the boss's son. (Tr. 39, 45-46)

All of the hundreds of suppliers and thousands of customers are throughout the entire continental United States and there are no customers of Timber Lake within 250 miles of Tupelo, Mississippi. (Tr. 60)

While the 250 mile radius is the geographic area of the no-compete agreement sought to be enforced, Joe Estess notes it has no magical meaning and there is no difference between carrying on this business next door to the Tupelo home office of Timber Lake or doing it 251 miles away. (Tr. 57)

One sales person performing the same type job as Stephanie actually resided in the state of Washington and still sold for Timber Lake. (Tr. 62)

The stated reason for the no-compete was to protect the customer base, client list, trade secrets and good will. (Tr. 56)

The real reason, however, for the no-compete was Joe Estess' desire to keep people whom he had hired and introduced to the business from competing with him. (Tr. 62)

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SUMMARY OF THE ARGUMENT

The Trial Court correctly held that the no-competition provisions of the employment contract between Stephanie and Timber Lake was unenforceable due to its being unreasonable. The basis of this decision was that the 250 mile geographic provision afforded no protection to Timber Lake as its business was national in scope, operated on using a telephone and a computer and Stephanie could just as effectively compete with Timber Lake 251 miles from Tupelo as next door to Timber Lake's office in Tupelo. Therefore, the preliminary injunction was properly denied as Timber lake could not show a substantial likelihood that it would prevail on the merits of the case.

All of the potential thousands of customers of Timber Lake are non-exclusive, there are thousands of brokers engaged in the same business as Timber Lake and there are hundreds of entities who process the chickens. Timber Lake did not show any real proprietary or confidential information that was protectable, could show no customer list or sale information that was protectable as

the price list are published daily in a national report available to all entities engaged in this business. Estess simply wanted to enforce the no-compete against Stephanie to make her move to continue to work in the industry because he employed her and trained her in the business. This cannot formulate the basis for a legitimate business interest that must be present in order for the no-compete provisions to be upheld and the Lower Court committed no error in holding that it was not enforceable.

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ARGUMENT

I. Introduction

Timber Lake correctly states what a moving party must prove in order for a preliminary injunction to issue:

1. A substantial likelihood that the movant will prevail on the merits;

2. A substantial likelihood that the movant will suffer irreparable injury if the injunction is not granted;

3. The threat of injury to the movant outweighs the threat of harm the injunction may do to the non-moving parties;

4. Granting a preliminary injunction will not disserve the public interest.

It should be noted that the relief sought by Timber Lake before the trial court was a preliminary injunction to enjoin Stephanie from continuing to work for Lawrence Wholesale, one of the thousands of competitors of Timber Lake. Stephanie was terminated on April 4, 2008, and therefore, as of the filing of the Brief of Appellee, the two year time frame of the no-compete

agreement has already passed. Therefore, the issue of preliminary injunction is now moot.

Having said this, however, it is also obvious that Judge Funderburk made a determination that Timber Lake failed to meet the first test for a preliminary injunction to wit, a substantial likelihood that the movant will prevail on the merits, with his ruling that the no-compete provision of the contract of employment between Stephanie and Timber Lake was not enforceable. (TAB B, CP 114-116)

Judge Funderburk properly noted that the 250 mile provision of the no-compete agreement was unreasonable and ineffective. The Court was correct in his finding that if Ms. Estess were required to conduct business 250 miles from Tupelo, she could continue to contact the same buyers and suppliers that she was currently doing business with at Lawrence Wholesale as well as those whom she contacted while working for Timber Lake. Therefore, the Court found that the geographic scope was unreasonable as it offered no protection to Timber Lake for any protectable interest. (TAB B, CP 115)

The Lower Court was clearly correct in its assessment of this case and the denial of the preliminary injunction should be upheld.

A. <u>The non-compete provision is unenforceable and therefore, a preliminary injunction against Stephanie is improper as Timber Lake cannot show a likelihood of success on the merits</u>.

Non-competition agreements have been viewed by the Mississippi Supreme Court as "restrictive contracts which are in restrain of trade and individual freedom and are not favorites of the law". Frierson v. Shepard Building Supply Co., 247 Miss. 157, 172, 154 So. 2nd 151, 156 (1963), cited in the case of Kennedy v. Metropolitan Life Insurance Company, 759 So. 2nd 362 ¶4 (Miss. 2000). The Court in Kennedy went on to state that only when such agreements are reasonable will be they be considered valid and upheld by the Court. The burden of proof of the reasonableness of these agreements is on the employer. (Kennedy ¶4) In addition, the Supreme Court has held that "when an employer terminates an employee in bad faith, the terms of the non-competition agreement will not be enforced." Empire Gas, Inc., of Kosciusko v. Bains 599 So. 2nd 971, 976 (Miss. 1992). It has already been noted that the reason that Stephanie was terminated had nothing to do with her job performance but was because she was divorcing the boss's son and apparently had engaged in an affair which undoubtedly was one of the reasons for the divorce. (Tr. 39, 45-46) As Joe Estess admitted, Stephanie was an excellent employee, (Tr. 37) and according to her contract of employment, firing her because she was divorcing his son, smacks of bad faith. Therefore, for this reason alone, the non-competition portion of the contract was unenforceable.

However, this alone is not the only nor the most important reason that the non-competition agreement was unenforceable as

correctly held by Judge Funderburk. (R.E. TAB B, CP 114-116) While most of the cases discuss reasonableness in relation to the duration of the restriction and the geographic distance, the cases also talk about the economic justification as being an essential element for consideration as to whether or not the non-compete agreement is reasonable or not and thus enforceable or not. In Empire Gas at page 976, the Supreme Court held: "This Court is committed to the general rule requiring the employer in a case such as this to demonstrate to the Trial Court the economic justification, the reasonableness of the restrain which is sought to be imposed." In the case of Redd Pest Control v. Heatherly 157 So. 2nd 133, 136 (Miss. 1963), the Supreme Court similarly held that the agreement would be enforceable to the extent that it is reasonable if it protects a legitimate business interest. The fact that the employee may have signed the agreement and that the employer may have trained the employee in the business have never been reasons for enforcing a non-compete agreement in any case in the State of Mississippi. Every case speaks of the requirement that the employer prove an economic justification and a legitimate interest to protect before the non-compete agreement will be enforced.

In this case, it is clear that there are no such legitimate business interests to be protected. In the pleadings filed by Timber Lake, they alleged that the business interest that they have a right to protect are confidential and proprietary information,

customer base, client list, trade secrets and good will. (CP 4-9) However, it is abundantly clear that none of those various business interest truly exist. (Tr. 57,58,62,65,76,77-78,79,82)

First, the type of business that Timber Lake is engaged in is national in scope. (Tr. 33,57,75,79-80) The proof showed that there are thousands of people engaged in the same business as Timber Lake, (Tr 47) there are thousands of non-exclusive customers that businesses such as Timber Lake sell to (Tr. 47) and there are hundreds of meat processors who process the chicken that Timber Lake seeks to sell to the customers. (Tr. 46) These thousands of brokers are all selling to basically the same customers and are buying from the same processors. (Tr. 46-47) Therefore, the allegation about desiring to maintain the integrity of their customer base and customer list is totally unfounded in fact.

All of these potential customers are non-exclusive (Tr. 75) and their names are in national publications for the benefit of the thousands of meat brokers like Timber Lake. (Tr. 54, 76-77) Further, everybody in the industry knows who the processors are and the price of chickens is published in a national market report on a daily basis, the Urner-Barry Report. (Tr. 47-77) The cost of chickens when Stephanie was fired had nothing to do with the cost of chickens the day after and the contention of Timber Lake that they need this non-compete provision to maintain the integrity of their confidential and proprietary information, customer base, client list, trade secrets and good will is simply not true.

Joe Estess was asked about one of the sales representative, Joe Buck, who was not required to sign a non-competition agreement. (Tr. 62) Estess responded that the reason Buck was not required to sign a no-compete agreement was that he had experience in the industry and therefore, it was not necessary. (Tr. 62) That one question and answer clearly reveals that there is nothing confidential, proprietary, special or a trade secret of Timber Lake different from anyone else in the industry. If there were, Mr. Buck would need to have signed the no-compete agreement regardless of his experience. The simple fact is, there is no legitimate business interest of Timber Lake to protect that is reasonably protectable.

As determined by Judge Funderburk, the 250 mile geographic restriction in the non-compete agreement at issue is unreasonable as it affords no protection whatsoever to Timber Lake. (R.E. TAB B, CP 14-16) Joe Estess admitted that his business functioned using a telephone and a computer. (Tr. 33) There are no local customers to worry about losing within the 250 mile radius and this is just an arbitrary figure that Timber Lake plugged into its non-compete agreement because typically a geographic area is included. (Tr. 58,60) In this case, the only purpose of the 250 mile radius is to require Stephanie to move 251 miles from Tupelo in order to be able to work for Lawrence Wholesale. (Tr. 65,82) There is no legitimate business interest of Timber Lake to protect within that distance, it just merely seeks to work a hardship on Stephanie, not

a legitimate business interest of Timber Lake. (Tr. 59, 82) Stephanie can compete just as effectively 251 miles from Tupelo as she can next door to the Tupelo office of Timber Lake. This being the case, there is no legitimate business interest to protect by the 250 mile provision as it is, frankly, not protectable. (Tr. 57, 58-59)

The real reason that Joe Estess wants to enforce the no-compete agreement is because he is laboring under the mis-conception that when you train someone and they work for you, it is reasonable to not allow them to work in that same industry when they leave employment. (Tr. 62) This has never been the law in Mississippi. It can only be assumed that every person who works is trained somewhat by their employer in how to do their job. However, this does not give rise to a no-compete restriction under Mississippi law unless it can be determined that there is a legitimate business interest to be protected. Redd Pest Control at ¶136

Some of the landmark cases in Mississippi have already been cited and it is certainly understandable how a local gas company in Kosciusko, Mississippi would be concerned about an ex-employee stealing their gas customers in the Kosciusko area as in the Empire Gas case. It is also understandable how Redd Pest Control Company located in Lee County, Mississippi would be concerned about an ex-employee stealing its pest control customers in the Lee County area as in the Redd Pest Control case. It is also understandable how

a building supply company in Hinds County, Mississippi would be concerned about an ex-employee stealing its customers in the Hinds County area as in the Frierson case. In spite of all this, however, and in spite of the obvious fact that these various employees were trained by these various local entities, the Supreme Court still required the analysis that has been discussed herein and held that there must be some legitimate business interest to be protected. However, in this case, all of the customers are not only known to all brokers in the industry but are nationwide and non-exclusive. That is the very reason that Judge Funderburk held the 250 geographic area in the non-compete agreement to be unreasonable as it affords no protection whatsoever to Timber Lake even if Timber Lake had information to be protected, which it does not. For this reason alone, the employment contract as noted by Judge Funderburk is unreasonable and unenforceable.

One case in Mississippi addresses to some extent this very point. In the Redd Pest Control case at Page 145, this Court held, "In short, Redd did not need to be protected throughout the state for the reasons that if Heavenly entered into competition with Redd anywhere except the Tupelo area, he would have no more advantage that any other competitor. Accordingly, we are unable to say that the Chancellor erred in holding that it would be unreasonable to restrict Heavenly throughout the state."

If Stephanie has a competitive advantage, it is because of her personal traits of having a good personality and drive Joe Estess

admitted these traits were one of the reasons that she was employed and was successful. (Tr. 37, 49) These are qualities that she brought to the table and cannot be the basis of enforcing this unreasonable no-competition agreement.

In analyzing no-competition agreements, this Court has recognized that there are three major factors to be considered, to wit: the rights of the employer, the rights of employee and the rights of the public. Texas Road Boring Company of Louisiana-Mississippi v. Parker 194 So. 2nd 885, 888, (Miss. 1967) In looking at these various interests that the Court considers, it is clear that Timber Lake has not shown a legitimate business purpose to exist justifying the enforcing of this non-compete agreement. Again, the fact that they trained her is no justification for enforcing a no-compete agreement and the fact that she is a pleasant person and a good salesman are traits of her personality and had nothing to do with training, proprietary information, etc.

To grant the injunction would have had a devastating effect on Stephanie, however. She has limited education, has limited work experience and in this particular climate jobs are hard to find. Her only skills are selling chickens and waiting on tables. The agreement as written does not prohibit her from working in competition with Timber Lake but requires her to move to do so. This is unreasonable and certainly not a legitimate business interest that Timber Lake is entitled to protect. As noted in the Empire Gas case at page 976 in speaking of the alternatives of the

employee in that case, "his alternatives were to work for Fair Propane in Ackerman or to find another job outside the 50 mile radius which would require a lengthy commute or uprooting his family from its home. An equitable balancing of the rights of the employer and employee leads us to conclude that enforcement of the agreement would have far more oppressive affect on Bain (employee) than its non-enforcement would have on Empire Gas (employer)."

Again, there has been no legitimate proof offered that the sales that Stephanie did make while working at Lawrence had any adverse affect on Timber Lake. Joe Estess testified that the chicken business was good while Stephanie noted that the economy had hurt the business significantly and referenced one of the major players having filed bankruptcy. (Tr. 79) When pressed, Joe Estess admitted that basically what he was trying to do was to force her to move in order to compete, a situation that is in no way legitimate. (Tr.65)

B. Timber Lake's reliance on the Opinion of Judge Mask is mis-placed.

Timber Lake makes mention of a decision of Chancellor, Jacqueline Estes Mask in a case involving Vector Trucking. In the first place, Timber Lake cites no authority that would justify this Court's finding that Judge Mask's decision in that case was res judicata on the reasonableness of the no-competition provisions of Timber Lake's contract. Absent a citing of authority to that effect, this point should not be considered by the Supreme Court.

In addition, that case involved a completely different business, a trucking concern, a completely different set of facts, (apparently the individual in the Vector Freight case was terminated for a legitimate cause) and all of the facts of that case are unknown. Each case must stand on its own and the reasonableness of the contract must be determined by the factual situation in each case. Empire Gas at 976 Therefore, the reliance on Judge Mask's decision is mis-placed and certainly Judge Funderburk was not bound thereby on the facts of this case.

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CONCLUSION

In conclusion, the Lower Court was correct in holding that the no-competition agreement in the employment contract between Stephanie and Timber Lake was unenforceable because it was unreasonable. The geographic distance, 250 miles, afforded no protection to Timber Lake because of the nature of the business and the national scope of the market . Timber Lake had no true business interest to protect and even if it did have, the inclusion of the 250 mile geographic restriction afforded it no protection. The sole purpose of the geographic requirement was to force Stephanie to move in order to carry on her work in the industry and requiring her to move to be employed is not a legitimate business interest that Timber Lake is entitled to protect. It only serves to work a hardship on Stephanie, contrary to the case law in Mississippi.

In conclusion, the Trial Court should be upheld in holding that the no-compete provisions of this employment contract are unenforceable and Judge Funderburk's finding thereof affirmed.

Respectfully submitted,

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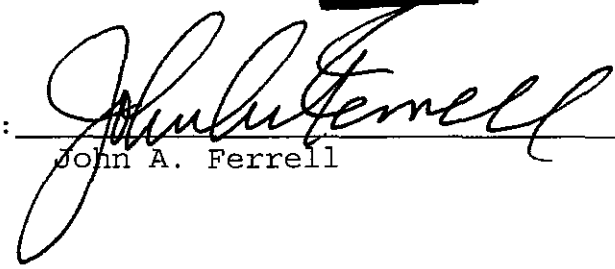
BY: 
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CERTIFICATE OF MAILING

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, the original and three (3) copies of the Brief of Appellee to Kathy Gillis the address of said Court, P. O. Box 249, Jackson, Mississippi, 39205-0249.

This the 27th day of April, 2010.

JOHN A. FERRELL

CERTIFICATE OF SERVICE

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, a true and exact copy of the foregoing Brief of Appellee to the following:

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This the 27th day of April, 2010.

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