In The

Supreme Court of Virginia

RECORD NO. 101837

HOME PARAMOUNT PEST CONTROL COMPANIES, INC.,

Appellant,

v.

JUSTIN SHAFFER and CONNOR'S TERMITE AND PEST CONTROL INC.,

Appellees.

REPLY BRIEF OF APPELLANT

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CLARIFICATION OF FACTS

Justin Shaffer ("Shaffer") and Connor's Termite and Pest Control, Inc. ("Connor's") have made the point several times that Shaffer was trained to handle dogs for the purposes of performing bed bug inspections. In fact, Shaffer and Connor's suggest that Home Paramount Pest Control Companies, Inc. ("Home Paramount") omitted this fact because Shaffer did not use dogs while employed by Home Paramount. (Appellee's Brief, p. 4). The fact that Shaffer uses a prop to perform inspections, which ultimately result in making proposals (i.e., sales) does not change the ultimate conclusion, that Shaffer was involved in inspections and sales for Home Paramount, and he is doing precisely the same thing at Connor's.

In response to a question about what Shaffer does when he is dealing with a canine, Shaffer states the following, "Then I bring the dog out and I perform my inspection." (J.A., p. 111, lines 4-5). Furthermore, Shaffer concedes that he prescribes certain treatments, and that as a result, he ultimately presents the potential customer with a proposal.

Q. Aren't you also in the business of prescribing services to treat the bed bugs?

A. Yes.

Q. And then do you prepare a contract and submit it?

A. Yes. If they'd like to receive a proposal from us I would prepare that for them.

(J.A., pp. 111-112).

Shaffer and Connor's attempt to argue that Shaffer's job is completely different at Connor's due to the use of a canine to find bed bugs is simply without merit. The essence of his job was to perform inspections and to make sales, the exact same basic job description he had at Home Paramount. Regardless of what props he uses, whether it is a canine, a flashlight, water meter, or any other prop used in the pest control industry, he is performing inspections at properties, and attempting to get the owners or managers of those properties to buy pest control services. His performance of those sales actions at Connor's in areas where he had previously done so, is exactly what Home Paramount is attempting to prevent through the use of its Non-Compete Agreement, which serves an obvious legitimate business interest.

LEGAL ARGUMENT

Shaffer and Connor's argue that Home Paramount did not meet its burden under Omniplex to establish the validity of its restrictive covenant. Home Paramount asserts that it never got a chance to do so because the trial court found that the restrictive covenant was overly broad on its face,

and did not perform the analysis required by Omniplex. (J.A., pp. 148-149). As a result, the trial court erred twice. It erred in the analysis it performed in determining the validity of the restrictive covenant and, second, ultimately erred in the conclusion it reached that the covenant was not enforceable under the facts of this case.

The dissent in the Omniplex case correctly states the status of the law, that a trial court should not limit itself in its analysis of restrictive covenants simply to whether or not they are facially reasonable.

> **Surveying precedent, we noted that we have 'not limit[ed] [our] review to considering whether the restrictive covenants were facially reasonable.' Rather, we have 'examined the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee…and the nature of the restraint in light of all the circumstances of the case.' (citations omitted).**

Omniplex World Services Corp. v. U.S. Investigation Services, Inc., 270 Va. 246, 251-252 (2005).

The Plaintiffs, and ultimately the trial court's, reliance on Modern Environments v. Stinnett finding that Home Paramount's non-compete provision is facially unreasonable or overly broad, is misguided, and does not accurately reflect the holding in that case. The Virginia Supreme Court held that Modern Environments did not provide argument or evidence of a legitimate business interest that could be served or supported by the

provisions of its restrictive covenant. "Modern offers neither argument nor evidence of any legitimate business interest that is served by prohibiting Stinnett from being employed *in any capacity* by a competing company…. In the absence of any justification for imposing the instant restraint on an employer's ability to earn a livelihood, Modern has not carried its burden of showing the restrictive covenant at issue is reasonable and no greater than necessary to protect a legitimate business interest." Modern Environments, Inc. v. Stinnett, 263 Va. 491, 495-496 (2002). As pointed out by the dissent in Omniplex, a court may not limit its analysis of the enforceability of a restrictive covenant simply to the language of that covenant, but must apply the three-prong test which is the established analysis of restrictive covenants in Virginia and has been for years. "In a more recent case, Modern Environments, Inc. v. Stinnett, 263 Va. 491, 494-495 (2002), we affirmed our view that a court may not determine the enforceability of a restrictive covenant which prohibits a former employee from working for a competitor in any capacity by the language of the covenant alone." Omniplex, 270 Va. 246, 251.

In this case, Home Paramount is simply asking this court to require the trial court, and all trial courts in the Commonwealth of Virginia, to perform the analysis and an evaluation of restrictive covenants fully and

completely based on the standards developed by the Virginia Supreme Court over many years. "These standards have been developed over the years to strike a balance between the employee's right to secure gainful employment and the employer's legitimate interest and protection from competition by a former employee based on the employee's ability to use information or other elements associated with the employee's former employment." Omniplex, 270 Va. 246 at 249. The standards applied by the court in reviewing covenants not to compete are as follows, "A non-competition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interests, is not unduly burdensome under the employee's ability to earn a living, and is not against public policy." Id. There is no dispute that this is the law in Virginia, and Home Paramount asserts that the trial court failed to apply these standards and perform the proper analysis in reaching its conclusion in this case.

Home Paramount will review this three-part test in reverse order. Starting with the public policy question, there does not appear to be a dispute that the non-compete provision in this case is not against public policy. Non-compete provisions in sales employment relationships are commonplace. As mentioned in Home Paramount's brief, a similar non-

compete provision was enforced on behalf of a pest control company more than 20 years ago. Paramount Termite Control Co., Inc. v. Rector, 238 Va. 171 (1989). A review of the transcript of the Plea in Bar hearing and, in particular, the court's questions and ultimate findings reflect that the court never considered the public policy element in examining the restrictive covenant. (J.A., pp. 139-149). This, in and of itself, is an error in light of the court's well-established standards in this area of the law. If the trial court were to consider the public policy issue, as mentioned above, restricting sales force from working for competitors and dealing with the former employer's customers, is well within acceptable public policy and, in fact, good public policy as it protects the hard work of establishing a sales-related business.

Home Paramount clearly met its burden with regard to the second point in that the non-compete covenant, and the application of that covenant, does not unduly burden Shaffer's ability to earn a living. At no point did Home Paramount contest that Shaffer's employment with Connor's violated the covenant not to compete. Home Paramount's argument was that Shaffer's employment with Connor's which involved directly or indirectly the counties and cities that he worked in for Home Paramount prior to his employment with Connor's violated the non-compete

clause. In fact, the record reflects that Shaffer understood that he could work in a number of areas in Northern Virginia as a salesman/inspector without violating his non-compete agreement. (J.A., pp. 114-115). As a result, it is clear based on the record in this case that there is no undue burden on Shaffer's ability to earn a living in the field that he was trained, and has worked in for several years.

The last inquiry is whether or not the contract is narrowly drawn to protect an employer's legitimate business interest. As set forth above in the Modern Environments v. Stinnett case, the employer Plaintiff did not make an argument, or provide evidence with regard to the legitimate business interest it was protecting. Stinnett at 495-496. In this case, there is ample evidence in the record that Home Paramount had a legitimate business interest, and the restrictive covenant that it was using to enforce that interest was sufficiently drawn to protect it.

As set forth in Omniplex, the court prefaced its analysis as follows, "Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved." Omniplex at 249. Again, the trial court's holding reflects that that type of analysis was not performed in this

case and is another instruction or direction that should be provided to the trial court should this case be reversed and/or remanded.

Home Paramount's legitimate business interest is to prevent former employees and, in particular, salespersons from using information obtained while employed at Home Paramount to establish a competitive edge with a competitive business. In this case, Shaffer went from a sales inspector for Home Paramount to a sales inspector with Connor's. Connor's is a direct competitor of Home Paramount's. This case would never have been brought if information was not provided to Home Paramount that Connor's had begun soliciting business from former customers serviced directly by Shaffer. (J.A., pp. 4, 102-105). In particular, Shaffer was crucial with regard to soliciting business from Landmark Terrace while employed at Home Paramount. Id. Landmark Terrace was not a client of Connor's prior to Shaffer coming to work at Connor's (J.A., p. 96), and Connor's knew that Landmark Terrace was a client of Home Paramount's because Shaffer told them that. Id. After Shaffer arrived at Connor's, Connor's made a proposal to Landmark Terrace. (J.A., p. 93). That proposal was directed to the manager, Cathy Karver, whom Connor's had no prior relationship with, or even knew her name prior to Shaffer's employment with Connor's. (J.A., pp. 93-94).

This record, and the specific facts of this case and reasonable inferences that can be drawn therefrom, reflect that after Shaffer's employment with Connor's, a big corporate client of Home Paramount's was being solicited directly by Connor's, and indirectly with the help of Shaffer. Restrictive covenant, paragraph 5 of the employment agreement was drafted specifically to prevent this scenario. (J.A., p. 17). By using the all-inclusive words which were criticized by the trial court, i.e., "or in any manner whatsoever," Home Paramount was attempting to prevent this type of indirect competition by former salesmen/inspectors. Id. Again, if Shaffer's actions did not occur with regard to Home Paramount's clients, or in an area where Shaffer had previously worked, Home Paramount would not, nor could they, be enforcing their non-compete covenant. Since there is evidence that Shaffer was competing with Home Paramount through Connor's and not only in an area where he previously worked for Home Paramount, but for customers he directly serviced while at Home Paramount, it is clear that Home Paramount does have a legitimate business interest that it is protecting with the use of the restrictive covenant. As a result, Home Paramount's covenant, and its attempt to enforce the covenant, does meet all three of the criteria established by the Virginia Supreme Court in evaluating restrictive covenants.

Plaintiff's and the trial court's attempt to use hypothetical scenarios in an effort to support its holding that the Home Paramount restrictive covenant is overly broad on its face is also inappropriate. In essence, the court is providing an advisory opinion based on facts that are not part of the record. Shaffer was not employed by Connor's as a janitor, mechanic, or dog food supplier. Shaffer was employed by Connor's as a salesman/inspector with his main task to make proposals, and close sales, with potential customers.

Courts are not permitted to make advisory opinions. Virginia courts can only review cases that are "justiciable," i.e., those involving "specific adverse claims, based upon present rather than future or speculative facts, [that] are ripe for judicial adjustment." Blue Cross and Blue Shield of Va. v. St. Mary's Hosp. of Richmond, Inc., 245 Va. 24, 35, 426 S.E.2d 117, 123 (1993) (quoting City of Fairfax v. Shanklin, 205 Va. 227, 229, 135 S.E.2d 773, 775 (1964). Courts are not authorized to issue advisory opinions "on a moot question based on speculative facts," Commonwealth v. Harley, 256 Va. 216, 219, 504 S.E.2d 852, 854 (1998), or to "answer inquiries that are merely speculative." Tracey v. Smithfield Foods, Inc., 256 Va. 97, 104, 500 S.E.2d 503, 506 (1998). That is exactly what the trial court has done in this particular case, which is, again, error on its part. This type of analysis

should not be permitted. Direction and clarification by this court, to trial courts, will assist the trial courts in performing the appropriate evaluation of restrictive covenants going forward.

CONCLUSION

Home Paramount asserts that the record is sufficient for this court to reverse the trial court, and find that Home Paramount's non-compete covenant is enforceable as a matter of law. In the alternative, Home Paramount requests that this Honorable Court remand this case to the trial court, with instructions for the trial court to perform the proper analysis in determining whether or not the contract is enforceable based on the criteria established by the Virginia Supreme Court.

WHEREFORE, based on the aforegoing, Home Paramount Pest Control Companies, Inc. respectfully requests that this Honorable Court reverse the trial court's ruling and find that the covenant not to compete is enforceable as a matter of law or, in the alternative, remand this matter directing the trial court to perform the appropriate analysis required by the Virginia Supreme Court.

Respectfully Submitted,

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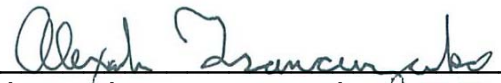
CERTIFICATE PURSUANT TO RULE 5:26(h)

The Appellant certifies the following pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, as amended:

The Appellant requests to state orally its arguments in support of this Appeal.

I hereby certify that fifteen (15) paper copies, and one (1) electronic copy on CD, of the foregoing Appellant's Reply Brief were hand-filed with the Clerk of the Supreme Court of Virginia, and that the required number of bound copies, and one electronic copy on CD, of the same were served, via UPS Ground Transportation, to Charles Sickels, Esq., Va. Bar # 13954, Hall Sickels Frei & Mims, PC, 12120 Sunset Hills Road, Suite 150, Reston, VA 20190, (703) 925-0500 (Telephone), (703) 925-0501 (Facsimile), chuck.sickels@hallandsickels.com, on this 25th day of March, 2011.



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