Supreme Court CASE ANALYSIS

A SNAPSHOT OF THE NEVADA SUPREME COURT'S MOST RECENT RESTRICTIVE COVENANTS DECISION:

WHAT IS CLEAR AND WHAT REMAINS BLURRY?

BY EDWIN A. KELLER, JR., ESQ.

As the State Bar's Labor and Employment Law Section continues its efforts to establish an Amicus Brief Sub-Committee, I am left wondering whether an amicus curiae brief would have been useful to the Nevada Supreme Court as it confronted the unique and interesting restrictive covenant issues in *Finkel v. Cashman Professional, Inc. et. al.,* 128 Nev. ___, 270 P.3d 1259 (2012), a case involving the terms of a consulting agreement between professionals in the wedding photography business.

Case Summary

Between 2001 and 2008, Marc Finkel was employed in executive positions at Cashman Professional, Inc. (Cashman). When Finkel left his employment with Cashman in 2008, the two parties entered into a consulting agreement containing restrictive covenants prohibiting Finkel from engaging in a competing business, disparaging Cashman, soliciting Cashman's employees and disclosing Cashman's confidential information.

In early 2009, Finkel purchased a printing company called IQ Variable Data, LLC (IQ), the only printing company in Las Vegas providing overnight printing of wedding photo books. Finkel also enlisted several Cashman employees to help at IQ and approached at least two of Cashman's customers to solicit their wedding photo and print production work. Cashman filed suit alleging breach of the agreement and seeking a preliminary injunction to enforce its restrictive covenants. The district court issued a preliminary junction in August 2009. Subsequently, Finkel terminated the consulting agreement and asked the district court to dissolve the preliminary injunction as the restrictive covenants only applied while the agreement was in effect. In January 2010, the district court denied Finkel's motion, finding the termination of the agreement did not end the district court's authority to protect Cashman from unfair competition. Finkel appealed both the initial order granting the preliminary injunction and the order declining to dissolve it.

On Appeal

In considering the issues on appeal, the Nevada Supreme Court decisively concluded that:

1. The preliminary injunction issued by the district court judge was supported by substantial evidence of the precise sort of conduct that would cause Cashman to suffer irreparable harm; and
2. Cashman had demonstrated a reasonable likelihood of success on the merits as to Finkel breaching the agreement and misappropriating trade secrets.

Noncompetition and Nonsolicitation Covenants Mooted

As an issue of first impression, the court agreed with Finkel that the district court should have dissolved the preliminary injunction upon his termination of the agreement because the restrictive covenants were no longer in force. It concurred with the Ninth Circuit's analysis in *Economics Laboratory, Inc. v. Donnolo*, 612 F.2d 405, 408-09 (9th Cir. 1979) that the majority of courts having considering this type of situation decline to enforce a noncompete provision after the period set forth in the agreement expires. Thus, the court concluded that the district court abused its discretion by denying Finkel's motion to dissolve the injunction to the extent it restricted Finkel's business activities based on the terminated agreement.

Continued Viability of Injunction Based Upon Likely Trade Secret Violations

With respect to the second, independent basis for the district court not dissolving the preliminary injunction,

Finkel's likely misappropriation of Cashman's trade secrets, the court recognized such a reason could constitute a valid ground for maintaining the injunction. The court noted that injunctions under Nevada's Uniform Trade Secrets Act must be terminated when the trade secrets at issue cease to exist, but may be continued for an additional reasonable period of time to eliminate commercial or other advantage that otherwise would be derived from their misappropriation. Thus, the court remanded the case back to district court to make additional, necessary factual findings concerning the extent Cashman's contracts, customer lists, process, and prices remained protected as trade secrets and, assuming that trade secrets are found to exist, to articulate a duration for extending the injunction pursuant to statute.

The Potential Value of Amici Curiae

Case Law Addressing Equitable Extensions of Expired Noncompetition Covenants

One area where friends of the court may have provided some additional context for the court's consideration is related to the Ninth Circuit's rigid position in *Donnolo* that "[t]here is no reason ... to enforce a covenant which is no longer in effect" and its assertion that "the other courts which have considered the matter are, with one exception, unanimous in declining to grant an injunction to enforce an agreement by a former employee not to compete after the period during which the employee agreed not to compete." The current legal landscape is far more complex and diverse than suggested by the holding in *Donnolo*.

There is definitely a split of authority on the issue of equitable

continued on page 42

A SNAPSHOT OF THE NEVADA SUPREME COURT'S MOST RECENT RESTRICTIVE COVENANTS DECISION

continued from page 41

extensions, with a substantial number of courts holding that an action to enforce a noncompetition covenant is mooted by the lapse of the original restriction period. But, there is also a sizeable number of cases in which the duration of an injunction is extended past the termination date specified in the noncompetition covenant to equitably make up for the time during which the covenant was violated. These are also separate from the various decisions extending the noncompete period as a remedy for violating an injunction[1].

Thus, where plaintiffs have acted promptly and made a sufficient showing of irreparable harm, but will only have the benefit of an injunction for a fraction of the time specified in their agreement, courts have found it necessary and appropriate to use their equitable powers to extend the restraint period so as to accomplish full and complete justice between the parties[2].These cases also reinforce the fact that a rigid adherence to the restraint period would encourage defendants to inject delay into their litigation with the purpose of using up as much of the original restraint period as possible.

Reevaluating Contractual Tolling and Extension Clauses

Given the ruling in Finkel, the district courts are likely to see more cases involving employers who have reexamined and revised their noncompete and nonsolicitation agreement language to add contractual tolling and/or extension clauses that extend the restriction period while litigation is pending and during any time the former employee is violating the agreement.

The Implicit Recognition of the Applicability of Noncompete and Nonsolicitation Restrictions to Independent Contractors

In the blurry background of the Finkel case, there is another murkier "first" for the court – the implicit recognition that noncompetition, nonsolicitation and confidentiality provisions are enforceable against independent contractors.

However, the precedential value of this case, as it pertains to independent contractors, is low. Before Finkel was a consultant/independent contractor, he was a key employee of Cashman and the vast majority of his knowledge of sensitive information and trade secrets came from his prior executive level employment, not from his role as a consultant. Thus, it is far from clear whether the court would take the same approach in a restrictive covenant case involving an independent contractor who was not previously an employee of the plaintiff or whether it would utilize some other modified analysis to assess the appropriateness of injunctive relief. ■

1. *See* 2 Callmann on Unfair Comp., Tr. & Mono § 16:22 at fn. 5 & fn. 5.25 (4th Ed. & Aug. 2013 Update); *JAK Product, Inc. v. Wiza*, 986 F.2d 1080, 1090 (7th Cir. 1993) (affirming grant of one-year preliminary injunction running from date of issuance because to do otherwise would effectively reduce contractual period from one year to eight months); *Roanoke Eng'g Sales Co., Inc. v. Rosenbaum*, 290 S.E.2d 882, 885-87 (Va. 1982) (seeking injunctive relief comparable to that in underlying covenant, but commencing on the date of final decree, after lapse of original noncompetition period will not moot action).
2. *Presto-X Co. v. Ewing*, 442 N.W. 2d 85, 90-91 (Iowa 1989).

EDWIN A. KELLER, JR. serves as the chair of the State Bar of Nevada's Labor and Employment Law Section. He is a partner/shareholder at Kamer Zucker Abbott in Las Vegas, where he provides labor and employment law advice counsel, and litigation representation to employers and executives.