

IN THE SUPREME COURT OF FLORIDA

THOMAS R. CAPRARO,

Defendant/Petitioner,

v.

Case No. 65,125

LANIER BUSINESS PRODUCTS, INC.,

Plaintiff/Respondent.

FILED

SID J. WHITE

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ON PETITION FOR DISCRETIONARY REVIEW
OF THE DECISION OF THE FLORIDA
FOURTH DISTRICT COURT OF APPEAL

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk *pl*

INITIAL BRIEF ON THE MERITS OF
DEFENDANT/PETITIONER, THOMAS R. CAPRARO

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STATEMENT OF THE CASE AND OF THE FACTS

THE NATURE OF THE CASE

The case, sub judice, is an action for injunctive relief and damages based upon an alleged violation of a non-competition agreement contained within a form employment agreement. This proceeding seeks review of the order of the Florida Fourth District Court of Appeal which affirmed the Trial Court's Order of October 14, 1983, which granted the Plaintiff's application for a temporary injunction enforcing the non-competition provisions of the employment agreement.

THE COURSE OF THE PROCEEDINGS

Plaintiff, Lanier Business Products, Inc. ("Lanier") filed the Complaint in this action on September 7, 1983. [Appendix pages 1-4]. A Complaint was served on the Defendant, Thomas R. Capraro ("Capraro") on September 17, 1983. [Appendix page 6]. The summons and complaint served upon Capraro was accompanied by a "Notice of Application for Temporary Injunction" giving notice of a hearing to be held on October 12, 1983. [Appendix page 5]. However, no "Application for Temporary Injunction" was ever served or filed [Appendix pages 89-90].

On October 7, 1983, Capraro served an answer and affirmative defenses denying the operative allegations of the Complaint and raising seven affirmative defenses. [Appendix pages 7-13]. Simultaneously, Capraro served and filed a motion

for a continuance of the hearing scheduled for October 12, 1983. [Appendix pages 14-15].

On October 11, 1983, the trial court orally announced its Order denying Capraro's motion for a continuance, which denial was incorporated in a written order signed October 12, 1983. [Appendix page 16]. On October 12, 1983, an evidentiary hearing was held pursuant to Lanier's Notice of Application for Temporary Injunction. [Appendix pages 17-87]. On October 14, 1983, the Court signed the Order granting Lanier's Application for Temporary Injunction. [Appendix page 88]. Lanier posted the bond required by the Order on November 3, 1983. [Appendix page 90].

On November 9, 1983, Capraro appealed the Order granting Plaintiff's Application for Temporary Injunction to the Florida Fourth District Court of Appeal pursuant to Fla.R.App.P. 9.130(a)(3)(B). [Appendix page 91]. On February 29, 1984, the Florida Fourth District Court of Appeal entered its decision affirming the trial court's order. A copy of the decision as published in Capraro v. Lanier Business Products, Inc., 445 So.2d 719 (Fla. 4th D.C.A. 1984) appears at pages 92-95 of the Appendix.

On March 30, 1984, Capraro petitioned this Court to review the decision of the Fourth District Court of Appeal because of an express and direct conflict with the decisions of other District Courts of Appeal and the Supreme Court on the same

questions of law. On October 24, 1984, this Court accepted jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A) (iv).

SUBSTANTIVE FACTS

The Complaint alleged Lanier and Capraro entered a contract on January 11, 1982, whereby Capraro became employed by Lanier. [Complaint paragraph 3; Appendix page 1]. A copy of the alleged contract is attached to the complaint. [Appendix pages 3-4]. The non-compete language in the alleged contract states as follows:

5. For the reasons recited above,
Employee covenants and agrees that:

* * *

(c) For a period of one (1) year after termination of employment hereunder, whether such termination is at the instance of Company or Employee, Employee will not, directly or indirectly, on Employee's own behalf or for others, demonstrate or sell in the Territory products or services that are competitive with the Products;...

[Appendix page 4, emphasis supplied]. The terms "Territory" and "Products" are defined in the alleged contract attached to the Complaint as follows:

1. For the purposes of this Agreement, the following definitions shall apply:

* * *

(c) "Territory" shall mean the geographical area served by the Company's Ft. Lauderdale office,

such area consisting of the following Counties in the indicated State or States: Broward, Palm Beach, Okeechobee, Martin, Indian River.

(d) "Products" shall mean the following product lines, and related supplies and services, carried by the Company: text editing, dictating, telephone answering, computer.

The foregoing definitions of Territory and Products may be altered from time to time by the mutual agreement of the parties, such alteration and agreement being evidenced by the execution of a written amendment to this agreement.

[Appendix page 3]. Notwithstanding the limited scope of the alleged anti-competitive covenant contained within the alleged contract, Lanier demanded an injunction (1) restraining Capraro from working for Lanier's competitor, Wang Laboratories Corporation, or any other competitor of Lanier and (2) a final judgment perpetually enjoining Capraro from working for any competitor of Lanier. [Appendix page 2].

In his answer and affirmative defenses, Capraro denied the document attached to the complaint constituted a contract, denied he has been or will be selling the same types of products as Plaintiff, denied that Plaintiff has suffered or will suffer any loss of revenue, loss of contracts, loss of customers or dissemination of modes of operation and trade secrets by virtue of his employment by Wang Laboratories, Inc., denied he was ever

advised of any confidential modes of operation or trade secrets, denied Lanier had suffered any injury whatsoever as a result of his actions, and stated certain affirmative defenses. [Appendix pages 7-9]. The affirmative defenses included:

1. The Complaint fails to state a cause of action.
2. Fraud in the inducement.
3. Unilateral modification by the Plaintiff. (Lack of mutuality of obligation)
4. Unconscionability.
5. Unreasonableness of the length of the noncompetition covenant.
6. Unclean hands.
7. Lack of equity.

[Appendix pages 9-12].

At the evidentiary hearing on October 12, 1983, it was undisputed that during Capraro's tenure as a sales representative for Lanier, he was permitted to sell only word processing products, as opposed to dictating, telephone answering, and computer products. [Appendix pages 42-43].

It was further undisputed that Capraro was permitted to sell only in the territory bounded on the north by Blue Heron Boulevard in Riviera Beach, Florida, and on the south by Sixth Avenue South in Lake Worth, Florida, all within Palm Beach County, as opposed to Martin, Indian River, Okeechobee and Broward counties. [Appendix page 42]. It was likewise

undisputed that at the time Capraro executed the document attached to the Complaint he was told by the authorized representative of Lanier who hired him that he did not have to worry about the non-compete provision. [Appendix page 65]. It was further undisputed that two of Lanier's management employees who were Capraro's supervisors during his employment with Lanier told Capraro that it was the history of the Ft. Lauderdale district of Lanier not to pursue non-compete provisions in its contracts and that Capraro relied upon these statements in deciding to leave Lanier to join Wang Laboratories, Inc. [Appendix pages 67-68]. It was also undisputed that Lanier had substantially identical contracts with at least seven other employees who had performed work substantially identical to the work done by Capraro who left to join competitors of Lanier and that Lanier had sued none of them on the non-compete agreement. [Appendix pages 52-55]. It was likewise undisputed that Capraro had relied in part upon the inactivity of Lanier in failing to pursue these other seven former employees of Lanier in deciding to leave Lanier and join Wang Laboratories, Inc.

It is clear from the face of the alleged contract itself, that the non-competition covenant was dependent upon promises of Lanier to provide Capraro with "trade secrets" and "confidential information" giving him a competitive advantage. [Appendix pages 46-47; Exhibit 1 to the Complaint, paragraph 4; Appendix page 3]. Capraro denied ever getting any such information from

Lanier. [Appendix pages 8-9]. Moreover, at the hearing, Lanier's representative admitted that all information given to Capraro by Lanier during his employment by Lanier was intended to be divulged to the public. [Appendix pages 51-52].

At the hearing, the only evidence supporting Lanier's allegation of "imminent irreparable harm" was the testimony of Lanier's employee, James E. Creedon, as follows:

Q. (By Mr. Zeidel) Do you know if there will be any loss of income at this time as a result of, if Mr. Capraro breaches the contract?

A. (By Mr. Creedon) Yes, in the sense that he will be selling a competitive product and having knowledge of the accounts and our products and where they fit in, I would assume that will happen, yes.

Q. Can you put a dollar amount on that?

A. No, I have no way of doing that.

[Appendix pages 40-41].

At the close of the evidentiary hearing, the Court announced its intention to enter an order granting Plaintiff's Application for Temporary Injunction, and on October 14, 1983, such an Order was executed. [Appendix page 87]. The Order "specifies its reasons for entry" as follows:

The Court having heard the testimony of representatives of Lanier Business Products, Inc., Thomas Capraro, Peter Vasil, and argument of counsel, finds that the present employment of Thomas

Capraro is in violation of his employment agreement with the Plaintiff.

The restraining portions of the order prohibited Capraro from demonstrating or selling in Broward, Palm Beach, Okeechobee, Martin, or Indian River counties, notwithstanding the fact that it was undisputed that Capraro never sold or demonstrated in Broward, Okeechobee, Martin, or Indian River counties for Lanier. The restraining portion of the order further prohibits Capraro from selling products "competitive with Plaintiff's text editing, dictating, telephone answering, or computer products" notwithstanding the fact that it was undisputed that Capraro never sold anything other than "text editing" products for Lanier.

Final trial of the merits of this action has never been held. Moreover, this Court may take judicial notice of the fact that the entire one year period of the noncompetition covenant has expired. However, the issues presented in this appeal remain an active, justiciable case and controversy because, as a condition of the order granting the temporary injunction, Lanier posted a bond in the amount of \$15,000.00 conditioned for the payment of costs and damages sustained by Capraro if it should be determined that Capraro was wrongfully enjoined or restrained. Thus, if this Court reverses the decision of the Florida Fourth District Court of Appeal and hence, the decision of the Trial Court, the case should be remanded for proceedings

to enforce the claims of Capraro against the bond and Lanier. If the case is affirmed, remand would be for the sole purpose of taxation of costs. However, in no event should the matter be remanded for relitigation of the issues which are the subject of this appeal.

ARGUMENT

I. INTRODUCTION

This appeal concerns the issuance of a preliminary injunction pursuant to Fla.R.Civ.P. Rule 1.610. It is clearly the law of Florida that the issuance of a preliminary injunction is an extraordinary and drastic remedy which should be granted sparingly. Islandia Condominium Association, Inc. v. Vermut, 438 So.2d 89 (Fla. 4th D.C.A. 1983); Contemporary Interiors, Inc. v. Four Marks, Inc., 384 So.2d 734 (Fla. 4th C.D.A. 1980). Capraro submits the trial court, sub judice, erred in granting Lanier's application for a temporary injunction in that (1) the order was not based upon a clear showing of imminent irreparable harm, a clear legal right, an inadequate remedy at law, or proper consideration of the public interest; (2) the order granting Lanier's application for temporary injunction fails to specify the reasons for its entry as required by Fla.R.Civ.P. Rule 1.610(d); and (3) the scope of the injunction which was entered was overbroad under even the most liberal interpretation of the proofs presented by Lanier. Capraro further submits the

Fourth District Court of Appeal, sub judice, erred in affirming the trial court's order.

II. PLAINTIFF'S APPLICATION FOR TEMPORARY INJUNCTION SHOULD NOT HAVE BEEN GRANTED

A. SINCE THERE WAS NO CLEAR PROOF OF RESULTING IRREPARABLE INJURY, THE APPLICATION FOR TEMPORARY INJUNCTION SHOULD HAVE BEEN DENIED

It is clearly the law of Florida that:

The issuance of a preliminary injunction is an extraordinary and drastic remedy which should be granted sparingly. A preliminary injunction must be based upon: (1) irreparable harm, (2) a clear legal right, (3) an inadequate remedy at law, and (4) considerations of the public interest...

Islandia Condominium Association, Inc. v. Vermut, 438 So.2d 89 (Fla. 4th D.C.A. 1983)[quoted above]; Contemporary Interiors, Inc. v. Four Marks, Inc., 384 So.2d 734 (Fla. 4th D.C.A. 1980) ["Although Plaintiff introduced evidence at the hearing indicating Defendant[s]... breach of the contractual provision in question, it presented no evidence regarding its allegation of irreparable harm"]. Uni-Chem Corp. of Fla., Inc. v. Maret, 338 So.2d 885 (Fla. 3d D.C.A. 1976 ["(... §542.12, Fla. Stat.)... does not negate the necessity of showing irreparable harm as a prerequisite to the granting of a temporary injunction"]. In the case at bar, there not only was no finding of "irreparable harm or an inadequate remedy at law," there was no evidence submitted sufficient to support such

conclusions. Therefore, the order granting the application for temporary injunction should be reversed.

As set forth in the Statement of the Case and of the Facts, supra, the only evidence adduced at the hearing which even arguably supports Lanier's conclusory allegation of the danger of irreparable harm was the uncorroborated testimony of James E. Creedon who stated that he "would assume" that there would be loss of income "if Mr. Capraro breaches the contract". [Appendix pages 40-41]. Likewise, there was no evidence of the lack of an adequate remedy at law except the further uncorroborated testimony of the same witness that he had "no way" of putting a "dollar value" on the losses which he "assumed" would happen. [Id.] Capraro submits the foregoing "proof" is totally inadequate to establish "irreparable injury" or "inadequate remedy at law" as required to comply with the rule that preliminary injunctions are extraordinary and drastic remedies which should be granted sparingly. Therefore, the order granting the preliminary injunction should be reversed.

The Fourth District Court of Appeal, sub judice, relying upon its earlier decision in Silvers v. Dis-Com Securities, Inc., 403 So.2d 1133 (Fla. 4th D.C.A. 1981), ruled that in temporary injunction cases involving noncompetition agreements "irreparable injury is presumed" and "money damages, if susceptible of reasonable proof, may not compensate for all aspects of such a violation." Capraro v. Lanier Business

Products, Inc., 445 So.2d 719 (Fla. 4th D.C.A. 1984) at 721. Thus, the decision sub judice, creates in the Fourth Appellate District of Florida, an exception from the time honored rules relating to preliminary injunctions whenever a non-competition agreement between an employer and an employee is involved. However, this is not the case in at least the Third Appellate District of Florida. See, Uni-Chem Corp. of Fla., Inc. v. Maret, supra. This conflict between the Fourth District Court of Appeal and the Third District Court of Appeal was acknowledged by the Fourth District Court of Appeal in the Silvers case, supra. Capraro submits the judicial exception to the rules relating to preliminary injunctions created by the Fourth District Court of Appeal and relied upon sub judice is unjustified, and should be eliminated by this Court to restore the historical uniformity of the law of Florida on this point.

In Silvers, supra, the Fourth District Court of Appeal, after reciting the normal rules for a grant of a preliminary injunction, noted:

We point out this general rule as a starting point only, with the admonition that proceedings involving §542.12, Florida Statutes (1979) appear to operate under modified guidelines. The rule is set out in Hunter v. North American Biologicals, Inc., 287 So.2d 726 (Fla. 4th D.C.A. 1974). In that case, we said that in order to state a cause of action to enforce a covenant falling within the

purview of the statute, it was necessary only to allege:

- (a) the contract
- (b) the appellant's intentional direct and material breach thereof
- (c) no adequate remedy except by injunctive relief.

The Court, when considering a motion to dismiss, must accept these allegations as true. The allegations are sufficient to state a cause of action under the statutes. Id at 728. The Complaint in the instant case meets these criteria and is therefore sufficient. Implicit in our holding is a recognition that irreparable injury may be presumed in cases involving violation of a covenant not to compete or not to divulge trade secrets. It need not be alleged nor proved.

Silvers, supra, 403 So.2d at 1136. The only possible explanation for this language is a misreading of former Section 542.12, Fla. Stat. (now Section 542.33, Fla. Stat.).

The statute in question reads, in pertinent part as follows:

(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise and as provided by subsections (2) and (3) hereof, is to that extent void.

(2)(a)... one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such

employer within a reasonably limited time and area... so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction. [emphasis supplied].

* * *

Section 542.33, Fla. Stat. (1983). The foregoing language is contained within Chapter 542, Fla. Stat., which is entitled "Combinations Restricting Trade or Commerce". The purpose of the chapter is stated in Section 542.16, Fla. Stat., as follows:

The Legislature declares it to be the purpose of this act to complement the body of Federal law prohibiting restraints of trade or commerce in order to foster effective competition. It is the intent of the Legislature that this act be liberally construed to accomplish its beneficial purpose.

The main substantive provisions of the act are similar to Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2. This fact is acknowledged in Section 542.32, Fla. Stat., which states:

It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the Federal Courts relating to comparable Federal Antitrust statutes. In particular, the failure to include in this chapter the substantive provisions of Section 3 of the Clayton Act, 15 U.S.C. Section 14, shall not be deemed in any way to limit the

scope of Section 542.18 or
Section 542.19.

Thus, in order to properly interpret any provision of Chapter 542, it is necessary to think in terms of the Federal Antitrust laws and the concepts relating to them.

From that vantage point, it is obvious that Section 542.33(1), Fla. Stat., is a Legislatively created per se antitrust rule. Compare Northern Pacific Railway Co. v. U.S., 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d. (1958). Likewise, Sections 542.33(2) and (3) are Legislatively created "reasonable business justification" exceptions to the terms of Section 542.33(1). See, e.g., Continental TV v. G.T.C. Sylvania, Inc., 433 U.S. 36, 975 S.Ct. 2549, 53, L.Ed.2d 568 (1977). If that is the case, Capraro submits, (1) the reasonableness of the including a non-competition covenant in an employment agreement, ab initio, (2) the reasonableness of the time of a non-competition covenants, and (3) the reasonableness of the area of any non-competition covenant, must be independently proven by the plaintiff, and may not be inferred from the language of the contract containing the non-competition agreement standing alone.

More importantly, however, nothing contained within Section 542.33, Fla. Stat., suggests that a court must enforce a reasonable non-competition agreement under any circumstances. Rather, the plain language of the statute says:

... said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.

Thus, discretion of the court must always be involved.

Moreover, since no special rules for the granting or denial of injunctions are set forth in the statute, the normal rules for the granting or denial of injunctions must be inferred to be incorporated by reference into the statutes.

The Florida Fourth District Court of Appeal, however, by its holdings, sub judice, in Silvers, supra, and in Hunter v. North American Biologicals, Inc., 287 So2d 726 (Fla 4th DCA 1974) for all intents and purposes, removes the discretion of the court whenever the barest allegations in support of a claim have been made and the barest evidence and support of those allegations has been proffered. Moreover, in the same cases, the Fourth District Court of Appeal suggests that the standard rules for the granting and denial of injunctions and preliminary injunctions do not apply to actions to enforce non-competition agreements apparently because the Legislature has sanctioned the use of injunction to enforce such agreements. As appears, supra, such a position is not supported by either the language of the statute or the various statutory declarations of legislative intent contained within Chapter 542.

Thus, the holding sub judice, as well as the holdings in Silvers v. Dis-Com and Hunter v. North American Biologicals should be quashed and the decision below reversed with

instructions for further proceedings to adjudicate the claim of Capraro against the bond previously posted by Lanier.

B. SINCE THE PLAINTIFF'S CLAIMS WERE DISPUTED BY ANSWERS AND PROOFS THE APPLICATION FOR TEMPORARY INJUNCTION SHOULD HAVE BEEN DENIED

In the case of Dade Enterprises, Inc. v. Wometco Theaters, Inc., 119 Fla. 70, 160 So. 209 (1935), the Florida Supreme Court held:

It is a rule of general application in injunction cases that an injunction should not be granted where there is substantial dispute as to the legal rights involved and the right of complainant is doubtful, or is not clear, or is questioned on every ground on which he puts it, not only by the answer of the defendant, but by the proofs and the cause...

160 So. at 214. See, also, Sackett v. Coral Gables, 246 So.2d

162 (Fla. 3d D.C.A. 1971); 42 Am.Jur.2d Injunctions, Section 26 "Caution in Granting; Necessity of Clear Case"; 29 Fla.Jur.2d Injunctions, Section 5 "Temporary Injunctions" at Footnote 28 page 658 ("The remedy will not ordinarily lie where there is a substantial dispute about the legal rights of the parties, the complainants claims being disputed by answers and proofs"). In the case at bar, Lanier's claims were disputed by both answers and proofs at the trial level. Moreover, the evidence at the evidentiary hearing of October 12, 1983, was not sufficiently clear to meet the plaintiff's burden in any respect.

For instance, Lanier alleged the parties entered into an employment agreement. [Appendix page 1; Complaint paragraph 3]. The existence of a contract is a necessary element of an action to enforce a non-competition agreement, even under the holdings in Silvers, supra, and Hunter, supra. In his answer, Capraro admitted signing the document attached to the complaint but denied it constituted a contract because he was fraudulently induced to execute it. Evidence at the hearing supported Capraro's affirmative defense of fraudulent inducement and such evidence was not contradicted. Thus, the first element of Lanier's claim was questioned both by pleading and by proof.

As a second example, it was clear from the contract that the reason for the non-competition covenant was Lanier's agreement to provide Capraro with trade secrets and confidential information which would give him an advantage against his competitors. However, Capraro denied ever getting any such information and Lanier's representative, Jim Creedon, admitted that all information which was provided to Capraro during the course of his employment with Lanier was intended to be divulged to the public. Thus, contractual reason for the non-competition covenant was disputed both by pleadings and by proof.

As a third example, Capraro asserted defenses of unclean hands and lack of equity. In support of these defenses, Capraro testified and Lanier's corporate representative, James Creedon, admitted, that during the previous year at least 7 salesmen

situated almost identically with Capraro and parties to identical non-competition agreements, left the employment of Lanier and were not pursued with respect to their non-competition covenants. Capraro further testified that he inquired about this practice and was advised that it was the normal practice of the Ft. Lauderdale district of Lanier not to pursue such non-competition agreements. Capraro then testified that he relied upon this information in leaving Lanier to join Wang. Thus, the equitable entitlement of Lanier to the relief requested was put at issue by both pleadings and proof.

Likewise, Capraro challenged the reasonableness of the inclusion of a non-competition covenant in the agreement in the first place, the reasonableness of the geographical scope of the non-competition agreement, and the reasonableness of the time of the non-competition covenant. Therefore, under the circumstances, under the principles announced by this court in Dade Enterprises, Inc. v. Wometco, Theaters, Inc. supra, the application for temporary injunction should have been denied.

The Florida Fourth District Court of Appeal, sub judice, dealt with this issue by holding:

... even where the validity of the contract is placed in dispute, however, a judge may in his discretion grant a temporary injunction....

The Appellate Court should rarely disturb a judge's preliminary factual assessment of this issue....

Capraro, supra, 445 So.2d at 721. This holding, of course, directly conflicts with the holding of this Court in Dade Enterprises supra, unless Dade Enterprises is meaningless. Capraro submits that if Dade Enterprises is to have continued vitality, the decision of the Fourth District Court of Appeal, sub judice, must be quashed.

C. SINCE THERE WAS NO PROOF OF HARM TO LANIER
THE COURT COULD NOT PROPERLY HAVE WEIGHED
THE COMPETING INTERESTS

As noted above, it is clearly law of Florida that, before a preliminary injunction may be granted, the competing interests of the plaintiff, the defendant, and the public must be weighed. Moreover, this Court held, in Miller Mechanical, Inc. v. Ruth, 300 So.2d 11 (Fla. 1974):

... The statute [§542.12, Fla. Stat. now §542.33, Fla. Stat. (1981)] is designed to allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers, and then moving into competition with them. The agreement, however, must be reasonable, as regards to the time during and the area within with the employee is to be prevented from competing with the employer. Capeluto v. Orkin Exterminating Co., 183 So.2d 532 (Fla. 1966). In determining the reasonableness of such an agreement, the Courts employ a balancing test to weigh the employer's interest in preventing the competition against the oppressive effect on the employee. Capeluto v. Orkin Exterminating Co., supra, Auto Club Affiliates, Inc. v. Morelly [98 So.2d 816 (Fla. 1st D.C.A. 1957)].

300 So.2d at 12. This holding necessarily requires proof of the employer's interest in preventing the competition as a precondition to the entry of a preliminary injunction to enforce the non-competition covenant. This principle is consistent with the law of most other jurisdictions which permit enforcement of non-competition covenants at all. See, e.g., Annotation, 41 ALR 2d 15 "Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction"; Annotation, 43 ALR 2d 94 "Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction." As stated in the first Annotation cited, supra:

The first and most important of the three elements comprising the concept or reasonableness as applied to a time limitation and a restrictive covenant not to compete, ancillary to a contract of employment, is reasonableness as to the employer.

Here the general rule is that the restraint as to time, in order to be reasonable, must be necessary in its full extent for the protection of some legitimate interest of the employer. Stated negatively, the time limitation renders the restraining unreasonable if it is for a longer period than is necessary to protect the employer's legitimate interests. [emphasis supplied]

41 ALR 2d at 61. Moreover, the second Annotation cited, supra, states:

The first and most important of the three elements comprising the concept

of reasonableness as applied to the scope of the territorial limitation in a covenant not to compete ancillary to a contract of employment, is its reasonableness as to the employer.

Here the general rule is that the restraint as to territory, in order to be reasonable, must be necessary in its full extent for the protection of some legitimate interest of the employer. Stated negatively, the territorial scope renders the restraint unreasonable, if it covers an area broader than necessary to protect the legitimate interest of the employer. [emphasis supplied].

43 ALR 2d at 151. Thus, before a non-competition agreement can be enforced by preliminary injunction, Capraro submits, the plaintiff must be required to put on evidence of its legitimate interest in preventing competition by the particular employee being sued. A weighing of the interest of the employer against the interest of the employee and the public in general cannot be accomplished if there is no proof of the employer's interest.

Although the Fourth District Court of Appeal in Silvers, supra, and the decision sub judice, holds that the injury to the employer can be presumed, such holding clearly disregards the holding of this Court in Miller Mechanical, Inc. v. Ruth, supra. This Court must take judicial notice of the fact that there are numerous employment relationships which could never support an enforceable non-competition covenant. It is only those employment relationships which involve the dissemination of the employer's trade secrets or the befriending of customers of the

employer in such a fashion as to permit the employee to compete unfairly with the former employer which will support such covenants. Thus, the truck driver who does nothing but drive the truck for his employer should never be enjoined from driving a truck for someone else. Likewise, the delivery boy who delivers only to the destinations to which he is directed by his employer should never be enjoined from competing with his former employer. Rather, only the employee who learns his former employer's trade secrets and attempts to use those trade secrets to the disadvantage of his former employer or the employee who has befriended repeat customers of a former employer and can use the friendship so developed to the disadvantage of his former employer later should be enjoined. Absent proof of the existence of such trade secrets or the availability and value of "befriending customers" it is difficult to see how any non-competition agreement can be reasonable.

In the case, sub judice, there was a claim that trade secrets were involved in the relationship. However, there was no evidence of the existence of any such trade secrets. In fact, Lanier's representative, James Creedon, admitted at the evidentiary hearing that all information which was provided to Capraro by Lanier was intended by Lanier to be divulged to the public by Capraro. That being the case, no trade secret can form the basis of a legitimate interest of Lanier in this case. Moreover, there was no evidence establishing that Lanier has the

type of business wherein one could "befriend customers" and use that friend-

ship to the disadvantageous of Lanier. The only person who testified at all about this subject at the trial was the potential customer, Peter Vasil, who ultimately testified that he was never a customer of Lanier nor of Wang. Moreover, this Court may take judicial notice of the proliferating literature concerning the purchase and use of text editing equipment and computer equipment, all of which shows an investment in such equipment is not an investment to be taken lightly. All of the literature talks in terms of long term commitments and the retention of equipment for years. See, e.g., Altman, Mary Ann and Weil, Robert I., How to Manage Your Law Office (Matthew Bender & Co., New York New York), Section 12.05, Section 13.03, Section 13.06, Section 13.07. That being the case, "old customers" of Lanier, of the sort described in Section 542.33, Fla. Stat., are "locked in" to Lanier for a period of time in excess of the length of the non-competition covenant contained in the Lanier form agreement. Thus, injury to Lanier from the alleged acts of Capraro could not be presumed in this case any more than it could be presumed in the case of a truck driver who does nothing but drive a truck. Rather, in order for a preliminary injunction to be granted, Lanier, like any other plaintiff, should have been required to put in proof of the facets of the relationship between it and its employees and it

and its customers which would give rise to injury if its employees were permitted to call upon its customers.

Since the evidence in the case at bar clearly established that Lanier had permitted numerous other employees substantially identically situated to Capraro and subject to substantially identical non-competition covenants to leave Lanier's employ, join competitors and not be subject to suit, Capraro submits that the potential harm to Lanier from Capraro's alleged conduct was rebutted by Lanier's own proof at the hearing. Absent proof that Capraro was uniquely qualified or trained, Capraro submits Lanier's conduct in permitting numerous other employees substantially identically situated to Capraro to compete with Lanier unabated renders the potential harm to Lanier from Capraro's alleged behavior a mere drop in the proverbial bucket. Capraro further submits the Court below erred in granting the application for temporary injunction under these circumstances.

Thus, since there was no proof of any injury to Lanier, no proof of any interest of Lanier which could be protected only by the enforcement of a non-competition covenant, and evidence that Lanier had previously failed to enforce its non-competition covenants with numerous other individuals substantially identically situated to Capraro, Capraro submits the order granting the temporary injunction, sub judice, should be reversed.

III. THE COURT'S ORDER GRANTING PLAINTIFF'S APPLICATION FOR
TEMPORARY INJUNCTION FAILS TO COMPLY WITH
FLA.R.CIV.P. 1.610(d).

Fla.R.Civ.P. Rule 1.610(d) provides in pertinent part:

(d) Form and scope. Every injunction
and temporary restraining order shall
specify the reasons for entry...

The present text of the rule reflects an extensive amendment
which became effective January 1, 1981. See, 31 Fla. Stat. Ann.
(Supp.) Rules of Civil Procedure "Committee Note"; following
Rule 1.610, In re: Amendments to the Florida Rules
of Civil Procedure, 391 So.2d 165 (Fla. 1980). According to the
Committee Note:

This rule has been extensively amended
so that it is similar to Federal Rule
65... The contents of an injunctive
order are specified...

Id.

Few reported decisions of Florida Appellate Courts have
considered Amended Rule 1.610(d) since its promulgation.
However, Federal decisions on the substantially identical
Federal Rule of Civil Procedure, Rule 65, upon which Rule 1.610
as amended was modeled, make clear that substantially more is
required to "specify the reasons for entry" of an injunction
than was provided by the court in this action.

The general rules stated by courts interpreting
Fed.R.Civ.P. Rule 65(d) is that the order granting a motion for
preliminary injunction or temporary restraining order should set

forth sufficient findings of fact and conclusions of law to meet the requirements of Fed.R.Civ.P. Rule 52(a). Ross-Whitney Corp. v. Smith-Kline & French Laboratories, 207 F.2d 190 (9th Cir. 1953). Fed.R.Civ.P. Rule 52(a) provides in pertinent part:

In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon... and in granting or refusing interlocutory injunctions, the court shall similarly set forth the finding of facts and conclusions of law which constitute the grounds of its action...

Although no specific rule for the required degree of specificity can be stated, it is clear from a review of the Federal decisions that the court should be specific, direct, and to the point in finding facts sufficient to support the legal conclusions necessary to support issuance of preliminary injunction. See, e.g., Withrow v. Larkin, 421 U.S. 35 (1975); Alberti v. Cruise, 383 F.2d 258 (4th Cir. 1967).

The legal conclusions which must be found to support the issuance of preliminary injunction as set forth in Islandia Condominium Association, Inc., supra, Contemporary Interiors, supra, and other Florida cases are:

1. Irreparable harm,
2. A clear legal right (substantial probability of success on the merits)
3. An inadequate remedy at law, and
4. Considerations of the public interest.

The order granting Lanier's application for a temporary injunction in this case not only does not specify facts sufficient to support the legal conclusions required for the issuance of the preliminary injunction, but does not even state in a conclusory fashion that the court has found a danger of imminent irreparable harm, a clear legal right, an inadequate remedy at law, or considerations of the public interest.

Capraro submits the absence of these findings and conclusions from the order is no mere technicality. Rather it is indicative of the failure of Lanier to provide the level of showing required to support the issuance of a preliminary injunction. The holdings of the numerous cases finding the requirements of Rule 65(d) to be mandatory suggests that the provision of the rule requiring the Court to "specify the reasons" for the entry of the preliminary injunction is an important procedural control to insure that preliminary injunctions are issued only sparingly. See, e.g., Commercial Security Bank v. Walker Bank and Trust Co., 456 F.2d 1352 (10th Cir. 1972); Alberti v. Cruise, supra; Brumby Metals, Inc. v. Barga, 275 F.2d 46 (7th Cir. 1960); Mayflower Industries, Inc. v. Thor Corp., 182 F.2d 800 (3d Cir. 1950) cert. denied. 341 U.S. 903. If the requirements of the rule are not enforced, the important procedural controls provided by the rule will be rendered meaningless.

Capraro submits this court should rule, in this case, that Rule 1.610(d) requires an order granting a preliminary injunction to set forth the specific findings of fact upon which the court relied in determining that the plaintiff had established imminent irreparable harm, a clear legal right (substantial probability of success on the merits) an inadequate remedy at law, and a weighing of the competing interests of the plaintiff, the defendant, and the public. Under such a rule, the finding of the court sub judice:

"That the present employment of Thomas Capraro is in violation of his employment agreement with the plaintiff"

would be totally insufficient. What would be required, would be findings of fact suggesting Lanier had a substantial probability of success on the merits arising from:

1. The existence of a contract
2. Characteristics of the business of Lanier which require the enforcement of non-competition covenants to protect the business of Lanier;
3. Facts showing that the geographical and time limitations of the non-competition covenant at issue are reasonable in light of the business of Lanier, the need of Capraro to work, and the interest in the public in either enforcing the non-competition covenant on behalf of Lanier or having the services of Capraro in someone else's employ;

4. Findings of facts suggesting that Lanier had a substantial probability of success on the merits of each and every one of Capraro's affirmative defenses. While at first blush it may seem such requirements would unnecessarily burden the trial courts, this Court may take judicial notice of the fact that it is counsel for the prevailing party who ordinarily draft the orders entered in such cases. In fact, that is what happened in the case sub judice. Moreover, it is clear that the case law in Florida requires the foregoing findings to be made in order to grant a preliminary injunction and it is further clear that preliminary injunctions are extraordinary and drastic" and should be "granted sparingly". Thus, such a ruling would merely give force to the recent amendments of Rule 1.610(d) to bring them into conformance with the provisions of Federal Rule of Civil Procedure 65(d).

IV. THE TEMPORARY INJUNCTION IS OVERBROAD

The cases interpreting the portions of section 542.33, Fla. Stat. (1981) relevant to this case, have, with few exceptions, held it to mean that a court may enforce such clause only to the extent reasonable in time and territory. Miller Mechanical, Inc., Ruth, supra; Auto Club Affiliates, Inc. v. Donahey, 281 So.2d 239 (Fla. 2d D.C.A. 1973); Capelvoto v. Orkin Exterminating Company of Florida, Inc., 183 So.2d 532 (Fla. 1966). As the Court held in Auto Club Affiliates, Inc. v. Donahey, supra:

If, however, there are insufficient contacts between the employee and the entire territory over which the employer's business extends, especially in those areas where the employee does not work, a covenant not to compete might not be enforced...

281 So.2d at 242-43. See, also, Annotation, 41 ALR 2d 15

"Enforceability of Restrictive Covenant, Ancillary to Employment Contract as Affected by Duration of Restriction" and Annotation, 43 ALR 2d 94 "Enforceability of Restrictive Covenant Ancillary to Employment Contract as Affected by Territorial Extent of Restriction". Each of the foregoing annotations states the general rule to be that, even though the need of the employer is the primary consideration in the determination of reasonability of a non-competition covenant, the interest of the employee and the public must also be considered. Thus, in order to determine the reasonableness of the geographical scope and the time scope of a noncompetition agreement, it is necessary to look at both the area in which the employer does business and the area in which the employee actually worked and what he was actually employed to do. This, the trial court sub judice failed to do.

The evidence at the evidentiary hearing on October 12, 1983, in the case at bar, was clear that Capraro had not worked for Lanier except within a closely defined territory within the county of Palm Beach and that the products he sold on behalf of Lanier were limited to "text editing" products. There was no evidence that Capraro was provided with any information which would give him an advantage either within the entire defined

"Territory," as to all the "Products", nor that it would otherwise be reasonable to enforce the agreement in that entire area for all those products. Thus, Capraro submits the injunction is unreasonably overbroad insofar as it extends beyond the territory and products in which Capraro dealt on behalf of Lanier. Moreover, since the entire period of the non-competition has now passed and Capraro was restrained from working in his chosen profession for that entire period, this court should reverse the order granting the temporary injunction and remand the case for further proceedings with respect to Capraro's claim against the bond posted as a condition of the temporary injunction.

V. CONCLUSION

Preliminary injunctions are extraordinary and drastic and should be granted only sparingly. The law of Florida holds preliminary injunctions should only be entered only on proof of (1) irreparable harm (2) a clear legal right (3) an inadequate remedy at law and (4) considerations of the public interest. The rules of Civil Procedure require an order granting a preliminary injunction to specify the reasons for its entry.

Since there was no substantial proof of irreparable harm by the plaintiff, since there was and is a substantial dispute about plaintiff's legal rights, and since there was no evidence to permit a weighing of competing interests, the court, sub judice, erred in granting a "temporary injunction" to Lanier.

Since the order granting the "temporary injunction" does not sufficiently specify the reasons for its entry, the court, sub judice, erred in entering it. Since Capraro never worked in the whole territory described in the complaint and never sold many of the products described in the complaint, the "temporary injunction" is likewise overbroad. Therefore, the order granting the "temporary injunction" should be reversed, the order of the District Court of Appeal affirming the order granting the "temporary injunction" should be quashed and the case should be remanded for further proceedings with respect to the amount of damages to which Capraro is entitled by reason of the wrongful entry of the "temporary injunction."

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to BRUCE A. ZEIDEL, ESQ., P.O. Box 14667, North Palm Beach, Florida 33408, by mail, this 13th day of November, 1984.

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By: 
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