IN THE SUPREME COURT OF FLORIDA

THOMAS CAPRARO,

Defendant, Petitioner,

v.

LANIER BUSINESS PRODUCTS, INC.,

Plaintiff, Respondent.

_____/

CASE NO. 65,125

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

REVISED
PETITIONER'S BRIEF LIMITED TO THE ISSUE OF THE SUPREME COURT'S JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

THE COURSE OF THE PROCEEDING

Plaintiff, Lanier Business Products, Inc., filed the complaint in this action on September 7, 1983. The complaint was served on the Defendant, Thomas Capraro on September 17, 1983. The summons and complaint served upon Defendant was accompanied by a "Notice of Application for Temporary Injunction" giving notice of hearing to be held October 12, 1983. However, no "Application for Temporary Injunction" was ever served or filed.

On October 7, 1983, Defendant served an answer and affirmative defenses denying the operative allegations of the complaint and raising seven affirmative defenses. Simultaneously Defendant served and filed a Motion for Continuance of the hearing scheduled for October 12, 1983.

On October 11, 1983, the trial court orally announced its order denying Defenant's Motion for Continuance, which denial was incorporated in an Order signed October 12, 1983. On October 12, 1983, a hearing was held pursuant to Plaintiff's Notice of Application for Temporary Injunction. On October 14, 1983, the trial court signed an Order Granting Plaintiff's Application for Temporary Injunction. Plaintiff posted the bond required by the Order Granting Plaintiff's Application for Temporary Injunction on November 3, 1983.

On November 9, 1983, Defendant filed Notice of Appeal of the trial court's Order of October 14, 1983.

On February 29, 1984, the District Court of Appeal of the State of Florida, Fourth District, issued its opinion affirming the trial court's order granting Plaintiff's application for temporary injunction. Thomas Capraro, Appellant v. Lanier Business Products, Inc., Appellee, Florida Fourth District Court of Appeal, Case No. 83-2429, 9 Fla. L. Wkly 485 (Opinion Filed, February 29, 1984). A copy of the decision of the Fourth District Court of Appeal, sub judice, appears in the Appendix at pages 91-94.

ARGUMENT

I. THE COURT HAS JURISDICTION BECAUSE THE DECISION SUB JUDICE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA THIRD DISTRICT COURT OF APPEAL IN UNI-CHEM CORP. OF FLA., INC., V. MARET, 338 So.2d 885 (Fla. 3rd D.C.A. 1976).

The decision of the District Court of Appeal for the Fourth District, sub judice, holds, inter alia:

> In order to state a cause of action for injunctive relief against one who violates a covenant not to compete, the complaint must allege a contract with an appropriate clause, the Defendant's "intentional, direct and material breach thereof," and "no adequate remedy except by injunctive relief."... Irreparable injury is presumed in these cases...
>
> Capraro first claims that Lanier did not prove irreparable injury. Such proof is unnecessary because irreparable injury is presumed....

In so holding, the Fourth District Court of Appeals expressly relied upon the decision in Silvers v. Dis-Com Securities, Inc., 403 So.2d 1133 (Fla. 4th D.C.A. 1981).

The case of Silvers v. Dis-Com Securities, Inc., 403 So.2d 1133 (Fla. 4th D.C.A. 1981) specifically acknowledged:

> In at least one case a different rule has been followed. In Uni-Chem Corp. of Fla., Inc. v. Maret, 338 So.2d 885, 887 (Fla. 3d D.C.A. 1976) the court stated that:
>
> > Notwithstanding statutory right to injunctive relief [see: §542.12 Fla. Stat.], upon proof

> of a valid covenant not to compete said statutory provision does not negate the necessity of showing irreparable harm as a prerequisite to the granting of a temporary injunction. Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975).
>
> We respectfully disagree with our sister court. The Wilson case relied on by that court did not involve an application of the statute authorizing covenants not to compete.

Silvers v. Dis-Com Securities, Inc., 403 So.2d at 1136-37.

The case of Uni-Chem Corporation of Florida, Inc. v. Maret, 338 So.2d 885 (Fla. 3d D.C.A. 1976) did deal with an action involving a covenant not to compete. In that case, as acknowledged by the District Court of Appeal for the Fourth District in the case of Silvers v. Dis-Com Securities, Inc., supra, the Florida Third District Court of Appeal specifically held that former §542.12, Fla. Stat., now §542.33, Fla. Stat. did not negate the necessity of showing irreparable harm as a prerequisite of a granting of a temporary injunction. Moreover, the decision of the Third District Court of Appeal in Uni-Chem Corp. of Fla., Inc., v. Maret, supra, is in accordance with the holding of this Court in Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975), and the general law of this state with respect to the granting or denial of preliminary injunctions.

Therefore, there is a direct and explicit conflict between the holding of the Fourth District Court of Appeal in the case sub judice and the decision of the Third District Court of Appeal in the case of Uni-Chem Corp. of Fla., Inc. v. Maret, supra and this Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) and the general law of Florida.

II. THIS COURT HAS JURISDICTION BECAUSE THE DECISION OF THE COURT SUB JUDICE DIRECTLY AND EXPLICITLY CONFLICTS WITH THE DECISION OF THIS COURT IN DADE ENTERPRISES, INC. V. WOMETCO THEATRES, INC., 119 Fla. 70, 160 So.209 (1935).

In the case of Dade Enterprises, Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So.209 (1935) this Court held, inter alia;

> 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 the 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 in the cause...

160 So. at 214. See also Sackett v. Coral Gables, 245 So.2d, 162 (Fla 3d D.C.A. 1971); 42 Am. Jur. 2d, Injunctions, §26 "Caution in Granting; Necessity of Clear Case"; 29 Fla. Jur. 2d, Injunctions, §5 "Temporary Injunctions" at footnote 28, p. 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.") This longstanding principle applies both to permanent injunctions and temporary injunctions. Id.

The Fourth District Court of Appeal, sub judice, held inter alia:

> A temporary injunction must be affirmed on appeal if there is evidence in the record to support findings of the existence of the above elements...
>
> * * *
>
> ... even where the validity of the contract is placed in dispute, however, a judge may in his discretion grant a temporary injunction...

[Appendix at 92]. Moreover, a reading of the entire opinion, sub judice, reveals that petitioner in his answer and by the

proofs at the hearing of October 12, 1983, (a) created a "substantial dispute as to the legal rights involved" and (b) "the right of the complainant... [was] questioned on every ground on which he put it".

Therefore, there is a direct and explicit conflict between the decision of the Fourth District Court of Appeal sub judice and the decision of this Court in Dade Enterprises, Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So.209 (1935), and this Court has jurisdiction pursuant to Fla. R. App. P. Rule 9.030(a)(2)(A)(iv) and the general law of Florida.

III. THIS COURT HAS JURISDICTION BECAUSE THE DECISION DIRECTLY AND EXPLICITLY CONFLICTS WITH THE DECISION OF THIS COURT IN MILLER MECHANICAL, INC. V. RUTH, 300 So.2d 11 (Fla. 1974).

In the case of Miller Mechanical, Inc. v. Ruth, 300 So.2d 11 (Fla. 1974) this Court held, inter alia:

> ...The statute [§542.12, Fla. Stat. renumbered §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 the time during and the area within which the employee is prevented from competing with the employer. Capelouto 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 oppresive effect on the employee. Capelouto v. Orkin Exterminating Co., supra, Auto Club Affiliates, Inc. v. Morelli [98 So.2d 816 (Fla. 1st D.C.A. 1957)]. [emphasis added]

300 So. 2d at 12. This holding necessarily requires proof by the employer of the employer's interest in preventing the competition.

In the decision, sub judice, the Fourth District Court of Appeal, relying upon the decision in Silvers v. Dis-Com Securities, Inc. 403 So.2d 1133 (Fla. 4th D.C.A. 1981) held, inter alia:

> ...Irreparable injury is presumed in these cases.... The court also notes that "money damages, if susceptible of reasonable proof, may not compensate for all aspects of such a violation. Injunctive relief is therefore the favored remedy."...
>
> ...Lanier introduced evidence of a contract that prohibited Capraro from selling text editing and other equipment in Palm Beach and other counties. Lanier also introduced evidence that Capraro was selling a competitor's text editing equipment in Palm Beach County. Because money damages are presumed to be inadequate and because irreparable injury is also presumed, the record supports the issuance of an injunction.
>
> ...Capraro's evidence consisted of evidence that he was assured that the clause would not be enforced against him and that the clause was not enforced against others who had left Lanier. Such evidence may present a claim for equitable estoppel or damages against Lanier, but Hollender [v. SRF, Inc. 321 So.2d 627 (Fla. 4th D.C.A. 1975)] implies that the appellate court should rarely disturb a judge's preliminary factual assessment of this issue. Instead, the issue is best left to be explored at a full trial on the merits. Hollender, at 628....
>
> Capraro also argues that the lack of proof of specific harm to Lanier should be fatal. As noted above, injury is presumed in these cases....

[Appendix at 92-93]. Petitioner submits that this language of the Fourth District Court of Appeal, sub judice, necessarily dispenses with the necessity of proof of the employer's interest in preventing the competition.

Therefore, this Court has jurisdiction by virtue of direct and explicit conflict between the holding of the court

sub judice and the holding of this Court in Miller Mechanical, Inc. v. Ruth, 300 So.2d 11 (Fla. 1974).

IV. THE COURT SHOULD ACCEPT JURISDICTION

Petitioner further submits that the holding of the Court sub judice taken together with the holding of the Fourth District Court of Appeal in the case of Silvers v. Dis-Com Securities, Inc., 402 So.2d 1133 (Fla. 4th D.C.A. 1981) effectively suspend the rights of defendants to due process of law in cases involving contractual covenants not to compete in which preliminary injunctions are sought. Under Silvers v. Dis-Com Securities, Inc., and the decision sub judice, in the Fourth Judicial District of Florida, whenever a former employer sues a former employee to enforce a written contractual covenant not to compete, the Defendant cannot prevail if there is any evidence that a contract containing a covenant not to compete was executed and the covenant not to compete contained within the contract is not patently unreasonable on its face. This situation is inconsistent with both the express language of §542.33, Fla. Stat., the common law of Florida with respect to the granting and denial of preliminary injunctions in every other context, and the Florida and Federal Constitutions.

Moreover, under Silvers v. Dis-Com Securities, Inc., supra, and the decision sub judice, the clear intent of §542.33, Fla. Stat. (1981) is turned on its very head. Specifically, §542.33, Fla. Stat. provides:

> Every contract by which anyone is restrained from exercising a lawful profession, trade or business

> of any kind, otherwise than is 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.
>
> * * *

Rather than reading this statute for what it is, i.e., a restriction upon the enforceability of non-compete covenants imposing strict burdens of proof upon the former employer and incorporating by reference the common law relating to the issuance of injunctions, the Fourth District Court of Appeal in Silvers v. Dis-Com Securities, Inc., supra, and the case sub judice, reads this statute to mandate the issuance of injunctive relief whenever the employer can produce any evidence of a written contract containing a covenant not to compete which is not patently unreasonable.

V. CONCLUSION

Because the decision of the Fourth District Court of Appeal, sub judice, directly and explicitly conflicts with the decision of the Third District Court of Appeal in the case of Uni-Chem Corp. of Fla., Inc. v. Maret, 338 So.2d 885 (Fla. 3d D.C.A. 1976) concerning the necessity of proof of irreparable harm in order to obtain a preliminary injunction to enforce a non-compete contract, directly and explicitly conflicts with

the decision of this Court in Dade Enterprises, Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So.209 (1935) in permitting the entry of injunctions notwithstanding substantial disputes as to the legal rights involved, and directly and explicitly conflicts with the decision of the Court in Miller Mechanical, Inc. v. Ruth, 300 So.2d 11 (Fla. 1974) in dispensing with the necessity of proof by the employer of any legitimate interest in preventing competition pursuant a written contract containing a covenant not to compete, this Court has jurisdiction of this case. Moreover, since the practical effect of the decision sub judice and the decision in Silvers v. Dis-Com Securities, Inc. is to mandate the entry of preliminary injunctions enforcing covenants not to compete in contravention of the clear meaning of Section 542.33, Fla. Stat. (1981), the common law of Florida and the Florida and Federal Constitutions, this Court should accept jurisdiction of this case.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bruce A. Zeidel, Esquire, Post Office Box 14667, North Palm Beach, Florida 33408, by mail, this 23d day of April, 1984.

By: Edward A. Marod
EDWARD A. MAROD