SUPREME COURT
STATE OF FLORIDA

CASE NO. 84,184

On Appeal from District Court of Appeal, Fifth District of Florida L.T. Case No. 93-02461

JOSEPH GUPTON,

Petitioner,

vs.

VILLAGE KEY AND SAW SHOP, INC.,

Respondent.

PETITIONER'S AMENDED REPLY BRIEF

Geoffrey B. Dobson
Florida Bar No. 0019919
DOBSON, CHRISTENSEN & BROWN, P.A.
66 Cuna Street, Suite B
St. Augustine, Florida 32084

VOICE: (904) 824-9032
FAX: (904) 824-9236

I N D E X

Citations of Authorities

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

No further elaboration on the Statement of the Case and Facts beyond that contained in Petitioner's initial Brief is required.

POINT I

WHETHER THE 1990 AMENDMENTS TO FLORIDA STATUTES 542.33 SHOULD BE APPLIED RETROACTIVELY.

A review of Village Key's response to Point I seemingly indicates that Village Key is erroneously referring to the former employee, JOSEPH GUPTON, as "the Respondent." The response concedes that Village Key proceeded in the action on the basis that the 1990 Amendments to Florida Statutes 542.33 were to be applied retroactively. No "counter" (Village Key's Answer Brief, p.4) has been offered to the position of the former employee.

Village Key has amended its Answer Brief by the inclusion of its Briefs filed with the District Court. Village Key, with regard to the retroactivity of the 1990 Amendments, states (Answer Brief p. 4 and 5) that its Brief *"explains our argument to that in detail * * *."*

An examination of the Initial Brief and Answer Brief attached as Appendices "A" and "B" to the Amended Answer Brief contains no argument as to the retroactive effect of the Amendments and seemingly proceeds on the basis that Hapney v. Central Garage, Inc., 579 So.2d 127 (Fla. 2d DCA 1991), rev. den. 591 So.2d 180 (Fla 1991) was correctly determined.

Accordingly, it would appear that Village Key is conceding that the position of the Fifth District Court of Appeal as to retroactivity was in error. Instead, Village Key apparently argues in Point II that under Florida Statutes 542.33, as presently drafted, a blanket injunction, should have been entered and, therefore, the decision of the trial court should be reversed.

This latter point was not considered by the District Court in its decision. As noted by the former employee in his initial Brief, there is nothing in the District Court decision which indicates that the finding by the trial court that the restriction was "generally unreasonable" was in error. The question of the propriety of the trial court's entering a limited injunction was considered in Point II of the initial Brief and will be considered in Point II hereof.

POINT II

WHETHER THE TRIAL COURT ERRED IN LIMITING ITS INJUNCTION TO DIRECT SOLICITATION OF IDENTIFIABLE CUSTOMERS IN AN ACTION INVOLVING ENFORCEMENT OF A NON-COMPETITION AGREEMENT.

In our initial Brief, we noted that the trial court properly applied a balancing test and properly entered a limited injunction. The trial court considered all of the factors which go into the entry of an injunction and, indeed, also considered the context in which the Amendments to Florida Statutes 542.33 were adopted. In regard to this latter point as to the consideration of the context in which amendments to the statutes are adopted and whether they are regarded as remedial, see Walsh v. Arrow Air, Inc., 629 So.2d 144 (Fla. 3d DCA 1993), in which the court, citing to this Court's decisions in City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986) and Martin County v. Edenfield, 609 So.2d 27 (Fla. 1992), held that in determining retroactivity it is appropriate to examine the historical context when making the determination that the enactment was regarded as remedial.

Village Key dismisses the trial court's consideration of all of the factors in fashioning its injunction as merely a simple election "not to put the Defendant out of work." (Answer Brief, p. 5) and cites to pre-amendment cases indicating that the application of proper equitable principles when injunctive relief is sought is limited strictly "to covenant provisions pertaining to duration and geographical area." (Answer Brief, p. 6)

As indicated in the initial Brief, the effect of the Amendments, as apparently conceded by the Fifth District Court, was

to reinstate use of traditional equitable principles in the consideration of injunctive relief with regard to the enforcement of restrictive covenants. Pre-amendment law restricted the court to a consideration only of the time limits and the geographical limits of the injunction and required the issuance of an injunction regardless of other equitable considerations normally applicable to injunctive relief. The effect of the amendment was an attempt to restore some of the normal balancing which occurs in the issuance of an injunction.

As noted by the former Fifth Circuit Court of Appeals in Aerosonic Corporation v. Trodyne Corp., 402 F.2d 223, 38 A.L.R.3d 560 (5th Cir. 1968):

> *"The Florida courts do hold that injunction 'should never be broader than is necessary to secure the injured party, without injustice to the adversary, relief warranted by the circumstances of the particular case,' Florida Peach Orchards, Inc. v. State by Dickinson, First DCA Fla. 1967, 190 So.2d 796; see also Moore v. City Dry Cleaners & Laundry, Fla. 1949, 41 So.2d 865."*

In Moore v. City Dry Cleaners & Laundry, relied upon by the Fifth Circuit Court of Appeals, this Court held:

> *"The rule obtains that in an injunction proceeding the acts or things enjoined should be specified in the decree with such reasonable definiteness and certainty, considering their nature and character, that a defendant bound by the decree may readily know what he must refrain from doing without the matter being left to speculation and conjecture. Palm Corporation v. Walters, 148 Fla. 527, 4 So.2d 696; Henderson v. Coleman, 150 Fla. 185, 7 So.2d 117. The rule is, also, that an injunction order should never be broader than is necessary to secure the injured party the full relief warranted by the particular facts of*

> *the case without injustice to his adversary. Seaboard Rendering Co. v. Conlin, 152 Fla. 723, 12 So.2d 882. Generally speaking, an injunctive order which permanently restrains a defendant 'from resuming, continuing or repeating the acts complained of in the complaint', without particularization of the specific acts enjoined, will be held to violate the principle stated; especially where the bill charges the commission of many different and varied acts and activities some of which may be perfectly permissible and proper."*

In essence, Village Key requested an unlimited and broad injunction enjoining Mr. Gupton from "competing with the employer" and that he "refrain, cease and desist, from carrying on a similar business and * * * from soliciting new customers of the locksmith and security alarm business" for a period of five years. Such an injunction would be unduly broad, and it would have been error for the trial court to enter it. Instead, the trial court, quite correctly, after finding that the type of business was "not the type of business in direct conflict with Plaintiff," considered all of the appropriate factors in the framing of the injunction. It was narrowly drawn, and it specifically identified the customers that could not be directly solicited. In the final analysis the type of injunction sought by Village Key would have been incapable of enforcement, since it would leave the parties in question as to what extent the former employee could engage in any business.

As noted in the initial Brief, the Annotator in "Enforceability of Contract Not to Compete," 61 A.L.R.3d 397, has noted a number of cases in which the injunctive limitations were held limited to customers serviced by employee (Section 37), restric-

tions were held limited to the duties performed by the employee (Section 38), the restrictions were held limited to the employer's customer lists and other trade secrets (Section 39) and the restrictions were held limited to business engaged in by the employer (Section 40). The reason for the limitation of these activities in an injunction is that by that means the interest of the employer will be protected without the injunction being unduly broad or unreasonably limiting competition. It should be noted that the non-compete agreement was unconnected with the sale of any accounts, but was contained in an employment agreement which also contained an "integration" clause.

The former employee recognizes that decisions from other states are not binding on this Court, but as observed by the First District Court of Appeal in Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108 (Fla. 1st DCA 1977):

> *"Since this is a case of first impression, it is helpful to look to cases from foreign jurisdictions involving the interpretation of similar provisions in statutes of other states or federal statutes."*

The Petitioner submits that it is peculiarly appropriate in the present instance since, as observed in the initial Brief, all statutes and modifications or amendments thereto in Florida are to be read in context of the common law. In determining the Common Law, this Court looks not only to the decisions of the British courts, but to the decisions of courts of other states.

In this context the trend and development of the Common

Law since at least the Seventeenth Year of the Reign of King John [1] has been to increase the liberties of the common workman and to reduce the possibilities that he might be placed in bondage to those holding superior economic power. For this reason non-compete agreements were held to be against public policy and statutes authorizing them narrowly and strictly construed. Otherwise, a workman might be placed in a position similar to that of an indentured servant unable to depart from his employment without the necessity of moving elsewhere. See reference to *"inverse peonage"* in Troup v. Heacock, 367 So.2d 691 (Fla. 1st DCA 1979), a case remarkably similar to the present in that there was an unilateral change of working conditions taken into account by the court in balancing of equities.

Accordingly, it is respectfully submitted that this Court should determine that the 1990 Amendments to Florida Statutes 542.33 are remedial; that a trial court in entering an injunction should properly consider all factors which are traditionally looked to under the Common Law in entering an injunction; and that an injunction when entered will not be overturned except for gross abuse of discretion. The policy of the Common Law upholding the right to earn an honest living and finding that competition favors the general welfare of the people should be followed.

---

[1] Magna Charta granted at Runnymede, June 15, 1215 recognizing the rights of freemen and free tenants.

CONCLUSION

For the reasons indicated in the initial Brief, the decision of the Fifth District Court of Appeal should be reversed.

DOBSON, CHRISTENSEN & BROWN, P.A.

By: _____
Geoffrey B. Dobson
Florida Bar No. 0019919
66 Cuna Street, Suite B
St. Augustine, Florida 32084

VOICE: (904) 824-9032
FAX: (904) 824-9236

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David M. Andrews, Esquire, P. O. Box 5358, St. Augustine, Florida 32085 by United States Postal Service, postage prepaid, this 2cth day of ~~January~~ March, A. D., 1995.

_____