

IN THE COURT OF APPEALS OF IOWA

No. 8-361 / 97-1614

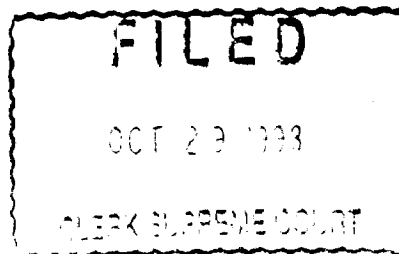
**VAN OORT CONSTRUCTION COMPANY,
INC., JERRY VAN OORT, CASEY VAN OORT,
and JEFF WANGSNESS,**

Plaintiffs/Counterclaim Defendants-Appellants,

vs.

NUCKOLL'S CONCRETE SERVICE, INC.,

Defendant/Counterclaim Plaintiff-Appellee.



Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Plaintiffs appeal from a district court judgment dismissing their breach of contract claim and awarding defendant damages on its counterclaim for breach of contract. **AFFIRMED IN PART; REVERSED IN PART.**

Jonathan C. Wilson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellants.

Denis Y. Reed of the Reed Law Office, Des Moines, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

SACKETT, P.J.

Plaintiffs/counterclaim defendants-appellants Van Oort Construction Co., Inc., Jerry Van Oort, Casey Van Oort, and Jeff Wangsness sold a ready-mix concrete business to defendant/counterclaim plaintiff-appellee Nuckoll's Concrete Service, Inc. in February of 1994 for \$3,400,000. There were two contracts. One was for \$2,950,000 for the sale of assets. This contract was paid in full at the time of the sale. The second contract was a covenant not to compete. It called for \$450,000 payable by buyer to sellers over sixty months at 7.42 percent interest. In June of 1996, plaintiffs sued claiming after March of 1996 defendant had failed to make payments due under the non-compete agreement. Defendant counterclaimed alleging breaches of the covenant not to compete and seeking the return of certain amounts paid. The district court found for defendant on all issues, relieving defendant of any obligation to make the remaining payments on the covenant not to compete after March of 1996 and awarding defendant \$11,700 in damages, plus interest and attorney fees.¹ This appeal follows.

This is a law action. Our review is for correction of errors at law. Iowa R. App. P. 4. The district court's findings have the effect of a special verdict and are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

¹ \$5666.25 in attorney fees were awarded in a supplemental judgment.

The covenant not to compete provided:

Seller(s)² . . . covenant to and with the Buyer, its successors and assigns, that for a period continuing for five (5) years after the closing date, the individual SELLERS shall not, directly or indirectly, enter the employment of, or perform any advisory or consulting service for, or make a substantial investment in, any company, partnership, organization, proprietorship, or other entity that engages in the ready-mix concrete business within one hundred (100) mile radius of SELLERS' current business operations excluding that portion of the State of Iowa North of Highway 20 as represented in pink on the map attached hereto and by this reference incorporated herein. SELLERS agree that Randall Van Oort's non-compete agreement with SELLERS will remain in force and part of the purchase until his non-compete with SELLERS expires and shall be enforced by SELLERS upon demand of BUYER.

Defendant quit making monthly payments in April of 1996 on the February 1994 covenant not to compete contending Randall was violating the covenant he initially made with plaintiffs in working for M. Peterson Construction Company.

Randall's covenant was given to plaintiffs in January of 1993 before plaintiffs sold the business to defendant in February of 1994. Randall Van Oort, not a party to this litigation, then owned an interest in Van Oort Construction Company, Inc. Plaintiffs bought out Randall's interest on a contract payable over a five-year term. As a part of the sales agreement, Randall gave plaintiffs a covenant not to compete. The covenant from Randall provided:

² The sellers named in and signing the covenant not to compete are Van Oort Construction Company, Inc., d/b/a V.O. Concrete, an Iowa corporation; Casey Van Oort, Vice President, Shareholder, and Individually; Jerry Van Oort, Vice President, Shareholder, and Individually; Shelley R. Wangsness, Secretary, Shareholder, and Individually; and Jeff Wangsness, Treasurer, Shareholder, and Individually.

Randall Van Oort agrees that he shall not, for a period of ten (10) years following the date of closing, January 15, 1993, within a radius of fifty (50) miles from any of the places of business of Company, directly or indirectly, own, manage, operate, control, be employed by, participate in or be connected in any manner with the ownership, management, operation or control of any business similar to the type of business conducted by Company or that delivers any product also delivered by Company within the radius set forth above, *except as agent or employee of Central Redi-Mix, Inc.*

(Emphasis added.)

After defendant advised plaintiffs Randall was violating his covenant by working for M. Peterson Construction, answering the phone and scheduling drivers for ready-mix delivery, plaintiffs notified Randall to cease the violation. Then plaintiffs, on May 16, 1996, sued Randall for his violation of the covenant not to compete. Defendant, not a party to the suit, was informed it was filed and was advised as to the particulars of the suit, including the hearing date. Defendant was given the opportunity to participate in the suit, but did not do so.

After a hearing, the district court concluded Randall was engaging in conduct prohibited by the non-compete agreement but he was not in violation of the covenant because the conduct was in the course of his employment with Central Redi-Mix, Inc., which was permitted under the covenant's terms. After the ruling, plaintiffs notified defendant of the ruling and sought to have defendant recommence monthly payments. Defendant refused to do so. Plaintiffs then commenced this suit contending defendant breached the covenant in failing to make required monthly payments after March of 1996.

Defendant's counterclaim alleged Randall violated his covenant not to compete and has continued to do so. Defendant sought return of some \$87,000 paid for the covenant not to compete. Defendant's counterclaim was amended in May of 1997 alleging plaintiffs started a ready-mix business in January of 1997 in Colfax and, in doing so, further breached the covenant.

The case was tried to the district court that found Randall in violation of his covenant not to compete. The trial court specifically found Randall's covenant allowed him to work as an agent or employee of Central Redi-Mix, Inc. without violating the covenant. The district court found Central Redi-Mix was an existing corporation when Randall signed the covenant, and Randall testified he formed Central Redi-Mix and subcontracted to have Central Redi-Mix perform the duties he had performed with Central Redi-Mix. The district court found Central Redi-Mix a sham corporation and found when Randall worked for M. Peterson Construction he was in violation of his covenant and at the time he was not an agent for Central Redi-Mix and plaintiffs had an obligation to enforce Randall's covenant but failed to do so.

Plaintiffs had contended the issue of Randall's violation of the non-compete agreement was determined in their suit against Randall. The district court determined otherwise, finding:

With regard to the requirement that the issue be identical, there is a common preliminary issue of whether or not Randall Van Oort violated his covenant not to compete with VOCC when he went to work for M. Peterson Construction Company. However, whether or not VOCC

fulfilled the contract obligation with defendant of enforcing its covenant not to compete with Randall Van Oort was not an issue which was material and relevant to the disposition of the prior action . . . and . . . was not necessary and essential to the resulting judgment The Court therefore concludes that the prerequisites for the application of issue preclusion are not satisfied in this case.

The district court went on to find plaintiffs should not prevail on this issue because (1) the issues of whether Randall violated the covenant not to compete and whether plaintiffs made a good faith effort to enforce it were not fully litigated in the first action; (2) plaintiffs made no effort to join defendant in the suit; and (3) the hearing did not bring forth all relevant facts because, in part, the parties were related and plaintiffs had a motive to only go through the motions of enforcing the covenant and no effort was made to aggressively litigate the issue.

Plaintiffs contend the doctrine of issue preclusion precluded the relitigation of Randall's violation of the covenant not to compete. This is an issue of res judicata. In dealing with res judicata, there are two specific types, namely issue preclusion and claim preclusion. *See Israel v. Farmers Mut. Ins. Ass'n*, 339 N.W.2d 143, 146 (Iowa 1983). It is agreed here claim preclusion is not applicable. Rather, we are dealing with issue preclusion.

In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981). When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the

determination is conclusive in subsequent actions between the parties, whether on the same or a different claim. *Id.*

Four prerequisites are required before the doctrine of issue preclusion can properly be applied in any given case:

- (1) the issue concluded must be identical;
- (2) the issue must have been raised and litigated in the prior action;
- (3) the issue must have been material and relevant to the disposition of the prior action; and
- (4) the determination of the issue in the prior action must have been necessary and essential to the resulting judgment.

See Bascom v. Jos. Schlitz Brewing Co., 395 N.W.2d 879, 881-82 (Iowa 1986); *Kraft v. El View Constr., Inc.*, 394 N.W.2d 365, 367-68 (Iowa 1986); *Israel*, 339 N.W.2d at 146; and *Hunter*, 300 N.W.2d at 123.

The first prerequisite requires the issue be identical in this case as compared with the prior action. *Risken v. Clayman*, 398 N.W.2d 833, 836 (Iowa 1987). An issue decided in the prior litigation is identical to the issue sought to be established here; that is, was Randall in violation of the non-compete provisions of the January 15, 1993 contract. This issue was litigated. This issue was material and relevant to the prior action. The determination of the issue was necessary to the resulting judgment. The trial court basically agreed with this conclusion.

The trial court found, however, the issue is not whether Randall violated the contract, but "whether plaintiffs fulfilled its contract obligation with defendant of enforcing it." Plaintiffs contend this is the same issue as the act complained of and

litigated in the enforcement of Randall's non-compete agreement. We agree with plaintiffs the act complained of and the act litigated are essentially the same issue.

Plaintiffs were obligated to enforce the agreement. The district court in plaintiffs' action against Randall found no violation of the covenant. The court having found no violation, there was nothing more plaintiffs needed to do to enforce the covenant. Consequently, the first judgment resolved defendant's claim Randall's breach of his covenant is a material and substantial breach of its contract with plaintiffs.

Defendant, though, was not a party to plaintiffs' suit seeking enforcement of the non-compete provision. Identity of parties is not always necessary to give validity to a claim of issue preclusion. See *Brigdon v. Covington*, 298 N.W.2d 279, 281 (Iowa 1980) (a stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide); see also *Thorp Credit, Inc. v. Johnson*, 257 N.W.2d 498, 500 (Iowa 1977); *Mauer v. Rohde*, 257 N.W.2d 489, 496-98 (Iowa 1977); *Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116, 131 (Iowa 1976); *Schneberger v. United States Fidelity & Guar. Co.*, 213 N.W.2d 913, 917 (Iowa 1973); *Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373, 378-79 (Iowa 1972); *Goolsby v. Derby*, 189 N.W.2d 909, 913-17 (Iowa 1971).

Plaintiffs seek to use the doctrine in an offensive or affirmative manner against a stranger to the judgment. Specifically, plaintiffs seek to rely on the former

judgment as conclusively establishing the issue in their favor. A trial court is granted discretion in permitting offensive use of issue preclusion. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31, 99 S. Ct. 645, 650-51, 58 L. Ed. 2d 552, 561-62 (1979). Circumstances to consider in making such a determination include:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.

Hunter, 300 N.W.2d at 124-25.

Issue preclusion is available in subsequent litigation by nonmutual parties, and a party is precluded from relitigating an issue with an opposing party unless the party lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording the party an opportunity to relitigate the issue. *See Hunter*, 300 N.W.2d at 124-25.

The general rule is that offensive use of issue preclusion is not allowed where a plaintiff could easily have joined the defendant in the earlier action or where offensive application would be unfair to a defendant. *See Parklane*, 439 U.S. at 331, 99 S. Ct. at 651, 58 L. Ed. 2d at 562. Defendant contends plaintiffs' failure to join it in plaintiffs' action against Randall is fatal to plaintiffs' claim issue preclusion be applied.

This is not a case where the litigation occurred without defendant's knowledge or consent. Nor is this a case where defendant was foreclosed from participating in the prior litigation. Here, defendant demanded plaintiffs enforce the covenant. Defendant did not seek an assignment of rights or seek to enforce the covenant itself. Defendant was notified of plaintiffs' suit against Randall. Defendant's attorney was given updates on the suit. Nothing precluded defendant from joining the suit. Brett Nuckolls, an officer of defendant, testified he did not feel the need to participate, feeling the plaintiffs were the best people to handle the suit.

We disagree with defendant that plaintiffs' failure to join defendant in their suit against Randall, standing alone, is sufficient to deny plaintiffs' claim of issue preclusion. We note the factors *Hunter* directs be considered also include the circumstances where the person seeking to avoid unfavorable preclusion could have effected joinder. *Hunter*, 300 N.W.2d at 124-25. Defendant had every opportunity to participate in the first case and elected not to do so. We consider the failure to seek joinder by either plaintiffs or defendant to be part of the collective circumstances a court is directed by *Hunter* to consider. *See id.*

The trial court found, among other things, the prior litigation was affected by the relationship between the parties, that is, plaintiffs Jerry and Casey Van Oort are Randall's brothers and their views that Randall needs to earn a living. We consider these factors in determining whether the district court abused its discretion on this issue. Yet we note testimony by defendant's representative the fact he thought the issue would better be litigated by the brothers was a reason he did not participate in the litigation. We consider, too, these factors were well known to defendant when it sat back and elected not to join or participate in the first litigation.

We consider also that treating the issue as conclusively determined is compatible with administering the remedies here. Both trials were in district court in Polk County, affording the parties the same procedural opportunities and equal accessibility to the same witnesses. Treating the issue as conclusively determined does not complicate the determination of future issues. Weighing all factors, we determine the trial court should have given preclusive effect to the first ruling.

Plaintiffs further contend the trial court's ruling is in error because there is not substantial evidence supporting the ruling. Plaintiffs contend the contract provision only required plaintiffs to enforce Randall's agreement. Plaintiffs contend they did this in filing suit for injunctive relief. Additionally, plaintiffs advance even if Randall was in violation of the covenant, it is only a partial violation of the covenant, not a total breach. Consequently, the trial court erred in finding defendant discharged totally from its obligation. Plaintiffs contend any activity by Randall is of minimal consequence to a defendant that has \$16 million in annual sales.

The trial court, though finding a breach, concluded defendant's lost profits were too speculative to fix. There is nothing in the record to prove defendant suffered damage from Randall's activities, even if in violation of his covenant. The district court was correct in finding damages too speculative to fix. Consequently, even if Randall's activities were a breach, at most they were a partial breach. For defendant to be entitled to a complete discharge of its obligation to plaintiffs, defendant must have shown the condition breached by plaintiffs constituted the entire agreed exchange or was expressly recognized in the bargain as the condition for the other party's performance. *Union Story Trust & Sav. Bank v. Sayer*, 332 N.W.2d 316, 322 (Iowa 1983).

The conditions for the covenant included more than just Randall's activities. There is no showing defendant suffered damage as a result of Randall's activities. There is not substantial evidence supporting the trial court finding defendant had no further obligation under the contract as of March 1996 because of plaintiffs' breach. Plaintiffs have shown defendant ceased making payments on the contract in April of 1996 and in doing so breached the agreement.

Defendant advances even if this were not a total breach, plaintiffs engaging in a new business, V.O.C. Concrete, was a complete breach.

The evidence supports the trial court's finding in January of 1997 there was a total breach of the contract by plaintiffs when the named plaintiffs re-entered the concrete business. Plaintiffs contend the breach was justified because defendant had breached the contract in April of 1996 and they did it to mitigate damages. The trial

court correctly dismissed this claim. The evidence supports the trial court's finding on this issue.

We reverse the trial court's finding the contract was breached by defendant in March of 1996. Plaintiffs shall have judgment against defendant for \$293,755.75. We also reverse the award of attorneys fees to defendant's attorney. We agree plaintiffs breached the agreement in January of 1997 and we affirm the trial court's award of \$11,700 in damages for defendant as a result of that breach.

AFFIRMED IN PART; REVERSED IN PART.

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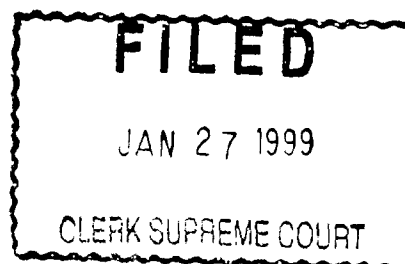
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Denis Y. Reed of the Reed Law Office, Des Moines, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ. Streit, J., takes no part.

SACKETT, C.J.

Plaintiffs/counterclaim defendants-appellants Van Oort Construction Co., Inc., Jerry Van Oort, Casey Van Oort, and Jeff Wangsness sold a ready-mix concrete business to defendant/counterclaim plaintiff-appellee Nuckoll's Concrete Service, Inc. in February of 1994 for \$3,400,000. There were two contracts. One was for \$2,950,000 for the sale of assets. This contract was paid in full at the time of the sale. The second contract was a covenant not to compete. It called for \$450,000 payable by buyer to sellers over sixty months at 7.42 percent interest. In June of 1996, plaintiffs sued claiming after March of 1996 defendant had failed to make payments due under the non-compete agreement. Defendant counterclaimed alleging breaches of the covenant not to compete and seeking the return of certain amounts paid. The district court found for defendant on all issues, relieving defendant of any obligation to make the remaining payments on the covenant not to compete after March of 1996 and awarding defendant \$11,700 in damages, plus interest and attorney fees.¹ This appeal follows.

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(Emphasis added.)

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After a hearing, the district court concluded Randall was engaging in conduct prohibited by the non-compete agreement but he was not in violation of the covenant because the conduct was in the course of his employment with Central Redi-Mix, Inc., which was permitted under the covenant's terms. After the ruling, plaintiffs notified defendant of the ruling and sought to have defendant recommence monthly payments. Defendant refused to do so. Plaintiffs then commenced this suit contending defendant breached the covenant in failing to make required monthly payments after March of 1996.

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The district court went on to find plaintiffs should not prevail on this issue because (1) the issues of whether Randall violated the covenant not to compete and whether plaintiffs made a good faith effort to enforce it were not fully litigated in the first action; (2) plaintiffs made no effort to join defendant in the suit; and (3) the hearing did not bring forth all relevant facts because, in part, the parties were related and plaintiffs had a motive to only go through the motions of enforcing the covenant and no effort was made to aggressively litigate the issue.

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The trial court found, however, the issue is not whether Randall violated the contract, but "whether plaintiffs fulfilled its contract obligation with defendant of enforcing it." Plaintiffs contend this is the same issue as the act complained of and

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Plaintiffs seek to use the doctrine in an offensive or affirmative manner against a stranger to the judgment. Specifically, plaintiffs seek to rely on the former

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The general rule is that offensive use of issue preclusion is not allowed where a plaintiff could easily have joined the defendant in the earlier action or where offensive application would be unfair to a defendant. *See Parklane*, 439 U.S. at 331, 99 S. Ct. at 651, 58 L. Ed. 2d at 562. Defendant contends plaintiffs' failure to join it in plaintiffs' action against Randall is fatal to plaintiffs' claim issue preclusion be applied.

This is not a case where the litigation occurred without defendant's knowledge or consent. Nor is this a case where defendant was foreclosed from participating in the prior litigation. Here, defendant demanded plaintiffs enforce the covenant. Defendant did not seek an assignment of rights or seek to enforce the covenant itself. Defendant was notified of plaintiffs' suit against Randall. Defendant's attorney was given updates on the suit. Nothing precluded defendant from joining the suit. Brett Nuckolls, an officer of defendant, testified he did not feel the need to participate, feeling the plaintiffs were the best people to handle the suit.

We disagree with defendant that plaintiffs' failure to join defendant in their suit against Randall, standing alone, is sufficient to deny plaintiffs' claim of issue preclusion. We note the factors *Hunter* directs be considered also include the circumstances where the person seeking to avoid unfavorable preclusion could have effected joinder. *Hunter*, 300 N.W.2d at 124-25. Defendant had every opportunity to participate in the first case and elected not to do so. We consider the failure to seek joinder by either plaintiffs or defendant to be part of the collective circumstances a court is directed by *Hunter* to consider. *See id.*

The trial court found, among other things, the prior litigation was affected by the relationship between the parties, that is, plaintiffs Jerry and Casey Van Oort are Randall's brothers and their views that Randall needs to earn a living. We consider these factors in determining whether the district court abused its discretion on this issue. Yet we note testimony by defendant's representative the fact he thought the issue would better be litigated by the brothers was a reason he did not participate in the litigation. We consider, too, these factors were well known to defendant when it sat back and elected not to join or participate in the first litigation.

We consider also that treating the issue as conclusively determined is compatible with administering the remedies here. Both trials were in district court in Polk County, affording the parties the same procedural opportunities and equal accessibility to the same witnesses. Treating the issue as conclusively determined does not complicate the determination of future issues. Weighing all factors, we determine the trial court should have given preclusive effect to the first ruling.

Plaintiffs further contend the trial court's ruling is in error because there is not substantial evidence supporting the ruling. Plaintiffs contend the contract provision only required plaintiffs to enforce Randall's agreement. Plaintiffs contend they did this in filing suit for injunctive relief. Additionally, plaintiffs advance even if Randall was in violation of the covenant, it is only a partial violation of the covenant, not a total breach. Consequently, the trial court erred in finding defendant discharged totally from its obligation. Plaintiffs contend any activity by Randall is of minimal consequence to a defendant that has \$16 million in annual sales.

The trial court, though finding a breach, concluded defendant's lost profits were too speculative to fix. There is nothing in the record to prove defendant suffered damage from Randall's activities, even if in violation of his covenant. The district court was correct in finding damages too speculative to fix. Consequently, even if Randall's activities were a breach, at most they were a partial breach. For defendant to be entitled to a complete discharge of its obligation to plaintiffs, defendant must have shown the condition breached by plaintiffs constituted the entire agreed exchange or was expressly recognized in the bargain as the condition for the other party's performance. *Union Story Trust & Sav. Bank v. Sayer*, 332 N.W.2d 316, 322 (Iowa 1983).

The conditions for the covenant included more than just Randall's activities. There is no showing defendant suffered damage as a result of Randall's activities. There is not substantial evidence supporting the trial court finding defendant had no further obligation under the contract as of March 1996 because of plaintiffs' breach. Plaintiffs have shown defendant ceased making payments on the contract in April of 1996 and in doing so breached the agreement.

Defendant advances even if this were not a total breach, plaintiffs engaging in a new business, V.O.C. Concrete, was a complete breach.

The evidence supports the trial court's finding in January of 1997 there was a total breach of the contract by plaintiffs when the named plaintiffs re-entered the concrete business. Plaintiffs contend the breach was justified because defendant had breached the contract in April of 1996 and they did it to mitigate damages. The trial

court correctly dismissed this claim. The evidence supports the trial court's finding on this issue.

We reverse the trial court's finding the contract was breached by defendant in March of 1996. Plaintiffs shall have judgment against defendant for \$293,755.75. We also reverse the award of attorneys fees to defendant's attorney. We agree plaintiffs breached the agreement in January of 1997 and we affirm the trial court's award of \$11,700 in damages for defendant as a result of that breach.

AFFIRMED IN PART; REVERSED IN PART.