FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MIKES LINES, INCORPORATED,	)	Filed June 28, 1983
Plaintiff-Appellee,	)	
vs.	)	3-57 2-68929
WILLIAM C. KELLEY,	)	
Defendant-Appellant.	)	

Appeal from Chickasaw District Court, Carrol E. Engelkes, Judge.

Defendant ex-employee appeals from an adverse trial court judgment and injunction enforcing plaintiff trucking company's covenant not to compete, awarding plaintiff damages in the amount of $3175 for defendant's breach of the covenant, and awarding plaintiff additional damages in the amount of $857 on defendant's counterclaim for unpaid wages and insurance premiums. AFFIRMED AND MODIFIED.

Mark W. Schwickerath and Mark B. Anderson, Cresco, for defendant-appellant.

Richard P. TeKippe, New Hampton, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Defendant ex-employee appeals from an adverse trial court judgment and injunction enforcing plaintiff trucking company's covenant not to compete, awarding plaintiff damages in the amount of $3175 for defendant's breach of the covenant, and awarding plaintiff additional damages in the amount of $857 on defendant's counterclaim for unpaid wages and insurance premiums. Plaintiff alleges that defendant has not complied with the trial court's injunction and has moved that the matter be remanded for the specific purpose of determining the appropriate amount of the judgment. We affirm the judgment of the trial court, modifiy its award of damages on defendant's counterclaim, and remand for a redetermination of damages on plaintiff's claim.

Plaintiff operates a trucking business in Fredricksburg, Iowa, hauling various commodities. For over five years prior to January 1, 1982, plaintiff supplied a driver and vehicle to haul milk on a regular basis for the local dairy cooperative, pursuant to an oral contract. During this period of time, defendant worked for plaintiff under an independent contractor/vehicle lease arrangement, and was assigned to the co-op's milk run.

The employment contract between plaintiff and defendant contained the following covenant not to compete:

> CONTRACTOR agrees that after the termination of this Agreement in any manner whatsoever, he shall not for a period of two years after such termination engage directly or indirectly in the business of transporting commodities or otner merchandise by truck to any of the customers or persons, firms or corporations to whom he had previously thereto been making deliveries for MIKES. CONTRACTOR agrees during such two year period, that he shall not directly or indirectly on his own behalf, or on the behalf of any other person, firm or corporation, solicit any of the customers of MIKES for any such business in competition with MIKES. In the event of a breach of these agreements by CONTRACTOR, MIKES may proceed by action in equity

> to restrain or enjoin such acts on CONTRACTOR'S part, and may recover at law or in equity, damages therefore, in the amount of $25.00 per day for each and every breach on the part of CONTRACTOR, which said amount is, by the parties hereto, settled on and agreed to as liquidated damages for said breach.

Effective January 1, 1982, the co-op terminated its contract with plaintiff. The parties dispute the circumstances under which this occurred. Defendant resigned from his employment with plaintiff, negotiated a contract with the co-op, and began hauling the milk run in his individual capacity.

Plaintiff subsequently filed a petition seeking an injunction to prohibit defendant from continuing the milk run and seeking damages as provided in the covenant. Defendant filed a counterclaim seeking recovery of wages plaintiff allegedly withheld following defendant's resignation and an insurance payment defendant allegedly made at plaintiff's request prior to his resignation.

Prior to trial the parties stipulated that plaintiff owed defendant $1,357 on the counterclaim. At trial there was testimony indicating that plaintiff had not sought enforcement of the covenant against other of its ex-drivers. Plaintiff claimed that was because those drivers had been engaged in only occasional grain hauling jobs, rather than competing on an established, regular trucking run. There was additional testimony regarding the employment contract between plaintiff and defendant, termination of plaintiff's contract with the co-op, defendant's contract with the co-op, and plaintiff's alleged loss of business.

In its findings, conclusions, and judgment, the trial court enjoined defendant from continuing the milk run and awarded plaintifff damages in the amount of $3,175, which was based on the $25 per diem damages clause in the covenant not to compete. The trial court mentioned the pretrial stipulation between the parties, but apparently mistakenly awarded judgment on the counterclaim to plaintiff rather than defendant.

On appeal, defendant asserts that: (1) the parties stipulated the amount of damages due defendant on his counterclaim, and the trial court erred in not awarding them to defendant; (2) the covenant not to compete does not meet the test of reasonableness applicable to employment covenants; (3) the true purpose of the covenant not to compete was to prevent defendant from leaving his employment with plaintiff; (4) no special skills are involved in the truckdriving job which will support a covenant not to compete; and (6) plaintiff's failure to enforce the covenant against other exemployees estops it from enforcing the covenant against defendant. Our scope of review in this equity case is de novo. Iowa R. App. P. 4.

I. Covenants Not to Compete

The general rule concerning covenants not to compete in employment contracts is that they are enforceable to the extent they are necessary to protect the interests of the employer, and to the extent that they do not unreasonably restrict the employee's rights. Brecher v. Brown, 17 N.W.2d 377, 378-79 (Iowa 1945). Of course, application of this general rule raises several questions. What interests of an employer may legitimately be protected by a covenant not to compete? What restrictions on a covenant's scope are necessary to avoid an unreasonable restriction of the employee's right?

It is clear that an employer has a legitimate interest against having an employee leave and employ special skills acquired from the employer's training for the benefit of a competitor. See Chemical Fireproofing Corp. v. Krouse, 155 F.2d 422 (CCA D.C. 1946). It is also clear that an employer has a legitimate interest against an employee's use of trade secrets for the benefit of a competitor, and may reasonably be protected from such an occurrence. However, it is not a requirement for enforcing a covenant not to compete that special skills or trade secrets be involved. An employer is reasonably entitled to be protected against an

employee's use of personal influence with the employer's customers which the employee gained through his employment. Baker v. Starkey, 144 N.W.2d 889, 896 (Iowa 1966).

> Where the nature of the employment is such that it will bring the employee in personal contact with the patrons and customers of the employer, or will enable the employee to acquire valuable information as to the nature and character of the employer's business and the names and requirements of the patrons and customers of his employer, thus enabling the employee, be engaging in a competing business, either for himself or for another, to take advantage of such knowledge of his former employer's business, or his acquaintance with the patrons and customers of such employer, the decisions quite generally hold that a court of equity will interfere on behalf of the employer, and restrain the breach of a covenant not to engage in such competing business, providing the covenant does no violence to the rule that the restraint shall not be greater, either as to territory or time, than may reasonably be necessary to protect the business or good will of the employer.

Federated Mutual Implement and Hardware Insurance Co. v. Erickson, 110 N.W.2d 264, 267-68 (Iowa 1961); quoting Madsen v. Travelers Ins. Co., 52 F.2d 75, 77 (8th Cir. 1931).

In Federated Mutual, the court ruled that a restrictive covenant which provided that an insurance agent could not, for a period of two years after termination of employment, engage in a similar type of insurance business in the three counties to which he had been assigned by his employer was reasonable both as to area and duration. We are of the opinion that the covenant not to compete in the present case is also reasonable both as to area and duration. Moreover, it does not unreasonably restrict defendant's right to engage in the trade which he has chosen. The covenant merely prevents defendant, for a period of two years, from competing for those of plaintiff's established customers with whom defendant had dealt while working for plaintiff. It does not prevent defendant from driving for any of the other established truck lines, nor does it restrict him from contracting to haul products for any facility which he did not service while in plaintiff's employment.

The trial court, in its findings of fact, found that "but for the intervention of defendant to obtain the contract in his own behalf, the plaintiff would still be hauling milk for the Co-op." This is precisely the sort of situation which covenants not to compete were designed to prevent. And it is for precisely this reason that the courts have enforced such covenants, despite the fact that they impose restraints on trade.

II. Estoppel

Defendant argues that plaintiff is estopped from enforcing the noncompete covenant against him. The essential elements of estoppel are a false representation or concealment of material facts, a lack of knowledge of the facts on the part of the actor, the intention that it be acted upon, and reliance thereon by the party to whom made, to his injury. Moser v. Thorp Sales Corp., 312 N.W.2d 881, 892 (Iowa 1981). The party urging estoppel has the burden of establishing each separate element.

In the present case, defendant claims that plaintiff's failure to enforce the covenant against a few other drivers led him to believe that the covenant would not be enforced against him. Defendant does not allege, however, that plaintiff intended him to rely on its prior lack of enforcement. "A party relying on the existence of estoppel has the burden to establish that the party against whom estoppel is urged knowingly took a position with the intention that it be acted upon, and relied thereon by the party urging estoppel." Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 316 (Iowa 1977). Reliance without any intent to induce reliance is insufficient to establish an equitable estoppel.

III. The Counterclaim

The parties are agreed that defendant is entitled to a judgment of $1357 against plaintiff on his counterclaim. This amount was stipulated to by the parties prior to trial. The trial court erred in awarding $857 to plaintiff on defendant's

counterclaim. Plaintiff's award should have been reduced by $1357 rather than increased by $857. The trial court's award of damages is therefore modified to reflect this change.

IV. Noncompliance with the Injunction

Plaintiff has filed a motion asking for a remand on the issue of damages on the ground that defendant has allegedly not complied with the trial court's injunction. We remand to the trial court to determine whether or not defendant has complied with the injunction and instruct that, if defendant has not so complied, additional damages are to be assessed at the rate of $25 per diem.

AFFIRMED AS MODIFIED AND REMANDED FOR ASSESSMENT OF ADDITIONAL DAMAGES.