ED101847

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

WHELAN SECURITY COMPANY,

Respondent / Cross-Appellant,

vs.

CHARLES KENNEBREW, SR.,

Appellant / Cross-Respondent.

On Appeal from the Circuit Court of St. Louis County
Honorable Maura B. McShane, Circuit Judge
Case No. 10SL-CC00006-01

OPENING BRIEF OF THE APPELLANT

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Preliminary Statement

Whelan Security Company, a nationwide private security firm based in St. Louis, hired Charles Kennebrew as its Dallas, Texas, branch manager in 2007. It required him to sign non-compete covenants prohibiting, for two years, *inter alia*: (1) soliciting any Whelan customer with whom he had dealt; or (2) working for any competing business within 50 miles "where [he] provided or arranged for [Whelan] to provide services."

In 2009, Mr. Kennebrew resigned to run his own private security contractor business, Elite, he had started in Houston, Texas, before he came to Whelan in Dallas. Not wanting to lose him just yet, Whelan agreed to allow him both to work as its Dallas branch manager for four more months while simultaneously running Elite in Houston. Once Elite became successful, however, even taking on a former Houston customer of Whelan's, Whelan sued Mr. Kennebrew in St. Louis for breach of the covenants.

The trial court granted Whelan summary judgment, holding there was no dispute that Mr. Kennebrew: (1) solicited Whelan customer Park Square; and (2) "provided services" for Whelan in Houston, prohibiting him from running Elite in Houston. It held Whelan was entitled to judgment as a matter of law that these actions violated the covenants, and awarded Whelan $69,375.75 in damages and $165,000 in attorney fees.

Summary judgment was error. Viewing the facts in a light most favorable to Mr. Kennebrew, the non-movant, there were genuine disputes of material fact: (1) whether Mr. Kennebrew solicited Park Square, rather than Park Square soliciting him; (2) whether Whelan waived enforcement of the non-compete covenants as to Houston; and (3) whether Mr. Kennebrew "provided services" for Whelan in Houston in the first place.

Table of Contents

Table of Authorities

Cases

Constitution of Missouri

Revised Statutes of Missouri

Missouri Supreme Court Rules

Rules of the Missouri Court of Appeals, Eastern District

Other Authorities

Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of St. Louis County holding that a former employee violated non-compete covenants he entered into with his former employer and granting the former employer damages and attorney fees.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. Thus, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in St. Louis County. Under § 477.050, R.S.Mo., venue lies in the Eastern District.

Statement of Facts

A. Background

This case stems from an employment agreement between Respondent Charles Kennebrew and Appellant Whelan Security Company (Legal File[1] 58-59, 232-33; Appendix ("Appx.") A10-11). Since October 2007, Mr. Kennebrew has owned 60 percent of Elite Protective Services, LLC ("Elite"), a Texas limited liability company located in Houston (L.F. 74; P.L.F. 551, 558; P.Tr. III 18).

Mr. Kennebrew has worked in the private security industry since his discharge from the United States Navy in 1998 (P.Tr. III 19-20). He worked for two major companies in Houston, Barton Security and its successor, Allied Barton (P.Tr. III 214-22). He signed a non-compete agreement with Allied Barton that prohibited him from working in the industry in Houston for six months after his employment ended (Tr. I 33).

Whelan Security is a Missouri corporation principally located in St. Louis that operates throughout the United States (L.F. 57). In October 2007, Whelan began negotiating with Mr. Kennebrew, who still lived in Houston, to bring him aboard (L.F.

[1] The parties' joint record in this appeal consists of four volumes of legal file, abbreviated "L.F." in this brief, and a transcript, abbreviated "Tr." in this brief. Additionally, on the parties' joint motion, the Court transferred in the record of a prior appeal in this case, No. ED96394. That prior record consists of ten volumes of legal file, abbreviated "P.L.F." in this brief, one supplemental legal file volume, abbreviated "S.P.L.F." in this brief, and three volumes of transcript, each abbreviated "P.Tr." in this brief.

57-58, 65; P.L.F. 603, 615). On October 31, 2007, Prentice Robertson, Whelan's Executive Vice President, offered Mr. Kennebrew a position at Whelan's Dallas branch in a "Quality Control/Continuous Improvement" role earning around $115,000 per year (P.L.F. 603, 615). Mr. Robertson offered to make a mutual decision as to whether Mr. Kennebrew would stay in Dallas or move back to Houston at the pending end of his six-month non-compete period from Allied Barton (P.L.F. 603, 615). Mr. Robertson offered that, either way, Mr. Kennebrew would assume control of "either" of those two branches at the end of that period, and would report to Todd McCullough, Whelan's Vice President of Operations for the entire Southern United States (L.F. 76; P.L.F. 603).

On November 2, 2007, Mr. Robertson sent Mr. Kennebrew an offer letter formally inviting Mr. Kennebrew to join Whelan, which superseded all previous communications and offers (P.L.F. 601). Effective November 26, 2007, he offered Mr. Kennebrew the position of Quality Assurance Manager for Whelan's Dallas branch, to be followed by a branch leadership role in one of Whelan's major Texas markets (P.L.F. 601). Mr. Kennebrew would be second-in-command in Dallas, and was given a goal to reorganize that branch's structure so a new Dallas manager could "step into a finely tuned operation with happy customers" (P.L.F. 601). "Should [Mr. Kennebrew] opt to remain in Dallas permanently, [he would] assume the branch leadership role in that branch" (P.L.F. 601). Mr. Kennebrew accepted the offer and moved to Dallas, becoming employed by Whelan as of November 26, 2007 (L.F. 75; P.L.F. 356-57).

B. Non-Compete Covenants

On November 26, 2007, Mr. Kennebrew met with Mr. McCullough, who presented Mr. Kennebrew with an agreement to sign titled "Employee Confidential Information and Non-Solicitation/Non-Competition Agreement" ("the Agreement") (L.F. 58-59; P.L.F. 356-57, 487; Appx. A24-25).

Section 3 of the Agreement, titled "Restrictive Covenants," contained its "Non-Solicitation/Non-Competition" portion:

> During the term of this Agreement, and for a period of two (2) years thereafter, whether the termination of this Agreement is initiated by EMPLOYER OR EMPLOYEE, EMPLOYEE shall not, without the prior consent of EMPLOYER, in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, agent, principal, broker, advisor, consultant, manager, shareholder, director, or officer, for himself or in behalf of any person, firm, partnership, entity, or corporation, or by any agent or employee:
>
> (a) Solicit, take away or attempt to take away any customers of EMPLOYER or the business or patronage of any such customers or prospective customer(s) whose business was being sought during the past twelve (12) months of EMPLOYEE'S employment; or
>
> (b) Solicit, interfere with, employ, or endeavor to employ any employees or agents of EMPLOYER.
>
> (c) Work for a competing business within a fifty (50) mile radius of any

location where EMPLOYEE has provided or arranged for EMPLOYER to provide services.

(d) Work for a customer of EMPLOYER or prospective customer(s) whose business was being sought during the last twelve (12) months of EMPLOYEE'S employment, if the work would include providing, or arranging for, services the same as, or similar to, those provided by EMPLOYER.

"Competing business" means any business engaged in providing guard and/or security services the same as, or similar to, those offered by EMPLOYER.

(L.F. 58-59; Appx. A24-25).

Mr. McCullough explained to Mr. Kennebrew that these non-compete provisions covered work only in the Dallas area, also including nearby Fort Worth, and only would be in force in that market (L.F. 75; S.P.L.F. 22, 55, 122, 137, 140-41). Mr. McCullough stated that, when discussing the terms of the contract with Mr. Kennebrew on November 26, 2007, he never suggested Mr. Kennebrew would be responsible for working in Houston (L.F. 75; S.P.L.F. 55). Indeed, Mr. McCullough noted Mr. Kennebrew worked exclusively in Whelan's Dallas branch throughout Mr. McCullough's term as Vice President, covering October 2007 to late March 2009 (L.F. 75; S.P.L.F. 62).

Mr. McCullough testified he personally explained to Mr. Kennebrew that the non-compete portion of the Agreement meant that Mr. Kennebrew could not do business in a 50 mile radius of *Dallas*, where he was stationed, and could not assist anyone else in

taking Whelan's customers in that area, either (L.F. 75; S.P.L.F. 26, 138). That is, since Mr. Kennebrew oversaw Whelan's Dallas-Fort Worth operations, the non-compete covenants covered a 50-mile radius of that area for two years after his employment with Whelan ended (L.F. 75; S.P.L.F. 30, 142).

Mr. McCullough assured Mr. Kennebrew that the covenants did not extend to any potential assistance Mr. Kennebrew may have to give to Whelan in securing business in Houston (L.F. 75; S.P.L.F. 26, 138). He understood the covenants did not prevent Mr. Kennebrew from opening his own security business in Houston, which Mr. Kennebrew already had done before going to work for Whelan (L.F. 74-75; P.L.F. 551, 558; S.P.L.F. 32-33; P.Tr. III 18).

Mr. Kennebrew testified that, based on this discussion with Mr. McCullough, he understood the non-compete covenants only applied to Dallas-Fort Worth, the territory he oversaw (P.Tr. III 71). He explained he understood this was because his original offer from Whelan gave him the option to remain in Dallas, which he had exercised, and Dallas was his only territory for Whelan (P.Tr. III 71-73). Mr. Kennebrew and Mr. McCullough each signed the Agreement (P.L.F. 536).

After signing the Agreement, Mr. Kennebrew immediately became Whelan's Dallas branch manager (L.F. 75; P.Tr. III 27). He earned a salary of around $115,000 per year (P.L.F. 603). Thereafter, he never considered the option to leave Dallas once his Allied Barton non-compete obligation ended because he became so heavily involved in Whelan's Dallas marketplace (P.L.F. 42, 288).

C. Mr. Kennebrew's Contacts with Houston While At Whelan's Dallas Branch

While managing Whelan's Dallas branch, Mr. Kennebrew managed *only* that branch, not Whelan's separate Houston branch, which had its own managers (L.F. 76). Mr. Kennebrew testified he only ever had access to Whelan's financials and price information in Dallas and, even then, was unable to copy or print it except merely to put it into a spreadsheet and, still then, only on Mr. Robertson's approval (P.Tr. I 37-39).

Mr. Kennebrew managed clients in Dallas, managed the Dallas branch's finances (except budgeting), and was responsible for human resources in Dallas (P.Tr. III 65). He had no access to any operational information about the Houston branch, such as financial or compensation data (P.Tr. III 66). Essentially, then, he was operationally in charge of the Dallas branch and only assisted Whelan as needed in Houston (L.F. 76).

The evidence below was Mr. Kennebrew's "assistance" with operations in Houston consisted only of three instances. First, and principally, there was a *single* "sales blitz" in April 2008, in which Mr. Robertson requested he give Whelan's Houston team some Houston contacts from his days at Barton and Allied Barton to help bring them over to Whelan (P.Tr. III 14, 18-19, 31). Mr. Kennebrew only had contact with five to ten prospective Houston customers during his 18 months at Whelan, and only as a result of that one event (L.F. 73-74, 76; P.Tr. III 34). Moreover, *all* these customers were contacts with whom he previously had been acquainted before his employment with Whelan (L.F. 73-74, 76; P.Tr. III 34). Whelan produced no evidence that Mr. Kennebrew ever provided any services for any clients outside the Dallas area, including after those five to ten later became Whelan customers (P.L.F. 91).

Mr. McCullough explained, though, that this was not part of the non-compete provision, but rather giving leads and things of that nature was merely assisting Whelan – while still working exclusively in the Dallas area – to drum up business (S.P.L.F. 27, 139). For, it was Mr. McCullough, not Mr. Kennebrew, who oversaw Whelan's operations in the entire South, including both Dallas and Houston (S.P.L.F. 29, 141). Simply put, Mr. Kennebrew had no staff or operational oversight in Houston; those functions belonged to Doug Blake, Jeff Rosenavich, and David Beltran, successive branch managers in Houston (S.P.L.F. 33-34, 145-46).

Second, and at the request of Mark Porterfield, Whelan's Senior Vice President and Chief Security Officer, Mr. Kennebrew once sent one of Whelan's Houston clients a gift from Dallas (L.F. 76-77). Finally, during Hurricane Ike, Mr. Kennebrew and other Whelan Dallas employees were sent to Houston to assist with securing buildings (L.F. 76-77; P.Tr. III 34-35, 45).

D. Park Square

Much of Whelan's claim against Mr. Kennebrew concerns the Park Square Condominiums in Houston and its Property Manager, Janice VerVoort (L.F. 73-75).

Mr. McCullough, Mr. Porterfield, and even Greg Twardowski, Whelan's CEO, all stated Mr. Kennebrew had a relationship with Park Square and Ms. VerVoort prior to his employment with Whelan (L.F. 77; P.Tr. I 49, 90). Mr. Twardowski testified Park Square was Allied Barton's customer before Mr. Kennebrew began working at Whelan (P.Tr. I 49). He acknowledged Mr. Kennebrew was not the Houston branch manager and knew of no instance in which Mr. Kennebrew worked on Park Square's account for

Whelan (P.Tr. I 51).

Rather, it was Mr. McCullough who brought Park Square to Whelan and oversaw Park Square's account (L.F. 76; P.Tr. III 73). Mr. Kennebrew only contacted Ms. VerVoort on two occasions during his time at Whelan: (1) it was she to whom Mr. Porterfield requested he send the gift described *supra* at p. 8; and (2) Park Square's buildings were among those some of Whelan's Dallas employees, including Mr. Kennebrew, helped secure during Hurricane Ike (L.F. 74, 76-77; P.Tr. III 34-35, 45).

After Mr. Kennebrew left Whelan, he twice received calls from Ms. VerVoort in which she stated she was about to terminate Whelan's services, first in August 2009 and then again in November 2009 (P.Tr. III 61). His response each time was to let Mr. Porterfield know (P.Tr. III 61). In response to the first call, he told Ms. VerVoort he had left Whelan "a week ago" and she responded she had not heard from anyone at Whelan since Mr. McCullough resigned months earlier (P.Tr. III 61). In the second call, Ms. VerVoort asked Mr. Kennebrew if he would be interested in bidding on a contract with Park Square (P.Tr. III 62). He declined and had no further contact with Ms. VerVoort until December 2009, *after* she already had terminated Whelan, when she asked Mr. Kennebrew to come meet with Park Square's board (P.Tr. III 63).

Ms. VerVoort, too, confirmed Mr. Kennebrew did not solicit Park Square's business for Elite; instead, it was *she* who solicited Mr. Kennebrew (L.F. 74-75; S.P.L.F. 46, 120-21). Even Whelan's CEO, Mr. Twardowski, acknowledged Mr. Kennebrew's meeting with Park Square's board and Elite's eventual contract with Park Square occurred *after* Park Square already had terminated Whelan (P.Tr. I 71-72).

Ms. VerVoort said she used the information on Mr. Kennebrew's Whelan business card to call him initially, as she did not yet know he had his own company (L.F. 74-75; P.L.F. 77, 198). Rather, she, too, explained Mr. Kennebrew told her he would contact someone with Whelan about her concerns, but let her know he no longer was with Whelan (L.F. 74-75; P.L.F. 77, 198). She said he did not tell her for whom he was working (i.e., himself) (L.F. 74-75; P.L.F. 77, 198).

Instead, it was not until Ms. VerVoort inquired further that she discovered Mr. Kennebrew had his own security business in Houston (L.F. 74-75; P.L.F. 177). This was at the same time she was looking for a new security provider for Park Square (L.F. 74-75; P.L.F. 177). She invited Mr. Kennebrew to meet with Park Square's board in December 2009 (L.F. 74-75; P.L.F. 33, 37, 174, 178).

Ms. VerVoort explained she fired Whelan because its quality of service "had gotten pretty bad," and Elite's was better (L.F. 77; P.L.F. 172). After comparing Elite to other companies, she felt that, because Elite was new, it would give more attention to Park Square than other, more established companies (L.F. 77; P.L.F. 37, 179).

E. Whelan's Permission for Mr. Kennebrew to Run Elite

Mr. Twardowski admitted he had told Mr. Kennebrew and Mr. McCullough that Mr. Kennebrew could run his own business in Houston while continuing to work for Whelan in Dallas (L.F. 77; P.Tr. I 25). He did not limit the area in which Mr. Kennebrew could operate that separate business, and allowed it to be wherever Mr. Kennebrew wanted (L.F. 77). He said he also discussed this with Mr. Robertson and Mr. Porterfield (L.F. 77; P.Tr. I 55, 57). Mr. Twardowski did not know exactly what Mr. Porterfield, Mr.

Robinson, and Mr. Kennebrew had discussed together (L.F. 77; P.Tr. I 57-58). Whelan had waived the same non-compete covenants Mr. Kennebrew signed for other former employees, including Mr. McCullough, himself, and former Houston branch managers David Beltran, Doug Blake, and Jeff Rosenavich (L.F. 77-78).

Mr. Porterfield gave two different versions of his conversation with Mr. Kennebrew concerning Mr. Kennebrew's desire to run his own business. In the first account, he said Whelan wanted to help Mr. Kennebrew because Whelan does not "particularly pursue government business, and that was gonna be his core focus, so [Whelan] certainly would be interested in assisting and supporting him" (S.P.L.F. 41, 131). He said, "My agreement with [Mr. Kennebrew] was: That's where we wanted a partnership arrangement, was specifically on government contracts" (S.P.L.F. 41, 131).

In later proceedings, however, Mr. Porterfield testified he did not know Mr. Kennebrew was forming his own company until Mr. Kennebrew's letter of resignation stated Mr. Kennebrew was going to start a minority-oriented company in Houston specifically focused on government business (P.Tr. I 86). But Mr. Kennebrew's resignation *did not* state he was forming a new company that would focus on government business (P.L.F. 529). Rather, the letter stated Mr. Kennebrew wanted to live his dream, in parentheses typing "Minority Company," meaning he was an African-American and his dream was to run a company owned by African-Americans (P.L.F. 529).

Indeed, the letter does not even refer to *starting* a company at all (P.L.F. 529). This is because Elite had been in existence for nearly two years: it was registered at its present address in Houston on October 29, 2007 (L.F. 551, 554, 558).

Mr. Porterfield's first round of testimony, however, mirrors Mr. Kennebrew's account. Mr. Kennebrew recounted that he repeatedly approached Whelan about a joint business venture regarding government contracts: he had approached Mr. Porterfield in December 2008, explaining he had a minority contractor opportunity with the City of Houston and wanted to partner with Whelan to do it (P.Tr. III. 46). He let Mr. Porterfield know he already had a minority-owned company and would seek government contracts, but he never told Mr. Porterfield it would be his company's main focus (P.Tr. III 70).

On March 30, 2009, Mr. Kennebrew submitted the letter of resignation to Whelan in which he stated he wanted "to at least try and live [his] dream (Minority Company)" (P.L.F. 529). Despite this, Whelan wanted him to stay on longer and entered into a verbal agreement with him in which Mr. Kennebrew remained employed with Whelan in Dallas while simultaneously running Elite in Houston (P.Tr. I 3-6; P.Tr. III 109). Mr. Twardowski admitted Mr. Kennebrew remained with Whelan under this arrangement until August of 2009; he said Whelan agreed to this both because Mr. Kennebrew was a valuable asset and Whelan wanted to be supportive of Mr. Kennebrew's business (P.Tr. I 77). During this period, from April 2009 until August 2009, Whelan continued to pay Mr. Kennebrew (S.P.L.F. 33; P.Tr. I 53).

On August 7, 2009, however, Mr. Kennebrew's employment with Whelan terminated, and the two-year non-compete covenant began to run (P.Tr. I 78).

F. Proceedings Below

1. Initial Proceedings

On January 4, 2010, Whelan filed an action against Mr. Kennebrew and another former Whelan employee, Landon Morgan, in the Circuit Court of St. Louis County seeking injunctive relief and damages (P.L.F. 26, 30).[2] Whelan stated claims for breach of contract, unjust enrichment, and civil conspiracy (P.L.F. 18-50). It alleged Mr. Kennebrew violated the Agreement's non-compete section, principally the language in § 3(c) restricting work with a competitor within a 50-mile radius of where Kennebrew provided services, but also the customer non-solicitation provision in § 3(a) and the employee non-solicitation provision in § 3(b) (P.L.F. 18-50; P.Tr. I 31).

The trial court issued three successive temporary restraining orders enforcing the non-compete provisions of the Agreement against Mr. Kennebrew (P.L.F. 57-60, 67-68, 94-95). Mr. Kennebrew filed successive motions to dismiss, contending in part that the Agreements were facially unreasonable and void, but the trial court overruled them (P.L.F. 97, 102, 119).

Whelan then requested a preliminary injunction against both Mr. Kennebrew and Mr. Morgan, and the trial court heard the issue over three days in June, July, and September 2010 (P.L.F. 636; P.Tr. I 1; P.Tr. II 1; P.Tr. III 1). It denied a preliminary injunction as to either defendant, ruling that the 50-mile clause in § 3(c) of the Agreement

[2] The case was filed and heard in Missouri, rather than Texas, due to forum selection and choice-of-law provisions in the Agreement (P.L.F. 535).

and the customer and employee non-solicitation clauses in §§ 3(a) and (b) of the Agreement were overbroad and unenforceable as a matter of law (P.L.F. 636-40). It also declined to rewrite the agreement (P.L.F. 641).

Thereafter, the parties filed dueling motions for summary judgment (P.L.F. 642-48, 652-800). On January 7, 2011, the trial court denied Whelan's request for summary judgment and granted summary judgment to Mr. Kennebrew and Mr. Morgan on all claims, holding "the employment agreements at issue in this case, as written, are overbroad, not reasonable as to time and space and are therefore not valid," and dismissed Whelan's case with prejudice (P.L.F. 1637-39).

2. First Appeal

Whelan timely appealed to this Court (P.L.F. 1641). The Court issued an opinion reversing the trial court's judgment in its entirety and holding that all the covenants in the Agreement were valid and enforceable as written. *See Whelan Sec. Co. v. Kennebrew*, No. ED96394, 2011 WL 5926166 (Mo. App. slip op. Nov. 29, 2011).

The Supreme Court of Missouri then transferred the case. On August 14, 2012, the Supreme Court also reversed the trial court's judgment, but differently. *See Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835 (Mo. banc 2012) (Appx. A17-32).

The Supreme Court agreed Whelan's customer non-solicitation clause in § 3(a) was unreasonably overbroad, because it prohibited soliciting both any of Whelan's actual or prospective customers nationwide, which "reach[ed] beyond that necessary to protect [Whelan's] legitimate interest in customer contacts." *Id.* at 844 (Appx. A28). The Court then judicially "modified" the clause to eliminate both the prohibition on soliciting

prospective customers and "the provision prohibiting Mr. Kennebrew … from soliciting existing Whelan customers except those customers with whom [he] dealt … during [his] employment." *Id.* at 844-45 (Appx. A29).

Next, the Supreme Court held the employee non-solicitation clause in § 3(b) might be enforceable, but there was "a genuine factual issue as to the purpose of" it. *Id.* at 846 (Appx. A30). As § 431.202, R.S.Mo., allowed employee non-solicitation agreements "to serve varying purposes, some of which are per se reasonable," "the lack of any language regarding the purpose of" Whelan's "clause prevent[ed the Supreme] Court from determining the purpose of the clause as a matter of law," and the "intent of the parties must instead be determined by the use of parol evidence, creating a factual issue for the trier of fact." *Id.* (Appx. A30-31).

Finally, the Supreme Court held the 50-mile non-competition clause in § 3(c) was enforceable, but its application similarly was not determinable as a matter of law:

> [A] genuine factual issue exists as to whether Mr. Kennebrew's actions violated [§ 3(c)]. Specifically, the parties dispute whether Mr. Kennebrew provided services in Houston while employed with Whelan in the Dallas office. Resolution of this factual issue is necessary to determine if a violation of the non-compete agreement occurred. Entry of summary judgment on this ground, therefore, is improper.

Id. at 847 (Appx. A31).

The Supreme Court remanded the case for further proceedings. *Id.* (Appx. A31). Shortly after remand, Whelan dismissed its claims against Mr. Morgan (L.F. 55).

3. Proceedings On Remand

On March 6, 2013, Whelan moved the trial court for summary judgment (L.F. 8-10). It argued there were no genuine disputes of material fact and it was entitled to judgment as a matter of law that Mr. Kennebrew: (1) violated the 50-mile clause in § 3(c) by working for a competing business in Houston; (2) violated the employee non-solicitation clause in § 3(b), the purpose of which was to protect Whelan's relationship with its customers; and (3) violated the customer non-solicitation clause in § 3(a), as modified by the Supreme Court, by soliciting Park Square (L.F. 47-54).

In opposition, Mr. Kennebrew offered previous records and testimony to refute Whelan's factual contentions that he had provided services in Houston, that the purpose of the employee non-solicitation clause was what Whelan said, or that he had solicited Park Square's business (L.F. 57-78). He argued that, viewing the facts in a light most favorable to himself, the non-movant, he *had not* "provided services" for Whelan "in Houston," he *did not* solicit Park Square (rather, Ms. VerVoort had solicited *him*), and the intent of the employee non-solicitation clause was legally inappropriate for summary judgment (L.F. 144-53). Additionally, he argued summary judgment on the non-compete clause was inappropriate because the admissions of Whelan's officers created a disputed fact as to whether Whelan's actions had waived it in the first place (L.F. 151-52).

On October 10, 2013, the trial court granted Whelan's motion in part and denied it in part (L.F. 232: Appx. A10). It held there was no genuine dispute of material fact that Mr. Kennebrew had solicited Park Square, in violation of the customer non-solicitation provision as modified by the Supreme Court, because, regardless of the evidence before

it, the "statement of facts" in the Supreme Court's opinion stated, "In November and December 2009, Mr. Kennebrew solicited the business of Park Square Condominiums ("Park Square"), a client of Whelan in Houston" (L.F. 234; Appx. A12) (quoting *Whelan*, 279 S.W.3d at 840 (Appx. A25)). It granted summary judgment against Mr. Kennebrew for breach of the customer non-solicitation clause in § 3(a) (L.F. 238; Appx. A16).

The court also granted summary judgment against Mr. Kennebrew for breach of the 50-mile non-competition clause in § 3(c) (L.F. 237-38; Appx. A15-16). It held there was no genuine dispute of fact that Mr. Kennebrew had "provided services" for Whelan in Houston by helping Whelan obtain customers there using his knowledge of that market (L.F. 237-28; Appx. A15-16). It did not address Mr. Kennebrew's affirmative defense that Whelan had waived the clause, but stated "[a]ll arguments submitted and not addressed have been considered and denied" (L.F. 238; Appx. A16).

Finally, the court denied summary judgment as to the employee non-solicitation clause in § 3(b) (L.F. 238; Appx. A16). It agreed with Mr. Kennebrew that, due to the necessity of parol evidence to determine the clause's intent and, thus, whether it violates § 431.202, whether § 3(b) was enforceable was a question of fact not amenable to summary judgment (L.F. 235-36; Appx. A13-14).

On April 28, 2014, the trial court held a bench trial on the issues of: (1) what damages should be awarded for Mr. Kennebrew's violation of the Agreement the court previously had found in summary judgment; (2) Whelan's claim for injunctive relief; (3) Whelan's claim for unjust enrichment; and (4) the amount of attorney fees Whelan

should be awarded[3] (L.F. 675; Tr. 3; Appx. A1).

Ultimately, Whelan conceded that its equitable unjust enrichment claim was superseded by any award of breach of contract damages, and the court agreed and denied that claim (L.F. 680; Appx. A6). The court also found Whelan presented no evidence "to justify the extraordinary remedy of injunctive relief," and held Whelan's request for an injunction was moot, as the Agreement had expired three years earlier and a preliminary injunction was denied four years earlier (L.F. 679-80; Appx. A5-6). The court denied Whelan's claim for injunctive relief (L.F. 682; Appx. A8).

Whelan sought $129,242 in breach of contract damages (L.F. 676; Appx. A2). After hearing the evidence, however, the court found Whelan's lost profits from Mr. Kennebrew's competition during the period of the non-competition clause and attributable to Mr. Kennebrew's actions the court found breached the Agreement were $69,375.75 (L.F. 678; Appx. A4). The court's judgment sets forth its detailed calculation to determine this (L.F. 678; Appx. A4). It awarded Whelan $69,375.75 in damages for Mr. Kennebrew violating §§ 3(a) and (c) of the Agreement (L.F. 682; Appx. A8).

The damage award did not include any for violation of the employee non-solicitation clause in § 3(b) (L.F. 679; Appx. A5). Whelan presented no evidence as to the clause's purpose, but requested "nominal damages" for breach of § 3(b) anyway (L.F. 679; Appx. A5). The court disagreed: it could not "award nominal damages since there

[3] Whelan's claim for attorney fees stemmed from a provision in the Agreement giving the prevailing party in any action under it the right to attorney fees (L.F. 681; Appx. A7).

has never been a finding that [Mr.] Kennebrew breached the employee non-solicitation covenant" (L.F. 679; Appx. A5). It denied Whelan any damages for that clause, and held "[a]ll arguments submitted and not addressed have been considered and denied" (L.F. 679, 682; Appx. A5, A8).

Whelan also sought $707,410.32 in attorney fees, which one of its officers testified was the total amount it had expended on attorneys during the entirety of the litigation involving Mr. Kennebrew and Mr. Morgan (L.F. 680; Tr. 59-60; Appx. A6).

Noting it was "an expert" on the issue of the amount of an award of attorney fees and determining that award was within its "sound discretion," the court disagreed (L.F. 681; Appx. A7). "Whelan ma[de] no argument the attorney fees it seeks are reasonable" (L.F. 681; Appx. A7). The court found the fees it sought were "excessive" and observed "Whelan was unsuccessful on four of the seven counts in its Petition" (L.F. 681; Appx. A7). "[E]ven after allowing for the appeals in this case, this case involved a straightforward non-compete agreement that could have been resolved quickly" (L.F. 681; Appx. A7). Therefore, "considering all the facts and circumstances," and "based on the Court's experience in similar cases," the trial court awarded Whelan $165,000 in attorney fees (L.F. 682; Appx. A8).

Mr. Kennebrew timely appealed to this Court (L.F. 684). Whelan timely cross-appealed (L.F. 687). On October 20, 2014, and on the parties' joint motion, the Court consolidated the two appeals and designated Mr. Kennebrew the appellant and cross-respondent.

Points Relied On

I. The trial court erred in granting Whelan summary judgment that Mr. Kennebrew had violated the customer non-solicitation clause in § 3(a) of the Agreement by soliciting Park Square's business *because* contracts in restraint of trade are disfavored and strictly construed, any controverted facts in summary judgment proceedings must be viewed in a light most favorable to the non-movant, and facts discussed in a previous appellate decision from a now-reversed summary judgment are not the "law of the case" in new summary judgment proceedings on remand *in that* Mr. Kennebrew presented evidence in response to Whelan's motion for summary judgment that he had *not* solicited Park Square's business and, rather, Park Square's manager had solicited *his* business, which did not violate the strict language of § 3(a).

Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835 (Mo. banc 2012)

Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. App. 2006)

Century Fire Sprinklers, Inc. v. CNA/Transp. Ins. Co., 87 S.W.3d 408 (Mo. App. 2002)

Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. banc 2011)

II. The trial court erred in granting Whelan summary judgment that Mr. Kennebrew had violated the 50-mile non-competition clause in § 3(c) of the Agreement by operating Elite in Houston *because* a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense is not subject to a genuine dispute of material fact and fails as a matter of law, and any controverted facts in summary judgment proceedings must be viewed in a light most favorable to the non-movant *in that* Mr. Kennebrew raised an affirmative defense that Whelan had waived the Agreement and, in opposition to Whelan's motion for summary judgment, presented evidence that Whelan had waived § 3(c) by his superiors at Whelan knowing about his operation of Elite in Houston, tolerating it, and expressly agreeing to allow him to do so.

Frisella v. RVB Corp., 979 S.W.2d 474 (Mo. App. 1998)

Austin v. Pickett, 87 S.W.3d 343 (Mo. App. 2002)

Scheck Indus. Corp. v. Tarlton Corp., 435 S.W.3d 705 (Mo. App. 2014)

Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. banc 2011)

III. The trial court erred in granting Whelan summary judgment that Mr. Kennebrew had violated the 50-mile non-competition clause in § 3(c) of the Agreement by operating Elite in Houston *because* contracts in restraint of trade are disfavored and strictly construed, and any controverted facts in summary judgment proceedings must be viewed in a light most favorable to the non-movant *in that* Mr. Kennebrew presented evidence that he only "provided services" for Whelan in Dallas, not Houston, and merely assisted Whelan with some Houston contacts while providing services for Whelan in Dallas, which did not violate the strict language of § 3(c).

Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835 (Mo. banc 2012)

Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. App. 2006)

Strobehn v. Mason, 397 S.W.3d 487 (Mo. App. 2013)

Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. banc 2011)

Argument

Standard of Review for All Points Relied On

All three of Mr. Kennebrew's points concern the propriety of the trial court granting partial summary judgment to Whelan on liability, which this Court reviews "*de novo*." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452 (Mo. banc 2011).

> Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion.
>
> …
>
> The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record.

Id. at 452-53 (citations and internal quotation marks omitted).

Additionally, "a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). "An abundance of caution must be exercised in granting a motion for summary judgment because it is an extreme and drastic remedy that borders on the denial of due process because the opposing party is denied its day in court." *Vill. of Big Lake v. BNSF Ry. Co.*, 433 S.W.3d 460, 465 (Mo. App. 2014) (citation omitted).

I. The trial court erred in granting Whelan summary judgment that Mr. Kennebrew had violated the customer non-solicitation clause in § 3(a) of the Agreement by soliciting Park Square's business *because* contracts in restraint of trade are disfavored and strictly construed, any controverted facts in summary judgment proceedings must be viewed in a light most favorable to the non-movant, and facts discussed in a previous appellate decision from a now-reversed summary judgment are not the "law of the case" in new summary judgment proceedings on remand *in that* Mr. Kennebrew presented evidence in response to Whelan's motion for summary judgment that he had *not* solicited Park Square's business and, rather, Park Square's manager had solicited *his* business, which did not violate the strict language of § 3(a).

The law of Missouri is summary judgment cannot lie when a non-movant defendant controverts an allegation of material fact with his own evidence, which must be taken as true. Whelan alleged Mr. Kennebrew had violated the customer non-solicitation clause in § 3(a) of the Agreement by soliciting Park Square's business after leaving Whelan. Mr. Kennebrew responded with evidence, including his own testimony and that of Park Square's manager, that he did not solicit Park Square, but rather Park Square's manager *solicited him*, and he accepted. Did the trial court err in holding there was no genuine dispute of material fact that Mr. Kennebrew had solicited Park Square?

* * *

A. Whelan presented no evidence in support of its allegation that Mr. Kennebrew had solicited Park Square's business, and Mr. Kennebrew sufficiently controverted Whelan's allegation, creating a genuine dispute of material fact.

The customer non-solicitation clause in § 3(a) of the Agreement, as modified by the Supreme Court, stated:

> During the term of this Agreement, and for a period of two (2) years thereafter, … [Mr. Kennebrew] shall not, without the prior written consent of [Whelan], in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, agent, principal, broker, advisor, consultant, manager, shareholder, director, or officer, for himself or in behalf of any person, firm, partnership, entity, or corporation, or by any agent or employee:
>
> (a) Solicit, take away or attempt to take away any customers of [Whelan] ["with whom Mr. Kennebrew … dealt … during [his] employment" by Whelan, *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 845 (Mo. banc 2012) (Appx. A29)] or the business or patronage of any such customers ….

(L.F. 58; Appx. A24).

In its summary judgment motion, Whelan argued it had the right to judgment as a matter of law that Mr. Kennebrew had violated § 3(a) by "solicit[ing] the business of Park Square, a client of Whelan in Houston" (L.F. 49). In its statement of material facts, however, Whelan's sole mention of this allegation was this:

> 19. In November and December 2009, Mr. Kennebrew solicited the business of Park Square, a client of Whelan in Houston. On behalf of Elite, Mr. Kennebrew signed a contract to provide services for Park Square on December 17, 2009. Park Square terminated its relationship with Whelan in January 2010.

(L.F. 14).

For this proposition, Whelan cited *only* to the Supreme Court's prior opinion (L.F. 14), in which the statement of facts recounted:

> In November and December 2009, Mr. Kennebrew solicited the business of Park Square Condominiums, a client of Whelan in Houston. On behalf of Elite, Mr. Kennebrew signed a contract to provide security services for Park Square on December 17, 2009. The next day, Mr. Morgan provided employment packets for Elite to Whelan's employees at Park Square. Park Square terminated its relationship with Whelan in January 2010, and Elite retained several of Whelan's employees at Park Square.

Whelan, 379 S.W.3d at 840. Whelan did not present any other supposed evidence of this whatsoever (L.F. 14).

In his response, Mr. Kennebrew admitted he had signed a contract with Park Square on December 17, 2009, but disputed the rest of this purported fact with his own evidence, attaching the deposition of Janice VerVoort, Park Square's manager, and other evidence (L.F. 74-75). Ms. VerVoort testified Mr. Kennebrew *did not* solicit Park

Square's business for Elite; instead, it was *she* who had solicited Mr. Kennebrew's business, and *after* she already had terminated Whelan (L.F. 74-75; S.P.L.F. 46, 120-21).

Specifically, Ms. VerVoort was unhappy with Whelan's quality of service (L.F. 77; P.L.F. 172). She terminated Park Square's relationship with Whelan effective December 2, 2009, *not* in January 2010, as Whelan had alleged (L.F. 105). She used the information on Mr. Kennebrew's Whelan business card to call him, as she did not yet know he had his own company (L.F. 74-75; P.L.F. 77, 198). Mr. Kennebrew told her he would contact someone with Whelan about her concerns, but explained he was no longer with Whelan (L.F. 74-75; L.F. 77, 198). He did not tell her, though, that he now was working for himself (L.F. 74-75; P.L.F. 77, 198).

It was not until Ms. VerVoort inquired further that she discovered Mr. Kennebrew had his own security business in Houston (P.L.F. 177). This was at the same time she was looking for a new security provider for Park Square (P.L.F. 177). She invited Mr. Kennebrew to meet with Park Square's board in December 2009, *after* she already had terminated Whelan (L.F. 74-75; P.L.F. 33, 37, 174, 178).

Mr. Kennebrew's testimony at the preliminary injunction hearing mirrored this. He explained that, after he had left Whelan, he twice received calls from Ms. VerVoort in which she stated she was about to terminate Whelan's services, first in August 2009 and then again in November 2009 (P.Tr. III 61). His response each time was to let his former superior, Mr. Porterfield, know (P.Tr. III 61).

He told Ms. VerVoort in response to the first call that he had left Whelan "a week ago" and she responded she had not heard from anyone at Whelan since Mr. McCullough

resigned months earlier (P.Tr. III 61). In the second call, Ms. VerVoort asked Mr. Kennebrew if he would be interested in bidding on a contract with Park Square (P.Tr. III 62). He declined and had no further contact with Ms. VerVoort until December 2009, *after* she already had terminated Whelan, when she asked Mr. Kennebrew to come meet with Park Square's board (P.Tr. III 63).

Plainly, viewing the facts in a light most favorable to Mr. Kennebrew, he *did not* solicit Park Square's business. To the contrary, Park Square solicited *his* business.

This is not some mere wordplay. As "[n]on-compete agreements are considered contracts in restraint of trade," they "must be strictly construed …." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 613 (Mo. App. 2006). Here, the Agreement Whelan seeks to enforce expressly prohibits only *Mr. Kennebrew* "soliciting" Whelan customers with whom he dealt during his employment (L.F. 58; Appx. A24). Its plain language *does not* prohibit *those customers* from soliciting *him* and his accepting their offers. Viewing the facts in a light most favorable to Mr. Kennebrew, Park Square's solicitation of *his* services would not have violated § 3(a) of the Agreement.

Particularly as Whelan introduced *no* evidence in support of its allegation that Mr. Kennebrew solicited Park Square, Mr. Kennebrew's plethora of evidence against that allegation showing instead that Park Square *solicited him* precludes summary judgment on this count. There was a genuine dispute of material fact.

B. The Supreme Court's earlier decision viewing the facts in a light most favorable to Whelan, at the time the non-movant, and reversing the previous summary judgment for Mr. Kennebrew, did not bind the trial court to hold Mr. Kennebrew solicited Park Square as a matter of law.

Below, however, Whelan argued that the "law of the case doctrine" meant that the trial court was *bound* by the Supreme Court's recounting of the facts of the case as they then stood to find Mr. Kennebrew solicited Park Square's business (L.F. 50). It argued "the Supreme Court expressly ruled that Mr. Kennebrew actively solicited Park Square at a time when he was prohibited by his Agreement from soliciting business from Park Square. This point now has been decided and resolved conclusively in Whelan's favor" (L.F. 50).

The trial court ultimately agreed with this argument and, *on this basis alone*, quoting the Supreme Court, granted Whelan summary judgment that Mr. Kennebrew violated the customer non-solicitation clause in § 3(a) (L.F. 234; Appx. A12).

This was error. First, the Supreme Court *completely reversed* the trial court's summary judgment for Mr. Kennebrew and remanded for further proceedings. It is well-established that a

> complete reversal generally annuls the judgment below, and the case is put in the same posture in which it was before the judgment was entered. Thus, after the reversal on appeal, the parties' rights are left wholly unaffected by any previous determination that was reversed, so that a judgment that is reversed and remanded stands as if no trial has yet been held.

Century Fire Sprinklers, Inc. v. CNA/Transp. Ins. Co., 87 S.W.3d 408, 423 (Mo. App. 2002) (quoting 5 AM.JUR.2D *Appellate Review* § 861 (1995)).

When the Supreme Court completely reversed the trial court's initial summary judgment for Mr. Kennebrew, both he and Whelan were placed back in the position before the trial court had entered any judgment. For this reason, to seek judgment in its favor, Whelan had to file a *new* motion for summary judgment in light of the Supreme Court's holdings, prove anew the existence of no genuine dispute of material fact, and prove anew its right to judgment as a matter of law based on those undisputed facts.

"The doctrine of law of the case provides that *a previous holding* in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007) (emphasis added). In this case, the Supreme Court's prior holdings were: (1) the customer non-solicitation provision was enforceable as modified; (2) the employee non-solicitation provision might be enforceable depending on its purpose; and (3) the 50-mile non-compete clause was enforceable. These are conclusive on remand.

Conversely, that Mr. Kennebrew "solicited Park Square's business" was *not* one of the Supreme Court's prior "holdings" before remand, and is *not* conclusive. The previous (now reversed) summary judgment was in Mr. Kennebrew's favor. As a result, when deciding the three issues it had before it, the Supreme Court had to view the facts in a light most favorable to Whelan, then the non-movant. Describing those facts in that light, the Supreme Court stated Mr. Kennebrew solicited Park Square, which Whelan had alleged in opposition to Mr. Kennebrew's motion for summary judgment.

But the Supreme Court did not *hold* this as a matter of either fact or law. Indeed, it did not hold that there was no genuine dispute of material fact as to whether Mr. Kennebrew solicited Park Square or not. That was not a question before it as, plainly, such a question was not yet ripe for decision. Rather, the sole question before the Supreme Court as to the customer non-solicitation clause was whether Mr. Kennebrew had a right to judgment as a matter of law that it was *unenforceable*, as the trial court previously had held. The Supreme Court held he did not, reversed the summary judgment in his favor otherwise, and remanded the case for further proceedings.

On remand, and as the trial court's previous judgment was nullified, whether Mr. Kennebrew violated that now-held-to-be-valid-as-modified clause was an open question at issue anew. If Whelan wanted to obtain summary judgment that Mr. Kennebrew *had* violated the clause, it had to prove, using admissible evidence, that there was no genuine dispute of material fact as to that allegation. It did not. Quoting the Supreme Court's discussion of the facts in a light most favorable to *it* was insufficient.

To apply the "law of the case" doctrine otherwise would be patently unjust and senseless. Such an application would allow a plaintiff to: (1) oppose a defendant's motion for summary judgment; (2) when unsuccessful, appeal and have the appellate court view the facts in a light most favorable to it; and (3) on reversal and remand, tell the defendant, "Gotcha, the appellate court held the facts for me, so I win!"

Imagine an erroneously unfounded defense summary judgment as to all liability and damages in a tort case in which all material facts actually were disputed. Under Whelan's proposed application of "law of the case," the plaintiff automatically would

win on reversal and remand because the appellate court stated the facts in a light most favorable to it. That is not how the law of the case doctrine ever has applied in Missouri, nor could it, given the mechanics of summary judgment review, nor did Whelan cite any authority for that proposition below (L.F. 50).

Viewing the facts in a light most favorable to Mr. Kennebrew, there is a genuine dispute of material fact as to whether Mr. Kennebrew solicited Park Square's business. The trial court's entry of summary judgment that he had violated § 3(a) of the Agreement on this basis was error. The Court must reverse the trial court's judgment and remand this case for further proceedings.

II. The trial court erred in granting Whelan summary judgment that Mr. Kennebrew had violated the 50-mile non-competition clause in § 3(c) of the Agreement by operating Elite in Houston *because* a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense is not subject to a genuine dispute of material fact and fails as a matter of law, and any controverted facts in summary judgment proceedings must be viewed in a light most favorable to the non-movant *in that* Mr. Kennebrew raised an affirmative defense that Whelan had waived the Agreement and, in opposition to Whelan's motion for summary judgment, presented evidence that Whelan had waived § 3(c) by his superiors at Whelan knowing about his operation of Elite in Houston, tolerating it, and expressly agreeing to allow him to do so.

The law of Missouri is that, when a defendant raises an affirmative defense, summary judgment cannot lie for the plaintiff unless he establishes the affirmative defense is not subject to a genuine dispute of material fact and fails as a matter of law. In opposition to Whelan's motion for summary judgment, Mr. Kennebrew presented evidence, which must be taken as true, supporting his previously-raised affirmative defense that Whelan had waived the non-competition clause in §3(c) of the Agreement by his former superiors knowing about, tolerating, and affirmatively agreeing to allow him to operate Elite in Houston. Did the trial court err in granting Whelan summary judgment that Mr. Kennebrew violated § 3(c) by operating Elite in Houston?

The non-competition clause in § 3(c) of the Agreement stated:

> During the term of this Agreement, and for a period of two (2) years thereafter, … [Mr. Kennebrew] shall not, without the prior written consent of [Whelan], in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, agent, principal, broker, advisor, consultant, manager, shareholder, director, or officer, for himself or in behalf of any person, firm, partnership, entity, or corporation, or by any agent or employee: …
>
> (c) Work for a competing business within a fifty (50) mile radius of any location where [Mr. Kennebrew] has provided or arranged for [Whelan] to provide services.

(L.F. 58-59; Appx. A24-25).

In its summary judgment motion, Whelan argued it had the right to judgment as a matter of law that Mr. Kennebrew had violated § 3(c) by operating Elite in Houston because, "During his employment with Whelan, [he] performed services for Whelan's customers in Houston" (L.F. 47). In its statement of material facts, Whelan alleged this was because:

> 13. Mr. Kennebrew used his knowledge and expertise about the Houston market to Whelan's advantage, and he obtained customers for Whelan in Houston. …
>
> 14. Mr. Kennebrew admitted he had more than ten (10) clients in Houston for Whelan. …

> 15. Mr. Kennebrew reiterated that he dealt with Whelan's customers in Houston. …
>
> 16. One of Whelan's customers Mr. Kennebrew did work for was Janice Vervoort [*sic*], manager of Park Square Condominiums ("Park Square"). Mr. Kennebrew explicitly recalled his dealings with Ms. VerVoort, the manager of Park Square. He explained that when an issue arose in May 2009, Whelan's Branch Manager, Mark Porterfield, dispatched him to Houston to deal with Ms. VerVoort in an effort to improve relations between Whelan and Park Square. …

(L.F. 13-14).

In his answer to Whelan's petition, however, besides generally denying Whelan's allegations, Mr. Kennebrew expressly raised an affirmative defense that Whelan had waived the Agreement, including § 3(c) (P.L.F. 136). In opposition to Whelan's motion summary judgment, he stated facts and presented evidence in support of his affirmative defense that Whelan, through its own actions, had waived § 3(c) as to his operation of Elite in Houston (L.F. 77-78). He argued there was a genuine dispute of material fact as to whether Whelan had waived § 3(c), precluding summary judgment (L.F. 151-52).

"Generally, an innocent party may waive a breach of contract by words or conduct. A waiver is an intentional relinquishment of a known right. 'To rise to the level of waiver, the conduct must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible.'" *Austin v. Pickett*, 87 S.W.3d 343, 348 (Mo. App. 2002)

(citation omitted). Used in this manner, "'waiver' is an affirmative defense …." *Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 725 (Mo. App. 2014).

As a result, "Whether [a party's] acts can be construed as [a] waiver is a question of fact." *Frisella v. RVB Corp.*, 979 S.W.2d 474, 477 (Mo. App. 1998). In *Frisella*, a defendant in a breach of contract action alleged in its answer and presented evidence in response to the plaintiff's summary judgment motion that the plaintiff had waived enforcement of the contract. *Id.* at 475, 477. The trial court granted the plaintiff summary judgment. *Id.* at 475.

This Court reversed: "While [the plaintiff]'s interpretation of its right not to disturb an agreement may be viable in many circumstances, [its] conduct may have waived this right. Whether [its] acts can be construed as an implied waiver is a question of fact." *Id.* at 477. Thus, there was "a genuine issue of fact" as to whether there had been a waiver of the contract, and this Court reversed the trial court's summary judgment and remanded for further proceedings. *Id.*

The same must be the result here. Mr. Kennebrew, the non-movant, presented evidence, which must be viewed in a light most favorable to him (and thus taken as true), that Whelan intentionally had relinquished its right to hold him to § 3(c) for operating Elite in Houston through conduct that was so manifestly consistent with and indicative of Whelan's intention to renounce that right that no other reasonable explanation was possible.

Specifically, Mr. Kennebrew presented the testimony of Whelan's CEO, Greg Twardowski, who admitted at the preliminary injunction hearing that he had told Mr.

Kennebrew and Todd McCullough, Whelan's Vice President of Operations for the South, including both Dallas and Houston, that Mr. Kennebrew could run his own business in Houston while continuing to work for Whelan in Dallas (L.F. 77; P.Tr. I 25). He did not limit the area in which Mr. Kennebrew could operate that separate business, and allowed it to be wherever Mr. Kennebrew wanted (L.F. 77). He said he also discussed this with Mr. Robertson and Mr. Porterfield (L.F. 77; P.Tr. I 55, 57). He also presented evidence that Whelan had waived the same non-compete covenants Mr. Kennebrew signed for other former employees, including Mr. McCullough, himself, and former Houston branch managers David Beltran, Doug Blake, and Jeff Rosenavich (L.F. 77-78).

Mr. Kennebrew also presented the testimony of Mark Porterfield, who stated Whelan wanted to allow Mr. Kennebrew operate Elite in Houston because Whelan does not "particularly pursue government business, and that was gonna be his core focus, so [Whelan] certainly would be interested in assisting and supporting him" (S.P.L.F. 41, 131). He said, "My agreement with [Mr. Kennebrew] was: That's where we wanted a partnership arrangement, was specifically on government contracts" (S.P.L.F. 41, 131).

Additionally, Mr. Kennebrew presented his own testimony that he repeatedly had approached Whelan about a joint business venture regarding government contracts: he had approached Mr. Porterfield in December 2008, explaining he had a minority contractor opportunity with the City of Houston and wanted to partner with Whelan to engage in it (P.Tr. III. 46). He let Mr. Porterfield know he already had a minority-owned company and would seek government contracts, but he never told Mr. Porterfield it would be his company's main focus (P.Tr. III 70).

Mr. Kennebrew also testified Whelan entered into a verbal agreement with him in which he remained employed with Whelan in Dallas while simultaneously running Elite in Houston (P.Tr. I 3-6; P.Tr. III 109). Mr. Twardowski admitted Mr. Kennebrew remained with Whelan under this arrangement until August of 2009; he said Whelan agreed to this both because Mr. Kennebrew was a valuable asset and Whelan wanted to be supportive of Mr. Kennebrew's business (P.Tr. I 77). During this period, from April 2009 until August 2009, Whelan continued to pay Mr. Kennebrew, all the while knowing he was operating Elite in Houston (S.P.L.F. 33; P.Tr. I 53).

In short, Mr. Kennebrew presented evidence that:

> 17. Whelan's CEO, Greg Twardowski, admitted that he agreed to an arrangement whereby Mr. Kennebrew, while still a full time employee with Whelan, was permitted to set up a new enterprise in Houston which was in direct competition with Whelan. …
>
> 18. Mr. Twardowski waived the non-competition provision of the agreement because he allowed Mr. Kennebrew to open and operate a competing business wherever he wanted, including Houston or Dallas. …
>
> 19. Mr. Twardowski admitted that in his discussions with Mr. Kennebrew that he did not limit the area that Mr. Kennebrew could operate his security business. … [and]
>
> 20. Whelan waived the [same] non-compete agreement for [three other former employees].

(L.F. 77-78).

This was more than enough to create a genuine dispute of material fact as to whether Whelan had waived § 3(c) as to Mr. Kennebrew's operation of Elite in Houston. Viewing the evidence in a light most favorable to Mr. Kennebrew, Whelan "waive[d any] breach of contract by words" (i.e., Mr. Twardowski and Mr. Porterfield expressly agreeing to allow Mr. Kennebrew to operate Elite in Houston) and "conduct" (i.e., Mr. Twardowski continuing to pay Mr. Kennebrew for six months and not proceeding against him in any way despite knowing he was operating Elite in Houston). *Austin*, 87 S.W.3d at 348. Whelan "intentional[ly] relinquish[ed its] known right [under § 3(c)]," as its "conduct [was] so manifestly consistent with and indicative of an intention to renounce [§ 3(c)] that no other reasonable explanation of the conduct [was] possible.'" *Id.* (citation omitted).

"While [Whelan]'s interpretation of its right [to enforce § 3(c)] may be viable …, [its] conduct may have waived this right. Whether [its] acts can be construed as an implied waiver is a question of fact." *Frisella*, 979 S.W.2d at 477. Whelan could not show that Mr. Kennebrew's affirmative defense of waiver failed as a matter of law.

Mr. Kennebrew presented "a genuine issue of fact" as to whether Whelan had waived § 3(c). This Court must reverse the trial court's summary judgment otherwise and remand this case for further proceedings. *Id.*

III. The trial court erred in granting Whelan summary judgment that Mr. Kennebrew had violated the 50-mile non-competition clause in § 3(c) of the Agreement by operating Elite in Houston *because* contracts in restraint of trade are disfavored and strictly construed, and any controverted facts in summary judgment proceedings must be viewed in a light most favorable to the non-movant *in that* Mr. Kennebrew presented evidence that he only "provided services" for Whelan in Dallas, not Houston, and merely assisted Whelan with some Houston contacts while providing services for Whelan in Dallas, which did not violate the strict language of § 3(c).

The law of Missouri is summary judgment cannot lie when a non-movant defendant controverts an allegation of material fact with his own evidence, which must be taken as true. Additionally, non-competition covenants are contracts in restraint of trade and must be strictly construed. Whelan alleged Mr. Kennebrew had violated the 50-mile non-competition clause in § 3(c) of the Agreement by operating Elite in Houston because he previously had "provided services" for Whelan in Houston. Mr. Kennebrew responded with evidence that he did not provide any services for Whelan "in Houston," but rather only ever worked for Whelan in Dallas, which work in Dallas included giving Whelan some Houston contacts. Did the trial court err in granting Whelan summary judgment that Mr. Kennebrew violated the non-competition clause because he had "provided services" for Whelan "in Houston"?

* * *

The non-competition clause in § 3(c) of the Agreement stated:

> During the term of this Agreement, and for a period of two (2) years thereafter, … [Mr. Kennebrew] shall not, without the prior written consent of [Whelan], in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, agent, principal, broker, advisor, consultant, manager, shareholder, director, or officer, for himself or in behalf of any person, firm, partnership, entity, or corporation, or by any agent or employee: …
>
> (c) Work for a competing business within a fifty (50) mile radius of any location where [Mr. Kennebrew] has provided or arranged for [Whelan] to provide services.

(L.F. 58-59; Appx. A24-25).

In its prior opinion in this case, the Supreme Court held "whether Mr. Kennebrew provided services in Houston while employed with Whelan in the Dallas office" is a "factual issue" making "[e]ntry of summary judgment on this ground … improper." *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 847 (Mo. banc 2012).

Nonetheless, in its summary judgment motion, Whelan argued it had the right to judgment as a matter of law that Mr. Kennebrew had violated § 3(c) by operating Elite in Houston because, "During his employment with Whelan, [he] performed services for Whelan's customers in Houston" (L.F. 47). In its statement of material facts, Whelan alleged this was because:

13. Mr. Kennebrew used his knowledge and expertise about the Houston market to Whelan's advantage, and he obtained customers for Whelan in Houston. …

14. Mr. Kennebrew admitted he had more than ten (10) clients in Houston for Whelan. …

15. Mr. Kennebrew reiterated that he dealt with Whelan's customers in Houston. …

16. One of Whelan's customers Mr. Kennebrew did work for was Janice Vervoort [*sic*], manager of Park Square Condominiums ("Park Square"). Mr. Kennebrew explicitly recalled his dealings with Ms. VerVoort, the manager of Park Square. He explained that when an issue arose in May 2009, Whelan's Branch Manager, Mark Porterfield, dispatched him to Houston to deal with Ms. VerVoort in an effort to improve relations between Whelan and Park Square. …

(L.F. 13-14).

In response, however, Mr. Kennebrew presented a host of evidence that he only ever "provided services" for Whelan *in Dallas*, not *in Houston*, which is far outside a 50-mile radius from Dallas.[4] He disputed each of Whelan's allegations (L.F. 72-74).

[4] Houston is some 225 miles from Dallas "as the crow flies," about ten miles less than the similar distance in Missouri between St. Louis and Kansas City.

While managing Whelan's Dallas branch, Mr. Kennebrew managed *only* that branch, not Whelan's separate Houston branch, which had its own managers (L.F. 76). He testified he only ever had access to Whelan's financials and price information in Dallas and, even then, was unable to copy or print it except merely to put it into a spreadsheet and, still then only on Whelan's Vice President's approval (P.Tr. I 37-39). He managed clients and customers in Dallas, both internal and external, managed the Dallas branch's finances (except budgeting), and was responsible for human resources in Dallas (P.Tr. III 65). He had no access to any operational information about the Houston branch, such as financial or compensation data (P.Tr. III 66).

Essentially, Mr. Kennebrew was operationally in charge of the Dallas branch and only assisted Whelan, *from Dallas*, as needed in Houston (L.F. 76). The evidence below was Mr. Kennebrew's "assistance" with operations in Houston consisted only of three instances, all of which were part of his work *in Dallas*.

First, and principally, there was a *single* companywide "sales blitz" in April 2008, in which the Vice President, Prentice Robertson, requested Mr. Kennebrew give Whelan's Houston team from his office in Dallas some Houston connections or contacts from his days working at security companies in Houston (P.Tr. III 14, 18-19, 31). Through this, Mr. Kennebrew only had contact with five or ten prospective Houston customers during his 18 months at Whelan, and only as a result of that one event (L.F. 73-74, 76; P.Tr. III 34). Moreover, *all* these customers were contacts with whom he previously had been acquainted before his employment with Whelan (L.F. 73-74, 76; P.Tr. III 34).

Whelan produced no evidence that Mr. Kennebrew ever provided any services for Whelan anywhere except *in Dallas*, but rather only that he *once* gave his superiors some of his old Houston contacts (P.L.F. 91). Whelan Vice President Todd McCullough explained, though, that this did not make Houston a locus of the 50-mile radius in § 3(c), but rather giving leads and things of that nature was merely assisting Whelan – while still working exclusively in Dallas – to drum up business (S.P.L.F. 27, 139).

Second, and at the request of Mark Porterfield, Whelan's Senior Vice President and Chief Security Officer, Mr. Kennebrew once sent one of Whelan's Houston clients, Park Square, a gift from Dallas (L.F. 76-77). Third, within Mr. Kennebrew's first four months in Dallas, Mr. McCullough asked Mr. Kennebrew to assist on a Houston account by leveraging contacts Mr. Kennebrew previously acquired while working for firms in Houston (S.P.L.F. 21-22, 111-12). Finally, during Hurricane Ike, Mr. Kennebrew and other Whelan Dallas employees were sent to Houston to assist in securing buildings (L.F. 76-77; P.Tr. III 34-35, 45).

As "[n]on-compete agreements are considered contracts in restraint of trade," they "must be strictly construed …." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 613 (Mo. App. 2006). Section 3(c) of the Agreement does not prohibit Mr. Kennebrew from working for a competing business within a 50-mile radius of any location where: (1) he once gave Whelan contacts; (2) he once specially was called in to assist with Hurricane preparations; or (3) one of Whelan's customers once received a gift basket from him. It prohibits doing so "within a fifty (50) mile radius of any location where [he] has *provided … services*" for Whelan.

Viewed in a light most favorable to Mr. Kennebrew, the evidence is that he always "provided services" for Whelan *in Dallas* and only ever *in Dallas*, never in Houston. Indeed, viewed in that light, providing Whelan in Dallas with some prospective customer contacts in Houston and helping another in-state branch batten down the hatches for a hurricane were *part of his services in Dallas*.

Especially in this age of mass long-distance communication, and especially at a nationwide company, a person working in the St. Louis office providing the company with a potential customer contact he happens to know in San Francisco does not mean he is providing services *in San Francisco*, rather than in his St. Louis office. At the very least, it could not be said that, *as a matter of law*, the St. Louisan was performing services for his employer "in San Francisco." Physically and duty-wise, he was in St. Louis.

As another, more direct example, undersigned counsel, whose office is in Kansas City, knows attorneys throughout the United States. When a colleague in New York calls him at his office in Kansas City for advice about a case the New York lawyer has in federal court in St. Louis, does counsel answering that question provide services for his colleague "in New York?" "In St. Louis?" Of course not: the services provided were in Kansas City. *Cf. Strobehn v. Mason*, 397 S.W.3d 487, 501 (Mo. App. 2013) (Missouri attorney assisting New York attorney with case in New York but working from his office in Missouri provided services in Missouri so as to be able to hale New York attorney into state court in Missouri under long-arm statute).

And, indeed, this is exactly how Whelan told Mr. Kennebrew the non-competition clause would work all along. He presented evidence that, upon his hiring, Mr.

McCullough explained to him that the Agreement covered non-competition only in the Dallas area, also including nearby Fort Worth, and only would be in force in that market (L.F. 75; S.P.L.F. 22, 55, 122, 137, 140-41). Mr. McCullough stated that, when discussing the terms of the contract with Mr. Kennebrew on November 26, 2007, he never suggested Mr. Kennebrew would be responsible for working in Houston (L.F. 75; S.P.L.F. 55). Indeed, Mr. McCullough noted Mr. Kennebrew worked exclusively in Whelan's Dallas branch throughout Mr. McCullough's term as Vice President, which covered October 2007 to late March 2009 (L.F. 75; S.P.L.F. 62).

Mr. McCullough testified he personally explained to Mr. Kennebrew that § 3(c) of the Agreement meant that Mr. Kennebrew could not do business in a 50-mile radius of *Dallas*, where he provided services (L.F. 75; S.P.L.F. 26, 138). That is, as Mr. Kennebrew oversaw Whelan's Dallas-Fort Worth operations, § 3(c) covered a 50-mile radius of that area for two years after his employment with Whelan ended (L.F. 75; S.P.L.F. 30, 142).

Indeed, Mr. McCullough assured Mr. Kennebrew that the covenants did not extend to any potential assistance Mr. Kennebrew may have to give to Whelan in securing business in Houston, because that was *merely part of his work in Dallas* (L.F. 75; S.P.L.F. 26, 138). Mr. McCullough said the covenants certainly did not prevent Mr. Kennebrew from opening his own security business in Houston, which Mr. Kennebrew already had done before going to work for Whelan (L.F. 74-75; P.L.F. 551, 558; S.P.L.F. 32-33; P.Tr. III 18).

Viewing the evidence in a light most favorable to Mr. Kennebrew, and strictly

construing § 3(c) by its own express terms, it cannot possibly be said that, *as a matter of law*, Mr. Kennebrew "provided services" for Whelan in Houston. The few Houston contacts he gave his superiors and the other morsels of assistance he gave Whelan involving Houston: (1) all were part of his providing services in Dallas; and (2) never were contemplated to activate § 3(c) as to Houston.

As the Supreme Court already held, "Entry of summary judgment" as to "whether Mr. Kennebrew provided services in Houston while employed with Whelan in the Dallas office … is improper." *Whelan*, 379 S.W.3d at 847. This Court must reverse the trial court's summary judgment and remand this case for further proceedings.

Conclusion

The Court should reverse the trial court's judgment against Mr. Kennebrew and remand this case for trial on: (1) whether Mr. Kennebrew solicited Park Square in violation of § 3(a) of the Agreement; (2) whether Whelan waived § 3(c) of the Agreement; and (3) whether Mr. Kennebrew "provided services" for Whelan in Houston so as to make Houston a locus of § 3(c) of the Agreement.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 360(a)(1)(a), and that this brief contains 12,005 words.

/s/Jonathan Sternberg
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Certificate of Service

I hereby certify that, on January 22, 2015, I filed a true and accurate Adobe PDF copy of this Brief of the Appellant and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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