

MEMORANDUM

TO: Inn Of Court
FROM: Zan Blue
DATE: February 18, 2004
RE: Primer on Noncompetition Agreements

Introduction

Sometimes going back through files to find things takes longer than just writing down what folks need to know. This is one of those times. Around this memo you will find some cases that should be of interest. You can read them as well as I, so I'll not do the "case citation, this is what it says" thing. This memo is written to provide a brief primer on the law, where to find out whether what I say is something you agree with, and how the process usually works. You can judge whether you think it's worthwhile.

First, what the heck are we talking about here? From the beginnings of time, according to Darwin, creatures have competed for resources of all sorts. Humans are no exception. With the development of capitalism, humans began competing for opportunities to earn money. Once that began, humans began trying to get an edge on the competition or trying to eliminate competition. This is about a small part of that saga.

People who hire other people and teach them about a business don't like it when the other people leave and start competing. As Sinatra would say, "it's not fair, it's not nice." People who buy other people's business really get cranky when the other people go back into the same business and start competing with them. On that point, suffice it to say for present purposes that the buyer can enforce significantly more stringent restrictive covenants on the seller than can an ordinary employer against an employee.

During the Employment Relationship

So let's just talk about the employment relationship. First, you can't compete with your employer while employed. There is a common law duty of loyalty, and for higher levels of employees, there are duties of a fiduciary nature saying you cannot usurp a corporate opportunity for yourself. This is not rocket science, but lots of folks seem to have trouble with the concept. Think of it this way: if the company for which you work looks regularly to try to

profit from this kind of economic activity, then while you are employed by the company, you should not try to profit from this kind of economic activity.

The Shrinking World of Secrets

Second, it's not nice to learn someone's trade secrets, leave, and try to use those secrets for your own benefit. In *Hickory Specialties v. B & L Laboratories*, 593 S.W.2d 583 (Tenn App. 1979), a fellow went to work for Hickory. Hickory had figured out how to make liquid smoke for flavoring foods. Only two other companies made the stuff, and it appeared no one did it like Hickory. The fellow, one Ledbetter, learned how to do it and went off to another company to compete. Hickory successfully persuaded the Court of Appeals that its process really was a secret, and that an injunction was proper under Tennessee common law to prevent Ledbetter from using the secret.

This gives rise to the question: what is a secret? Not much, it turns out. There are lots and lots of cases on the subject, and they fall all over the place, but there are some common threads. First, if you want to claim it's a secret, treat it like a secret. Lock it up. Stamp it CONFIDENTIAL. Restrict its circulation. Don't post the client list above the copy machine to facilitate charging for copies and later try to claim the list is confidential. Second, generally speaking only formulas and processes are secrets, and most of them are not. Lots of folks think they have the equivalent of the recipe for Coca-Cola. They don't. Client lists usually are not secrets because it is not too hard to figure out who out there would be interested in what products and services. Pricing can be confidential, but in most industries everyone knows pretty much what pricing patterns exist. Lists of suppliers usually are not confidential for the same reason.

The Classic Case

Third, what if Sally comes to work for you in a sales capacity, gets to know all your customers along with what they like and don't like in terms of products, bundling, delivery, pricing and so forth, and then she goes to work for your hated rival? Can you stop her? Absent a valid contract containing an enforceable restrictive covenant, no. But, you say, she was nothing before she came to you! Yeah, yeah, yeah. As my daughter would say, "whatever."

Free mobility of labor is a foundation of the capitalist system, right up there with the freedom to move capital and an enforceable rule of law. Covenants restricting mobility of labor are not favored in the law. Now, indentured servitude has a place in society, but its not viewed as particularly desirable. In other words, you can agree to fund someone's education, just as once the employer funded the immigrant's passage to America, and expect them to work the loan off by working for you for some specified period of time. The government does it with certain student loan forgiveness programs, and lots of medical type outfits do it for nurses and technician types. But you have to let them buy their way out of the contract for a reasonable price. No, I wouldn't go down that path, just know it's an issue.

The Case Law Develops

Anyway, I digress. If you want to prevent Sally from hurting your business after she leaves you, you'll need an agreement. Now, let's start with this proposition: You must have a legitimate protectible interest. Once upon a time, you could specify a geographic area and a time frame in the agreement. As long as Sally stayed out of the area for the specified period of time, all was right with the world. But times changed. As communications and shipment methods changed, the geographic scope became less and less important for both employer and employee. But if you shut someone down from their occupation for a specified period of time, then how will they feed their family? The courts are loath to say that, in this age of increasing specialization of skills, you cannot practice your trade or profession for a year. Judge Kilcrease once looked me in the eye and said "This Chancellor will not tell a man he can't do the only thing he knows how to do for a year. Petition dismissed." Wrong legal result, probably the correct equitable result. So the courts shifted from geography and time (with its rules of reasonableness, blue-penciling and the like) to determining whether the restriction narrowly protects the employer's legitimate protectible business interest. We see this with the decision in *Corbin v. Tom Lange Co.*, 2003 WL 22843167 (Tenn App. 2003), Rule 11 application pending.

I'll spare you the details, but in general it worked like this: Corbin sold vegetables. Not out of a stand in the Farmer's Market, but out of a room with some other people selling similar but different stuff to the same large group of customers. According to the employer's lawyer, our very own Frank Scanlon, this really was specialized work requiring knowledge of customer needs, characteristics of the products (shelf life, growing seasons, fungibility and so forth) and pricing variations. Corbin and Lange had an agreement providing that for two years after he left Lange he would not deal with certain listed "essential produce customers or essential trucking companies." Corbin left. He filed an action seeking to have the agreement declared unenforceable. Very important point, that. He won in front of Chancellor Lyle. He went to work for a competitor at that point. Tom Lange appealed. They lost. Why?

Sidelight on Procedure

Before we explore that, note the procedural posture of the case. At the time Corbin appeared in front of Lyle, he had not violated the agreement. He had clean hands. Corbin gave sixty days notice and Lange tossed him out immediately. Corbin did not contact any of the listed "essential" entities at first. He filed his lawsuit and still abided by the agreement. Only after the Chancellor ruled did he contact any of the essential entities. Note, he did this at his peril. If the Supreme Court reverses, and if eventually he is found to have violated the agreement, he may be liable for the period between when the Chancellor tried to set him free and when the final judgment is handed down. The important point here is that he went into court with clean hands. Lange tossed him out despite his attempt to give lots of notice and he abided by the agreement until the Chancellor ruled in his favor.

That's important, because it's not usually how these cases evolve. More usually, the employee quits or is fired, immediately goes to work for the hated rival (who may or may not know about the non-compete) and sets out to snag as many of the former employer's customers as possible. The former employer, with an air of righteous indignation (usually more righteous if

the employee was fired in a strange perversion of things), immediately demands the lawyer send threatening letters to the employee and the hated rival, warning of imminent doom if they do not immediately abide by the agreement. The hated rival is threatened with treble damages for inducing a breach of contract under T.C.A. Section 47-50-109, and with punitive damages under the Supreme Court's dreadful decision in *Trau-Med of America v. Allstate*, 71 S.W.3d 691 (Tenn. 2002).

Back to the Classic Case

Here the decision tree branches off. The hated rival is shocked, shocked to learn there is an agreement, and tells Sally to get right with the church and come back when she has done so. Or, the hated rival knows about the agreement and believes it unenforceable, and sends the former employer a love note saying that and more. The former is more common than the latter, although you can expect to see more of the latter. Sally, of course, is horrified that her former friends, who forced her to quit by treating abysmally, are trying to destroy her life by enforcing that dreadful agreement she had to sign in a time of extreme economic distress to be able to avoid a life on Dickerson Road. They never taught her anything anyway, she had to struggle against a hostile tide from the minute she started working there. She made the business what it was despite her employer, not because of him. She runs to a lawyer, demanding that the lawyer protect the American way of life and get her out of that life of slavery and bondage.

Now there are more decisions to be made. Sally usually has little money. Former employer has lots. Former employer, if smart, did not put a fee shifting provision in the agreement. That's right – did not put a fee shifting provision in the agreement. That way Sally's lawyer can look only to Sally for hope of payment, win or lose, while former employer can afford to pay. That puts Sally's would-be lawyer in a bad position. Former employer hires a lawyer who knows what he or she is doing, gathers a couple of affidavits, prepares a petition for a restraining order under Rule 65 and trots down to the Clerk and Master's Office to seek relief. Along the way the lawyer calls Sally on the cell phone and leaves a message that an ex parte order is going to be applied for that very afternoon. Former employer's lawyer, crafty soul, does not sue the hated rival at first, preferring instead to see if the petition flushes hated rival out into the open. If Sally appears with one of the few lawyers in town who know how to do this stuff, then either she has friends in the right places (which does happen) or the hated rival is footing the bill. If she doesn't appear, then usually a properly drafted petition with proper affidavits to support it will be granted, as long as the agreement provides no bond will be needed or a bond is posted.

Sally's lawyer, if capable and unpaid by hated rival, usually will try to make a deal. "We'll agree to stay away from certain accounts for a certain time," he says, or "we'll agree to work only this part of the city." He knows the motion for expedited discovery is almost certainly going to be granted and that costs mount fast at this stage. Of course, he also knows former employer almost certainly must contact customers to get the needed proof to keep the restraining order in place, and former employer really does not want to do that. So the questions are mounting. Who is going to pay for this? How bold dare I be? Will former employer foul the nest to prove up the case? Where does the balance of vindicativeness lean? Oh, wait, and almost as an afterthought -- is the agreement enforceable?

Back to the Law Develops

So that takes us back to the notion of legitimate business interests. In 1992, the Court of Appeals said it would accept use of a noncompete where necessary to retain existing customers, protect trade or business secrets or confidential information, or protect the employer's investment in training or enhancing the employee's skill and experience. *Cam Int'l LP v. Turner*, 1992 WL 74567 (Tenn. App. 1992). Interestingly, the formulation in *Corbin v. Tom Lange* is not much different, but the meaning is far different.

In 1992, my clients were told Tennessee was not particularly hostile to non-competes and would enforce them unless they were patently unreasonable. Then they proliferated. All of a sudden, in the mid-90s, the number of employers seeking to use non-competes grew exponentially, for all levels of employees. In the medical field, the alleged "shortage" of nurses started open warfare among the hospitals with the nurses and nursing students used a fodder. The fad of hospital chains opening clinics with employed doctors started up, and as the hospital bought up the practices they got non-competes. Of course, as soon as the doctors passed the risks to the hospitals they stopped breaking their necks. The hospitals clamped down on costs. The doctors rebelled. It got ugly, and still is. As sort of a low point, one company wanted to enforce a non-compete against a guy who used to work in the warehouse before he was fired. The court didn't think much of that. The courts began to show visible hostility to the restrictive covenants.

Up to Today

What with the changes in communications and transportation, as mentioned above, the geographic restrictions became less and less meaningful. Finally, the *Corbin* case built on pieces of various precedents and gave us the new focus. (As a side note, our friend Bob DeLaney, said to have recently decamped to family estates in East Tennessee, was all over this legitimate business interest stuff back in the mid-90s, long before it became cool.) Under *Corbin*, we ask not whether the restrictions are reasonable (because restrictions on contacting customers with whom the employee worked while employed are universally considered reasonable), but whether the employer has a legitimate business interest to protect. This we decide by examining: (1) whether the employer provide specialized training; (2) whether the employee had access to trade secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee because of the employee's repeated contacts with the customers ("the face of the employer").

Here discovery begins and everyone starts to put a spin on it. The employee denigrates the importance of the training received and work done after spending years trying to persuade the employer how darned important the employee's skills are to justify a raise. The employee tries to play up how unique the employee is, how we just can't live without her, how she has all these unfair advantages over us (often having fired the wretch).

With this kind of analysis, uncertainty and spin required in each case, the employer has some hard questions to ask. While the employer may be able to pressure Sally into

some sort of agreement, if the employer pushes too hard she may have no choice but to fight the best she can. The agreements are to be construed in favor of the employee and are disfavored in the law. So the Chancellor will help the employee to some unknown extent. The extent to which the hated rival will be dragged into the fray is subject to more unknowns. The *Trau-Med* decision leaves this all up in the air, as it seems to outlaw competition by “improper means,” and what is improper turns on the state of mind of the actor as much as on objective fact. Meanwhile, Sally is none too pleased either. This is her livelihood and often all she knows how to do. The kids are in school, the husband has a decent job but her income is not optional, and they certainly cannot afford the legal fees. Sally cannot afford to alienate the current employer either. It is not a good situation. At this point, with the uncertainty at its highest point, everyone needs to stop and draw a breath.

So now you have the general framework of the law. One more observation: these cases tend to be won and lost, settled or abandoned, within first three months. The parties usually come out shooting and quickly tire. In the vast majority of cases, the most important thing counsel for both sides can do is encourage resolution by agreement, as both sides will poison the well from which both must drink by getting the customers involved in the warfare. Resolution by litigation may profit the lawyers, but usually does not serve the clients well.

By the by, an excellent all around reference source is Malsberger, *Covenants Not to Compete, A State by State Survey* (2d Ed. 1991) and its various supplements published by the ABA Section of Labor and Employment Law.

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

James CORBIN,
v.
TOM LANGE COMPANY, INC.

No. M2002-01162-COA-R3-CV.

March 20, 2003 Session.
Dec. 1, 2003.

Appeal from the Chancery Court for Davidson County, No. 01-532-III; Ellen Hobbs Lyle, Chancellor.

Frank J. Scanlon, Nashville, Tennessee, for appellant, Tom Lange Company, Inc.

Kevin H. Sharp and [Brad A. Lampley](#), Nashville, Tennessee, for appellee, James Corbin.

HOLLY M. KIRBY, J., delivered the opinion of the court, in which [ALANE. HIGHERS](#), J., and DAVID R. FARMER, J., joined.

OPINION

HOLLY M. KIRBY, J.

*1 This case involves a noncompetition agreement. An employee signed a noncompete agreement when he began working for an employer. The employee resigned and began working for a competitor of the employer. The employee sought a declaratory judgment that the noncompete agreement was unenforceable. Approximately eighteen months into the two-year noncompetition period, the trial court issued a ruling that the agreement was not enforceable. The employer appeals. We affirm, finding that neither the training provided to the employee nor the employee's relationship with the employer's customers created a business interest that warranted the protection of a noncompetition agreement.

Plaintiff/Appellee James Corbin ("Corbin") began working for the Defendant/Appellant Tom Lange Company, Inc. ("Lange") in 1988. Lange is in the business of buying and selling produce. Near the beginning of his employment, Corbin entered into an employment noncompetition agreement ("Agreement") with Lange. The Agreement states:

Noncompetition Agreement. During the Restriction Period defined below, Employee shall not, in connection with the conduct of any business substantially similar to the Produce Brokerage Business, contact, solicit business from, buy or sell produce to or from, or otherwise deal with any of the Essential Produce Customers or Essential Trucking Companies listed on Attachment A to this Agreement, or with any other Essential Produce Customers or Essential Trucking Companies which the Company may add to said list from time to time by mailing written notice thereof to Employee at the Company's office in Nashville....

....
Definition of Restriction Period. The "Restriction Period" is the period beginning as of the effective date of the termination of Employee's employment under this Agreement and ending two years later.

Thus, the Agreement provided that, for a period of two years after his employment was terminated, Corbin could not contact clients designated as essential by Lange.

In July 2000, Lange updated the list of its essential clients, whom Corbin was restricted from contacting in the event his employment was terminated. The list included the names of five companies with whom Corbin conducted business for Lange. On September 26, 2000, Corbin resigned his employment with Lange. Although Corbin gave Lange sixty days' notice of his resignation, Lange terminated his employment immediately. Thus, the period of noncompetition specified in the Agreement began on the date Lange gave his notice, September 26, 2000, and would expire two years later, on September 26, 2002. Two days after his termination, Corbin began working for one of Lange's competitors.

Initially after Corbin left Lange, he abided by the terms of the Agreement, that is, he refrained from contacting any of the clients listed as essential by Lange. On February 16, 2001, Corbin filed a lawsuit against Lange seeking a declaratory judgment that the Agreement was not enforceable. Corbin asserted, *inter alia*, that the Agreement was unenforceable because his job responsibilities required only "general skills," and therefore Lange had no protectable business interest. [\[FN1\]](#)

FN1. Corbin also contended that a sufficient amount of time had passed for his "replacement to have established his [or her] identity with [Lange] customers such that there would be only ordinary competition between Corbin and [Lange]." In addition, Corbin claimed that a dispute existed as to the scope and enforceability of the Agreement; that Lange did not enforce similar covenants against other employees; that the Agreement was an unlawful restraint of trade; that the Agreement did not protect any legitimate business interest of Lange; that the Agreement was unreasonable; that the Agreement posed a financial hardship on Corbin; and that the agreement was contrary to public interest.

*2 Lange's answer asserted that Corbin's position at Lange required "expertise far above the 'general skills' of an average worker." Lange further contended that Corbin's expertise was acquired through the extensive training Lange provided to him. Discovery ensued.

The parties deposed Walter Lampertz ("Lampertz"), vice president of sales for Lange's Nashville division. In his deposition, Lampertz described the requirements for salespersons and the training Corbin received. In order to function effectively, Lampertz testified, a sales employee had to have a working knowledge of the Perishable Agricultural Commodities Act ("Federal Act"), the federal laws governing the produce industry, since Lange is licensed and regulated under the Federal Act, and its license is affected by its compliance with the Federal Act. In addition, Lampertz testified, a sales employee had to be able to read produce and transportation markets, and had to know Lange's customers. The sales employee also had to be familiar with "growing seasons, planting and harvesting schedules, crop diseases, availability of harvest labor crews and weather patterns." He had to be knowledgeable about produce transportation, and be familiar with "fuel prices, availability of transportation equipment, weather conditions, [and] season of the year." Lampertz testified that Lange did not have a formal training program, but rather new sales employees learned these skills "by doing day-to-day business in tandem with me or someone in my office." Lampertz testified that when a new employee came to Lange, he received a "blue book," a widely available independent industry resource on the Federal Act. The "blue book" contained the names of produce

vendors, purchasers, and shippers who were licensed under the Federal Act. Employees learned about the Federal Act by reading the "blue book" and through day-to-day business experience.

Most of Lange's business is conducted over the telephone. Lampertz testified that he coached new employees and helped them become accustomed to talking with vendors, suppliers, and shippers over the telephone. When the new employee became comfortable, the employee would begin making calls on his own. Lampertz sometimes listened in on the telephone conversations and offered advice to the employee if needed. All of the employees sat near each other in an open area. Each salesperson specialized in different categories of produce. Consequently, any given vendor, purchaser or shipper usually worked with more than one salesperson. In order to complete a sale, the salesperson would typically speak to a customer and then hand the telephone to the next salesperson, who then handed it to the next. Lampertz testified that the company had used this technique to build customer relationships and that Lange's relationship with its customers was vitally important.

When Corbin came to work at Lange, Lampertz gave Corbin coaching on his telephone skills. Lampertz said that Corbin received specialized training in asking the right questions to shippers and growers in order to properly read those markets. He said that Corbin was trained to ask questions regarding transportation in order to calculate the delivered price of produce for his customers.

*3 In his deposition, Corbin acknowledged that Lampertz assisted him by giving him the "blue book." Corbin said that the "blue book" had thousands of listings, and that he chose from the listings whom he would call. Lampertz also listened in on Corbin's phone conversations with Lange customers and allowed Corbin to listen in on his own. Corbin said that during the second half of his first year of training, Lampertz did not listen to each of his telephone calls. Corbin explained that, on a typical day at Lange, he would "[c]all up various suppliers of fresh produce, determine availability, cost, and then formulate a plan to call potential buyers to attempt to sell them product." He agreed that a salesperson had to understand the transportation market and its fluctuating pricing, and be able to arrange the shipping of produce. Corbin said he learned this through on-the-job training as well as through Lampertz's assistance. Corbin acknowledged that a salesperson had to have a working knowledge of the Federal Act, and understand that as a licensee of the

Federal Act, Lange as a company must adhere to the codes. Corbin said that it took him two to three years to become proficient as a salesperson. He said that he dealt with approximately six customers on a daily basis. Corbin testified that abiding by the noncompete provision in the Agreement created an economic hardship and a burden, and had made it difficult, though not impossible, for him to make a living.

Lange and Corbin filed cross-motions for summary judgment. The parties' cross-motions centered on whether the training provided to Corbin by Lange, coupled with Corbin's relationships with Lange's customers, created a legitimate business interest which warranted the protection of a noncompetition agreement. Corbin argued that Lange's informal "on-the-job" method of training of "watching and doing" is not the type of specialized training entitled to protection. He maintained that Lange's training program is standard to the industry and that a person trained by Lange's competitors could work for Lange with no further instruction. In its pleadings, Lange, rather than focusing on the method of training, argued that the knowledge and skills required for working with the complex produce and trucking markets, along with the laws and regulations governing the industry, created a protectable business interest.

In regard to Corbin's relationships with Lange's customers, Corbin argued that because each Lange customer was routinely contacted by several Lange representatives, and Lange's corporate culture emphasized teamwork, and because so much time had passed from the time Corbin left Lange, there was no danger that Lange customers would identify Lange with him. [\[FN2\]](#) Lange argued that, regardless of the number of sales persons working with its customers, Corbin had in fact become the "face of the company." Lange noted that Corbin, as a Lange representative, contacted six to ten customers daily, some of whom he contacted on a weekly basis.

[\[FN2\]](#). Corbin also noted that he had not violated the agreement since he left Lange.

*4 On April 16, 2002, after considering the cross motions for summary judgment, the trial judge found that Lange did not have a protectable business interest because Corbin "did not receive unique knowledge and skill through specialized training from [Lange]," nor did Corbin become the "face" of Lange to its customers. The trial court's

comprehensive memorandum opinion cited [Vantage Technology, LLC v. Cross, 17 S.W.3d 637 \(Tenn.Ct.App.1999\)](#), noting that, in order to enforce a noncompetition agreement, an employer must have a legitimate business interest to protect. [Vantage Technology, 17 S.W.3d at 644](#). The employer has a legitimate business interest if, absent the noncompetition agreement, the employee would have an unfair competitive advantage over the employer. *Id.* In determining whether the employee would have an unfair advantage over the employer, the following factors are considered:

(1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer.

Id. The trial judge noted that the only *Vantage* factors pertinent to the case at bar were whether Lange provided Corbin with specialized training, and whether Corbin's contacts with Lange's customers resulted in the customers associating Corbin with Lange.

The trial court found that "knowledge of the governing laws, ability to read the markets of produce and transportation and the ability to read the market on the price the customer is willing to pay" was "general information and skill which is obtained through experience in the industry." The trial court observed that other Lange salespeople also contacted Corbin's customers, and therefore, Corbin's customer contact was diluted. As a result, the trial court found, Corbin was "not so closely associated with the employer's business as to be the face of the company and have an unfair advantage in competition with the employer." Thus, the Agreement was unenforceable because Lange had no legitimate business interest to protect through a noncompete agreement. [\[FN3\]](#) The trial court granted Corbin's motion for summary judgment. From this order, Lange appeals.

[\[FN3\]](#). The trial court found, however, that if Lange had a protectable legitimate business interest, the Agreement was reasonable, and therefore enforceable, because it was "narrowly tailored to cover only the five essential customers [that Corbin] dealt with regularly during his employment," and because the two-year time limit was reasonable under the circumstances.

On appeal, Lange argues that the trial court improperly granted summary judgment to Corbin because Lange has a business interest beyond normal competition, warranting the protection of a noncompetition agreement. A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. [Tenn. R. Civ. P. 56.04](#). Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. [Carvell v. Bottoms](#), 900 S.W.2d 23, 26 (Tenn.1995). When only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. [Bain v. Wells](#), 936 S.W.2d 618, 622 (Tenn.1997). Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. [Warren v. Estate of Kirk](#), 954 S.W.2d 722, 723 (Tenn.1997).

*5 Corbin raises a threshold issue, namely, whether, given the fact that the two-year covenant not to compete expired on September 26, 2002, the issues raised in this appeal are now moot. In support of this argument, Corbin cites *CSJ Travel, Inc. v. Payne*, No. 03A01-9604-CH-00142, 1996 Tenn.App. LEXIS 509 (Tenn.Ct.App. Aug. 20, 1996) and *Crain v. Kesterson Food Co.*, No. 02A01- 9302-CH-00041, 1994 Tenn.App. LEXIS 65 (Tenn.Ct.App. Feb. 16, 1994). Corbin acknowledges that, after the trial court issued its finding that the noncompete agreement was unenforceable, Corbin began contacting the protected "essential" customers. Lange responds that, since the trial court's decision was rendered before the expiration of the Agreement, if this Court finds that the Agreement is enforceable, Lange is entitled to seek damages for the period beginning at the date on which Corbin began contacting "essential" customers to the date of the expiration of the Agreement.

In *CSJ Travel, Inc. v. Payne*, the trial court enforced a noncompete agreement which prohibited the employee from soliciting customers of the employer after the employee's termination, by enjoining the employee from soliciting the customers. *CSJ Travel, Inc. v. Payne*, 1996 Tenn.App. LEXIS 509, at *3-4. The trial court, however, declined to enforce a provision of the noncompete agreement that prohibited the employee from working for a competitor of the employer. *Id.* at *4. This Court held that the trial court should have enforced the entire agreement. *Id.* at *6. Although the noncompete agreement had expired while the appeal was pending, the appellate court remanded the cause to the trial

court for a determination of damages. *Id.* at *7. Thus, in a case in which a noncompetition agreement previously ruled unenforceable was on appeal found enforceable, the case was not moot even though the noncompete agreement had expired, because the employer could recover damages from the employee.

In *Crain v. Kesterson Food Co.*, the trial court refused to enjoin a former employee from competing against his former employer in violation of a noncompete agreement. *Crain*, 1994 Tenn.App. LEXIS 65, at *4. The appellate court found that the trial court erred in its denial of the injunction. *Id.* at *9-10. Although the noncompete agreement had expired, the employer asked the appellate court to nevertheless issue the injunction. *Id.* at *10. The appellate court refused the request, indicating that the injunction issue was moot because the employer could have applied for an interlocutory appeal or could have moved to finalize the order, but failed to do so. *Id.* Although the request for injunctive relief was denied, the appellate court noted that the employer could seek damages from the employee. The appellate court concluded, however, that there was insufficient proof of damages in the record. *Id.* at *10-11. Thus, as in *CSJ Travel*, although the noncompete agreement found on appeal to be enforceable had expired, the appellate court found that the employer could nevertheless seek damages from the employee, and thus the case was not moot.

*6 In this case, Corbin did not contact prohibited customers until after the trial court had issued a final order finding the noncompete agreement unenforceable. Consequently, prior to the final order, Lange had no reason to file a counterclaim seeking damages. It is undisputed, however, that after the trial court issued its order, Corbin began contacting such customers. Therefore, under the *CSJ Travel* and *Crain* decisions, because the possibility exists that Lange is entitled to damages, the issue of whether the Agreement is enforceable is justiciable and not moot. Thus, we now address the enforceability of the noncompete provision.

Noncompetition agreements are generally disfavored in Tennessee as a restraint on trade. See [Hasty v. Rent-A-Driver, Inc.](#), 671 S.W.2d 471, 472 (Tenn.1984) (citing [Allright Auto Parks, Inc. v. Berry](#), 409 S.W.2d 361, 365 (Tenn.1966)). They are not, however, *per se* unenforceable. Rather, they are to be construed in favor of the employee. *Id.* (citing [Allright Auto Parks](#), 409 S.W.2d at 363, 365). As noted by the trial court, in order to enforce the noncompete agreement, the employer must establish that it has a legitimate business interest that warrants

the protection of a noncompetition agreement. [Vantage Technology, LLC v. Cross](#), 17 S.W.3d 637, 644 (Tenn.Ct.App.1999) (citing [Hasty](#), 671 S.W.2d at 473). If the employer has a protectable business interest, the court then continues its analysis of the reasonableness of the noncompetition agreement. *See id.*

In order to establish a protectable business interest, the employer must show "special facts present over and above ordinary competition" such that the employee would have an unfair advantage over the employer absent the noncompetition agreement after his employment has ended. [Hasty](#), 671 S.W.2d at 473 (citation omitted). In determining if there would be such an unfair advantage, the court must consider (1) whether the employer provided specialized training, skill, or knowledge to the employee, (2) whether the employee was privy to business secrets and confidential information, [FN4](#) and (3) whether the employee had such repeated contact with the employer's customers that the customers would tend to see the employee as the "face" of the company. *See id.*; [Vantage Technology](#), 17 S.W.3d at 644. These factors, individually or together, may give rise to a protectable business interest. [Vantage Technology](#), 17 S.W.3d at 644. Here, Lange asserts that Corbin was given specialized training and that Corbin was the "face" of Lange to its customers.

[FN4](#). Lange does not contend that Corbin was privy to business secrets or confidential information.

As to training, after employment has ended, an employee may use his general skill and knowledge, either acquired during the course of employment or brought into the employment relationship, even if the employee acquired the knowledge and skill through expensive training. [Vantage Technology](#), 17 S.W.3d at 644- 45 (citing [Hasty](#), 671 S.W.2d at 473 (Tenn.1984)). The employee's use of specialized or unique skill or knowledge acquired through special training may be restricted by a noncompetition agreement "at least when such training is present along with other factors tending to show a protectable interest." [Id.](#) at 645; [Hasty](#), 671 S.W.2d at 473 ("Training in conjunction with other factors has ... been cited as a factor in upholding the reasonableness of a covenant."). The court must draw a line "between the general skills and knowledge of the trade and information that is peculiar to the employer's business." [Selox, Inc. v. Ford](#), 675 S.W.2d 474, 476 (Tenn.1984) (quoting [Restatement](#)

[\(Second\) of Contracts § 188](#) cmt. g)). They must determine "whether the skill acquired as a result of [the training the employee received] is sufficiently special as to make a competing use of it by the employee unfair." [Vantage Technology](#), 17 S.W.3d at 645.

*7 Likewise, the employer may have a legitimate business interest warranting the protection of a noncompete agreement if the employee's repeated contacts with customers would cause the customers to tend to associate the employee with the employer. [Vantage Technology](#), 17 S.W.3d at 645. In the customers' eyes, the employee must become the "face" of the employer. [Id.](#) The [Vantage Technology](#) court stated:

This relationship is based on the employer's goodwill.... [As the employer's agent], the employee is made privy to certain information that is personal, if not technically confidential. Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship, or the information that flows through it, for his own benefit. This is especially true if this special relationship exists along with the elements of confidential information and/or specialized training.

[Id.](#) at 645-46 (citations omitted). Thus, the employer may have a protectable interest in the relationship between the employee and its customers because that relationship is based on the employer's goodwill.

The enforceability of noncompete agreements has been addressed by Tennessee courts. In [Hasty v. Rent-A-Driver, Inc.](#), 671 S.W.2d 471 (Tenn.1984), the employee was not privy to trade secrets or confidential information. [Id.](#) at 473. In order to establish a protectable business interest, the employer relied on the extensive screening done to hire drivers. [Id.](#) at 474. In its hiring process, the employer hired only ten out of every 100 applicants, and spent approximately four hours per applicant "weeding out" unwanted drivers. [Id.](#) at 473. After these employee drivers had gone through a ninety-day probationary period, the employer retained only three or four of the ten drivers. [Id.](#) at 473-74. The Tennessee Supreme Court found that the employer's expenditure of resources to identify and hire a qualified driver did not render the driver's subsequent competition unfair, because the employer had expended no resources to make the driver qualified. [Id.](#) at 474. Therefore, the noncompetition agreement was held unenforceable. [Id.](#)

The [Hasty](#) decision was cited in [Selox, Inc. v. Ford](#),

[675 S.W.2d 474 \(Tenn.1984\)](#), as establishing that, in order to justify the protection of a noncompetition agreement, special facts over and above ordinary competition must exist such that, without the noncompetition agreement, the employee would gain an unfair advantage over the employer. *Id.* at 476. In *Selox*, the employee had no sales experience prior to working for the employer. *Id.* at 475. The employee's training consisted of working on an existing sales route with another salesperson. *Id.* The employee later took over the route. His duties required him to contact existing and potential customers and sell them the employer's products. Prices were fixed by the employer or the manufacturer. *Id.*

*8 The trial court found that the employee had acquired no trade secrets, and that the employer's customers could be ascertained by referring to a phone directory. *Id.* The trial court also found that the employee had received no specialized training and that "the particular work done by [the employee] for [the employer] could have been performed by any other employee of average competence." *Id.* The *Selox* court agreed with the trial court's conclusion that, under these circumstances, the hardship to the employee created by enforcing the agreement outweighed any benefit that the employer might receive. *Id.* Thus, the noncompete agreement was held unenforceable. *Id.* at 476.

A noncompete agreement was held enforceable in [Vantage Technology, LLC v. Cross, 17 S.W.3d 637 \(Tenn.Ct.App.1999\)](#), discussed in the trial court's memorandum opinion. In *Vantage*, the employer hired technicians to transport portable eye surgery equipment. *Id.* at 641. The technicians set up the machines according to each physician's preferences, and assisted the physicians during surgery. *Id.* During the employee's first month of employment, he participated in 241.5 hours of training and observed approximately seventy surgeries. *Id.* at 646. He kept work diaries in which he recorded the physicians' preferences. *Id.* at 641, 643. Customer relationships were based on the employer's goodwill. *Id.* at 646. The employee developed a relationship with a physician that eventually resulted in his departure from the employer. *Id.* at 643, 646. Under these circumstances, the appellate court held that the employer had a legitimate business interest which warranted the protection of a noncompetition agreement. *Id.* at 646

In this case, Lange contends that the Agreement is enforceable because Corbin received specialized training, and because he was the "face" of the company to its customers. Clearly, in his work as a

salesperson, Corbin was required to understand the produce market and its fluctuations, the selling and pricing habits of vendors, and the purchasing habits of Lange's customers. In orchestrating the transportation of produce purchased from vendors, Lange had to be aware of the shipping market. Lange's "informal" training consisted of providing Corbin with a readily-available "blue book," and asking him to become familiar with the Federal Act, as set out in the "blue book." Corbin's phone conversations were frequently monitored for at least the first six months of his employment, and on a regular basis for the following 2-3 years. Lange coached Corbin about his conversations with customers, to train him to be a better salesperson for Lange, and he received "on-the-job" training on the produce and transportation markets. Obviously, after twelve years of employment, Corbin had acquired considerable knowledge of the produce market. However, based on the undisputed facts in this case, we find no error in the trial court's conclusion that Corbin did not receive specialized or unique training.

*9 Lange also contends that Corbin's contact with Lange's customers was such that the customers saw him as the "face" of Lange, thus warranting the protection of a noncompete agreement. As noted above, at Lange each salesperson dealt with specific produce. The salesperson would speak with the customer and then pass the telephone to another salesperson specializing in other types of produce. The trial court found that this "tag-team" approach to customers diluted Corbin's contact with customers, so that each customer had relationships with multiple salespeople. Again, based on the undisputed facts, we find no error in the trial court's determination that Corbin's contact with customers was not such that Corbin became the "face" of Lange to its customers. Thus, we must agree with the trial court's conclusion that Lange did not have a business interest which warranted the protection of a noncompetition agreement, and that the noncompete agreement in this case is unenforceable. Accordingly, we find no error in the trial court's denial of Lange's motion for summary judgment and its grant of Corbin's motion for summary judgment.

The decision of the trial court is affirmed. Costs are taxed to the appellant, Tom Lange Company, Inc., and its surety, for which execution may issue, if necessary.

2003 WL 22843167 (Tenn.Ct.App.)

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Court of Appeals of Tennessee,
Eastern Section, at Knoxville.

VANTAGE TECHNOLOGY, LLC, Plaintiff-
Appellant,

v.

Mark CROSS, Defendant-Appellee.

Oct. 19, 1999.

Application for Permission to Appeal
Denied by Supreme Court
April 17, 2000.

Employer filed action against former employee, seeking injunctive relief and damages for breach of a non-competition covenant. Following a bench trial, the Hamblen County Chancery Court, Thomas R. Frierson, II, Chancellor, found that the covenant was unreasonable and unenforceable. Employer appealed. The Court of Appeals, Susano, J., held that: (1) covenant not to compete was enforceable to extent that it restricted competition within 50 driving miles of clients regularly serviced by former employee during employment; (2) former employer was not entitled to amend its pleadings to conform to evidence to add breach of duty of loyalty claim; and (3) agreement not to compete contained valid choice of law provision calling for application of Tennessee law.

Reversed in part, affirmed in part, and remanded.

West Headnotes

Trade secret

*640 [J. Ford Little](#) and [Michael J. King](#), Woolf, McClane, Bright, Allen & Carpenter, PLLC, Knoxville, TN, for Appellant.

[H. Scott Reams](#), Taylor, Reams, Tilson & Harrison, Morristown, TN, for Appellee.

OPINION

SUSANO, Judge.

Vantage Technology, LLC ("Vantage") filed this suit against its former employee, Mark Cross ("Cross"), seeking injunctive relief and damages for breach of a non-competition covenant. Following a bench trial,

the Chancellor found that the covenant was unreasonable and unenforceable. Vantage appeals, raising the following issues for our consideration:

1. Did the trial court err in finding that the non-competition covenant was unreasonable and unenforceable?
2. Did the trial court err in denying Vantage's motion to amend its pleadings to conform to the evidence?

Appellee Cross raises the additional issue of whether the trial court erred in applying Tennessee law rather than Illinois law.

I. Facts and Procedural History

A. Vantage's Business

Vantage's business involves the rendering of a service to ophthalmologists in a hospital setting. To best understand the facts of this case, it is necessary to have an elementary grasp of cataract surgery logistics, especially as it relates to the relationships of the parties involved. When an ophthalmologist determines that a patient needs surgery to remove cataracts, the physician must then choose, from among the hospitals at which the doctor has privileges, the facility at which the surgery is to be performed. Because physicians often *641 prefer to perform surgery with certain equipment, supplies, and instruments, the presence or absence of these accouterments at a particular hospital is often the determining factor in the surgeon's choice of location. Thus, hospitals, in competition with one another for facility usage fees, often seek to attract surgeons by offering the tools that surgeons prefer. While larger hospitals are generally able to provide these tools in-house, rural hospitals must often obtain them from third parties. These third parties, sometimes referred to as "mobile service providers", transport the necessary equipment to the hospital when a surgeon is scheduled to perform cataract surgery. These mobile service providers are driven by the same incentives as are the hospitals--to provide the equipment, supplies, instruments and services that surgeons prefer.

Vantage, as one of these mobile service providers, employs technicians to transport the required materials to rural hospitals and to assist the physicians during surgery. Cross is a former Vantage technician. For the reasons outlined above, Vantage has an interest in initiating, developing, and sustaining relationships not only with hospitals, but also with the physicians performing cataract surgery at the hospitals. To initiate such relationships, Vantage utilizes direct-mailings or face-to-face demonstrations to sell its services to hospitals.

Vantage delegates to the technicians the ongoing task of developing and sustaining these relationships because a technician is the primary liaison between Vantage and the doctors and hospitals. In furtherance of the goal of relationship-building, Vantage encourages its technicians to use entertainment expense accounts to purchase meals or gifts for physicians and other surgical staff.

Another method that Vantage employs to build and strengthen relationships is the collection and recordation of surgeon preferences. These "doctor diaries" are used to record surgeons' preferences for machine settings, supplies, and instruments. This information is initially gathered and logged in by a Vantage salesperson. When a technician is assigned to a particular surgeon, the technician refers to the diary to determine what equipment to bring and how to set up the machine, instruments, and supplies. The doctor diaries also include personal information about the doctor such as hobbies and interests. Part of the technician's responsibility is to record in the doctor diaries any change in surgeon preferences or problems encountered during surgery. The technicians are also required to report growth opportunities of which they become aware during the performance of their duties.

The primary piece of equipment that Vantage provides to hospitals is a phacoemulsification machine. This machine is used to break cataracts into pieces and remove the pieces through irrigation and aspiration. Once the cataract is removed, the surgeon implants an artificial lens into the eye. Surgery with the machine enables the surgeon to utilize a much smaller incision which, in turn, allows an easier and shorter recuperation time for the patient. Additionally, the machines allow surgeons to perform more cataract surgeries in less time.

In addition to providing the machine, Vantage also provides supplies, instruments, and technician services. The technician's pre-surgery responsibilities include transportation of the equipment, setting up the machine's parameters according to the surgeon's preferences, tuning the hand piece, "breaking out" the supplies and instruments, and preparing the room for surgery. During surgery, the technician stays by the machine and changes the machine's modes by pressing buttons according to the surgeon's instructions. The surgeon, not the technician, places the machine tip to the eye and otherwise operates the machine during surgery through the use of foot pedals.

*642 No medical training or education is required

for technicians, nor do technicians need to be licensed. One can be trained to operate the machine in a single day. A trained technician can set up the parameter preferences in approximately 15 seconds. A physician can perform surgery without a technician in the room. Still, a technician's responsibilities require a degree of familiarity with the machine.

From October, 1994, to August, 1996, Vantage, with 15 to 18 employees, provided mobile services to 70 to 100 hospitals in eight states, including Tennessee. Four hospitals in Tennessee are relevant to this case: Fort Sanders-Loudon Medical Center ("Fort Sanders-Loudon") in Loudon; Lakeway Regional Hospital ("Lakeway") in Morristown; LaFollette Medical Center ("LaFollette") in LaFollette; and Fort Sanders-Sevierville Medical Center ("Fort Sanders-Sevierville") in Sevierville.

Vantage provided mobile services to Fort Sanders-Loudon under an exclusive contract from August 15, 1995, to August 14, 1996. After termination of the contract, Vantage provided services at least once more on September 4, 1996. The primary ophthalmologist performing cataract surgery at Fort Sanders-Loudon was Dr. Subba Rao Gollamudi.

Vantage provided mobile services to Lakeway under a one-year, non-exclusive contract beginning on October 1, 1995. Dr. Gollamudi was also the primary ophthalmologist at Lakeway.

Vantage provided mobile services to LaFollette on one occasion in 1994. Because LaFollette was, at that time, satisfied with its own machine and because LaFollette and Vantage could not come to an agreement regarding price, LaFollette did not become a Vantage customer.

Vantage first contacted Fort Sanders-Sevierville in April, 1998, two months prior to trial.

B. Cross' Employment with and Departure from Vantage

Cross began employment with Vantage as a technician in October, 1994. His qualifications for the position included a bachelor's of science degree in administrative management and experience from a variety of jobs. He had no experience, training or education directly relevant to the operation of phacoemulsification machines.

In January, 1995, Cross signed a covenant not to compete, which provides as follows:

[d]uring the term hereof and for a period of three

years thereafter, the Employee shall not compete, directly or indirectly, with the Company interfere with, disrupt or attempt to disrupt the relationship, contractual or otherwise, between the Company and any customer, client, supplier, consultant or employees of the Company, including, without limitation, employing or being an investor (representing more than a 5% equity interest) in, or officer, director or consultant to, any person or entity which employs any former key or technical employee whose employment with the Company was terminated after the date which is one year prior to the date of termination of the Employee's employment therewith. An activity competitive with an activity engaged in by the Company shall mean performing services (whether as an employee, officer, consultant, director, partner or sole proprietor) for any person or entity engaged in the business then engaged in by the Company, within 50 miles of any Company office or Company's client location.

The agreement also provides that:

[i]t is the desire and intent of the parties that the provisions of this Section shall be enforced to the fullest extent permissible under the laws and public policies applied in each jurisdiction in which enforcement is sought. Accordingly, if any particular portion of this Section shall be adjudicated to be invalid or unenforceable, this Section shall be deemed amended *643 to delete therefrom the portion thus adjudicated to be invalid or unenforceable, such deletion to apply only with respect to the operation of this Section in the particular jurisdiction in which such adjudication is made.

Vantage taught Cross how to perform his duties as a phacoemulsification technician. Cross spent his first month of employment with Vantage in 241.5 hours of training. This training primarily consisted of observing a more senior Vantage technician during approximately 70 cataract surgeries. Cross also watched videos and read manuals. During the course of his employment, Cross attended monthly meetings and also went to one "wet lab" where he performed a cataract surgery on a pig's eye. Most of Cross' training pertained to two models of a machine manufactured by Alcon and one model manufactured by Storz.

After Cross' initial training, he began to provide services to hospitals without the supervision of another Vantage technician. Cross relied on the doctor diaries to ascertain the preferences of the doctors with whom he worked. In addition to the doctor diaries, Cross received schedules which

included not only his own itinerary, but also the names of the hospitals and doctors for whom his fellow technicians would be working. Cross testified that, after referring to the schedules to determine where and with whom he was to work, he discarded the schedules without having ascertained the identities of any other Vantage customers. Cross had limited knowledge of Vantage's pricing and other terms of Vantage's contracts with hospitals.

During his employment with Vantage, Cross serviced 49 hospitals in at least six states. Two of the hospitals Cross serviced were Fort Sanders-Loudon and Lakeway. At first, Vantage dispatched several different technicians to service these two hospitals. By the summer of 1996, however, Cross was the Vantage technician in the majority of the surgeries performed at these two hospitals, and had developed a strong relationship with Dr. Gollamudi.

In the summer of 1996, Vantage informed Cross that it wanted him to service hospitals in Ohio rather than in Tennessee. Cross and Dr. Gollamudi began to discuss the possibility of Cross working as a technician for Dr. Gollamudi independent of Vantage, using an Allergan Prestige machine which Dr. Gollamudi preferred over the machines supplied by Vantage. Vantage never trained Cross on an Allergan Prestige machine.

Around this time, Cross learned from Dr. Gollamudi that LaFollette was experiencing problems with its phacoemulsification machine to the point of having to postpone and cancel surgeries. The Operating Room Director at LaFollette testified that Cross met her on August 13, 1996, to discuss the providing of mobile services. Cross did not mention that he was a Vantage employee. On August 15, 1996, Cross gave Vantage his two weeks notice. Cross faxed a price quote to LaFollette on August 16, 1996. On August 19, 1996, Dr. Gollamudi secured \$40,000 from a bank and then loaned the money to Cross to finance the start-up of Cross' business, Southern Surgical Support. Cross used most of the money to purchase a refurbished Allergan Prestige machine which he ordered on August 29, 1996, his last day as a Vantage employee. Cross received the machine on September 2, 1996, and an Allergan representative, in one day, instructed him in its operation.

Cross rendered his first service through his new business on September 10, 1996, at LaFollette. With the help of Dr. Gollamudi's influence, Cross began servicing Lakeway sometime within the next month and Fort Sanders-Loudon in October, 1996. In November, Dr. Gollamudi introduced Cross to a

partner who performed surgery at Fort Sanders-Sevierville. Cross began servicing Fort Sanders-Sevierville in January, 1997.

*644 Vantage filed suit on May 16, 1997, alleging that Cross had breached a valid and enforceable covenant not to compete. The trial court, finding the covenant unreasonable and unenforceable, rendered judgment in favor of Cross. Vantage then appealed.

II. Standard of Review

[1] In this non-jury case, our review is *de novo* upon the record, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates otherwise. [Rule 13\(d\)](#), T.R.A.P.; [Union Carbide Corp. v. Huddleston](#), 854 S.W.2d 87, 91 (Tenn.1993); [Wright v. City of Knoxville](#), 898 S.W.2d 177, 181 (Tenn.1995). The trial court's conclusions of law, however, are accorded no such presumption. [Campbell v. Florida Steel Corp.](#), 919 S.W.2d 26, 35 (Tenn.1996); [Presley v. Bennett](#), 860 S.W.2d 857, 859 (Tenn.1993).

[2] Our *de novo* review is subject to the well-established principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. [Massengale v. Massengale](#), 915 S.W.2d 818, 819 (Tenn.App.1995); [Bowman v. Bowman](#), 836 S.W.2d 563, 566 (Tenn.App.1991).

III. Analysis

A. Non-Competition Covenant

[3][4] Covenants not to compete, because they are in restraint of trade, are disfavored in Tennessee. [Hasty v. Rent-A-Driver, Inc.](#), 671 S.W.2d 471, 472 (Tenn.1984). As such, they are construed strictly in favor of the employee. *Id.* However, when the restrictions are reasonable under the circumstances, such covenants are enforceable. *Id.* The factors that are relevant in determining whether a covenant not to compete is reasonable include "the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest." [Allright Auto Parks, Inc. v. Berry](#), 219 Tenn. 280, 409 S.W.2d 361, 363 (1966).

[5] The first factor, consideration, is not an issue on appeal. In balancing the other three factors, a threshold question is whether the employer has a legitimate business interest, *i.e.*, one that is properly

protectable by a non-competition covenant. *See Hasty*, 671 S.W.2d at 473.

[6][7] Several principles guide the determination of whether an employer has a business interest properly protectable by a non-competition covenant. Because an employer may not restrain ordinary competition, it must show the existence of special facts over and above ordinary competition. *Id.* These facts must be such that without the covenant, the employee would gain an unfair advantage in future competition with the employer. *Id.* Considerations in determining whether an employee would have such an unfair advantage include (1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer. *Id.* These considerations may operate individually or in tandem to give rise to a properly protectable business interest. *See, e.g., AmeriGas Propane, Inc. v. Crook*, 844 F.Supp. 379 (M.D.Tenn.1993); [Flying Colors of Nashville, Inc. v. Keyt](#), C/A No. 01A01-9103-CH-00088, 1991 WL 153198 (Tenn.App. M.S., filed August 14, 1991).

1. Specialized Training

[8] An employer does not have a protectable interest in the *general* knowledge and skill of an employee. *645 [Hasty](#), 671 S.W.2d at 473. This is not only true of knowledge and skill brought into the employment relationship, but also true as to that acquired during the employment relationship, even if the employee obtained such general knowledge and skill through expensive training. *See Hasty*, 671 S.W.2d at 473 ("general knowledge and skill appertain exclusively to the employee, even if acquired with expensive training and thus does not constitute a protectible [sic] interest of the employer").

[9] In contrast, an employer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer, at least when such training is present along with other factors tending to show a protectable interest. *Id.*; [Selox, Inc. v. Ford](#), 675 S.W.2d 474, 476 (Tenn.1984) ("A line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business.") (quoting [Restatement \(Second\) of Contracts § 188](#) cmt. g (1981)). *See also Flying Colors of Nashville*, 1991 WL 153198 at *5 (holding that training in specialized techniques and processes

of paint-mixing, together with a special relationship with the employer's customers, gives rise to a properly protectable interest).

[10] Thus, whether an employer has a protectable interest in its investment in training an employee depends on whether the skill acquired as a result of that training is sufficiently special as to make a competing use of it by the employee unfair.

2. Trade Secrets and Confidential Information

[11][12][13] An employer has a legitimate business interest in keeping its former employees from using the former employer's trade or business secrets or other confidential information in competition against the former employer. [Hasty, 671 S.W.2d at 473](#). A trade secret is defined as any secret "formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." [Hickory Specialties, Inc. v. B & L Labs., Inc.](#), 592 S.W.2d 583, 586 (Tenn.App.1979) (quoting [Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng'g Corp.](#), 255 F.Supp. 645, 653 (E.D.Mich.1966)). The subject matter of a trade secret must be secret and not well known or easily ascertainable. [Hickory Specialties, 592 S.W.2d at 587](#).

What constitutes "confidential information" is somewhat less clear. In [Heyer-Jordan & Assocs., Inc. v. Jordan](#), 801 S.W.2d 814 (Tenn.App.1990), we held that the identities of the employer's customers did not amount to "confidential business information" within the meaning of the employment agreement because such information was generally available in the trade. We reasoned that "confidential information" is analogous to "trade secret" and that, because customer identities are not secret, they cannot be considered confidential. See also [Amarr Co. v. Depew](#), C/A No. 03A01-9511-CH-00412, 1996 WL 600330, *4-*5 (Tenn.App. W.S., filed October 16, 1996) (holding that customer lists, customer credit information, pricing information, and profit and loss statements did not constitute confidential information because such information is easily available from sources other than the employer).

3. Special Customer Relationships

[14] An employer may also have a legitimate protectable interest in the relationships between its employees and its customers. See [Hasty, 671 S.W.2d at 473](#). It is often the case that the customer

associates the employer's business with the employee due to the employee's repeated contacts with the customer. The employee in essence becomes "the face" of the employer. This relationship is based on the employer's goodwill. The employee's role in this relationship is merely that of the employer's agent. In this role, the employee *646 is made privy to certain information that is personal, if not technically confidential. Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship, or the information that flows through it, for his own benefit. This is especially true if this special relationship exists along with the elements of confidential information and/or specialized training. For illustrations of this principle, see [AmeriGas Propane, Inc. v. Crook](#), 844 F.Supp. 379, 386 (M.D.Tenn.1993); [Ramsey v. Mutual Supply Co.](#), 58 Tenn.App. 164, 427 S.W.2d 849, 852 (1968); [Federated Mut. Implement and Hardware Ins. Co. v. Anderson](#), 49 Tenn.App. 124, 351 S.W.2d 411, 415 (1961); [Arkansas Dailies, Inc. v. Dan](#), 36 Tenn.App. 663, 260 S.W.2d 200, 204-05 (1953); [Powell v. McDonnell Ins., Inc.](#), C/A No. 02A01-9608-CH-00176, 1997 WL 589232, *5 (Tenn.App. W.S., filed September 24, 1997); [Flying Colors of Nashville, Inc. v. Keyt](#), C/A No. 01A01-9103-CH-00088, 1991 WL 153198, *5 (Tenn.App. M.S., filed August 14, 1991).

4. Application

[15] Vantage argues on appeal that it has a legitimate business interest in all of the above categories, *i.e.*, specialized training, confidential information, and special customer relationships. The trial court concluded that Cross' training was "not so unique or specialized as to justify a covenant not to compete for its protection...." It also held that Vantage had no legitimate business interest in the customer lists, pricing levels, and doctor diaries because such information does not constitute confidential information. Finally, the trial court found that Vantage does not have a protectable interest in the relationship arising out of Cross' direct and repeated contacts with Vantage's customers because the hospitals are primarily concerned with quality and price rather than developing relationships.

While the relevant factors mentioned above must each be analyzed in isolation, they must also be analyzed in tandem. When the facts of the instant case are analyzed in the latter manner, we find and hold that Vantage has established a legitimate business interest that can be properly protected by a covenant not to compete.

Cross' first month of employment was devoted to training. His first 241.5 hours on the job were primarily spent in observation of approximately 70 surgeries. After the initial training period ended, he attended monthly meetings. In addition to this training, the relationships between Vantage and the hospitals and surgeons were initiated by Vantage and were built on the foundation of Vantage's goodwill. Any contribution of Cross to the development and sustenance of these relationships was accomplished in Cross' role as an agent of Vantage. In performance of this role, Cross was made privy to surgeon preferences. He had a degree of knowledge of Vantage's other customers and the prices it charged for Cross' services. Additionally, it was in this role as Vantage technician that Cross' relationship with Dr. Gollamudi was initiated and developed. This relationship, as well as the information that flowed through it, gives Cross an unfair advantage in competition against his former employer because it comes at the expense of his former employer. When this special relationship is coupled with the training Cross received from Vantage and the confidential information he received while in its employ, the totality of all of this amounts to a legitimate business interest properly protectable by a covenant not to compete. [\[FN1\]](#) To the extent the trial court *647 found otherwise, we find and hold that the evidence preponderates against such a finding.

[FN1.](#) Cross strenuously argues that much of what he learned while a Vantage employee is of no use to him because he uses a different machine. He also argues that the information in the Vantage doctor diaries is not relevant to the services currently being provided by him. Even if true, this does not affect our holding that the totality of the circumstances-- training, confidential information and relationships--amounts to a protectable business interest of Vantage.

[16] Finding that Vantage has established a protectable interest, however, does not end our inquiry. According to the [Allright](#) factors, the threatened danger to Vantage's protectable interest in the absence of a non-competition covenant must be balanced against the economic hardship imposed on Cross by such a covenant. The public interest must also be considered. [Allright Auto Parks, Inc. v. Berry](#), [219 Tenn. 280, 409 S.W.2d 361, 363 \(1966\)](#).

The trial court, apparently relying on its previous findings of fact, found that "[t]he economic hardship imposed upon Cross by such a covenant greatly outweighs the threatened danger to Vantage in the absence of such an agreement." For the reasons articulated above, we disagree. If the covenant is not enforced, Vantage stands to lose its investment in training Cross and its investment in the development of customer relationships as well as the effort expended in gathering information concerning surgeon preferences. If the covenant is enforced, Cross merely loses that which does not belong to him.

The relevant considerations bearing on the public interest do not preclude enforcement of the non-competition covenant. Any restraint on competition has the potential to increase the cost of what are already expensive health care services. On the other hand, not enforcing the covenant would allow Cross to unfairly use the benefits bestowed upon him by his employer and may result in a disincentive to Vantage to properly train and inform its employees. Accordingly, we find that the public interest considerations do not militate against enforcement of the covenant. We conclude that the threatened danger to Vantage in the absence of such enforcement outweighs the economic hardship imposed upon Cross by enforcement of the non-competition covenant.

[17][18][19][20] To be enforceable, a covenant not to compete must clear one final hurdle. The scope of a covenant not to compete must be reasonable in that "the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer." [Allright Auto Parks](#), [409 S.W.2d at 363](#). If the scope of the covenant is reasonable as written, it will be enforced as written. If the scope is unnecessarily burdensome to the employee, however, it will be enforced only "to the extent that [it is] reasonably necessary to protect the employer's interest 'without imposing undue hardship on the employee when the public interest is not adversely affected.'" [Central Adjustment Bureau, Inc. v. Ingram](#), [678 S.W.2d 28, 37 \(Tenn.1984\)](#) (quoting in part [Ehlers v. Iowa Warehouse Co.](#), [188 N.W.2d 368, 370 \(Iowa 1971\)](#)). Hence, a court may modify an unreasonable covenant so as to render it reasonable. To protect against employers drafting overly broad language secure in the knowledge that the sole sanction would be modification to the maximum extent allowed, courts will hold the entire covenant invalid if credible evidence supports a finding that the covenant is deliberately unreasonable and oppressive. [Central Adjustment Bureau](#), [678](#)

[S.W.2d at 37](#). With respect to territorial limitations, covenants that embrace an area in which the employee never performed services are unreasonable unless the employee possesses knowledge of the employer's trade secrets. [Allright Auto Parks](#), 409 S.W.2d at 364.

The covenant at issue in the instant case is rather inartfully drawn. It essentially prohibits Cross from competing with Vantage for three years "within 50 miles of any Company office or Company's client location." Vantage's rationale for the 50-mile restriction is that surgeons often serve numerous hospitals within 50 miles of each other, and, because surgeons are *648 so influential in the hospitals' choice of mobile service provider, a provider's relationship with a surgeon can translate into relationships with surrounding hospitals.

[21] We find the 50-mile restriction to be a reasonable geographical scope with respect to the locations of Vantage's customer-hospitals in which Cross served as technician for Vantage. Vantage's asserted rationale, however, does not explain the need for protection of a 50-mile area surrounding Vantage's offices. Nor does it explain the need for protection in areas near hospitals in which Cross never performed services. The evidence does not suggest that Vantage deliberately drafted the covenant to be unreasonable or oppressive. Accordingly, we modify the covenant to prohibit Cross from competing with Vantage within 50 miles of any Vantage customer location in which Cross performed services while a Vantage technician.

There are at least two other problems with the subject covenant. First, it does not expressly state whether "within 50 miles" is intended to refer to a radius or driving distance. Second, the covenant does not state whether the "Company's client location" refers to hospitals which were at one time clients or which were clients at the time of Cross' termination. Because the agreement is ambiguous, and because we are to construe covenants not to compete favorably to the employee, we find and hold that the area of restriction is 50 miles as determined by the shortest driving distance. Additionally, we hold that the covenant applies only to those hospitals in which Vantage was regularly providing services at the time of Cross' termination.

[22] With respect to the period of restriction, we hold that three years is reasonable. See [Matthews v. Barnes](#), 155 Tenn. 110, 293 S.W. 993, 993, 996 (1927) (five-year covenant held reasonable); [Ramsey v. Mutual Supply Co.](#), 58 Tenn.App. 164, 427 S.W.2d

[849, 852-53 \(1968\)](#) (five-year covenant held reasonable); [Arkansas Dailies, Inc. v. Dan](#), 36 Tenn.App. 663, 260 S.W.2d 200, 205 (1953) (three-year covenant held reasonable); [Mike Glynn & Son, Inc. v. Schang](#), 1990 WL 7449, *1, *4 (Tenn.App. W.S., filed February 5, 1990) (three-year covenant held reasonable).

In sum, we hold the following: (1) that Vantage has established that it has a legitimate, protectable interest; (2) that the threatened danger to this interest in the absence of a non-competition covenant outweighs the economic hardship imposed on Cross resulting from enforcement of the covenant; (3) that the three-year time period for which Cross is prohibited from competing with Vantage is reasonable; and (4) that the geographical scope of the covenant is modified so that Cross is prohibited from competing with Vantage within 50 miles, shortest driving distance, of any hospital in which Vantage was regularly providing services at the time of Cross' termination, but only with respect to those hospitals in which Cross performed services while a Vantage technician.

On remand, the trial court must determine, according to the parameters we have outlined above, whether and to what extent Cross has violated his non-competition covenant. If Cross has violated his covenant, the trial court must determine the extent of injunctive relief and/or damages to which Vantage is entitled.

B. Motion to Amend to Conform to the Evidence

The second issue Vantage raises on appeal is whether the trial court erred in denying Vantage's motion to amend its pleadings to conform to the evidence. On May 16, 1997, Vantage filed suit alleging breach of the covenant not to compete. Vantage did not assert breach of duty of loyalty as a cause of action. On June 30, 1998, the parties proceeded to the first day of trial. Vantage examined, and Cross cross-examined, four witnesses. The court then adjourned until July 13, 1998. On July 7, 1998, Vantage filed a motion to *649 amend the pleadings to conform to the evidence seeking to add a breach of duty of loyalty cause of action. The court heard the motion on July 13, 1998, and denied it, finding that the issue had not been tried by express or implied consent and that an amendment at that time would result in prejudice to Cross.

[23] In determining whether to grant or deny a motion to amend the pleadings to conform to the evidence [\[FN2\]](#), "the most important question is

whether the new issues were tried by the parties' express or implied consent and whether the defendant 'would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.' " Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 891 (Tenn.1980) (quoting Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1086 (2d Cir.1977)). Presentation of evidence that is relevant to both a pled issue and a non-pled issue does not establish trial of the non-pled issue by implied consent. Hiller v. Hailey, 915 S.W.2d 800, 805 (Tenn.App.1995). Whether the issue has been tried by implied consent is a decision resting within the sound discretion of the trial court, and, as such, it cannot be disturbed on appeal absent an abuse of discretion. Zack Cheek Builders, 597 S.W.2d at 891.

FN2. Motions to amend pleadings to conform to the evidence are governed by T.R.C.P. § 15.02: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.... If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

[24] Here, Vantage seeks to amend the pleadings to include a breach of duty of loyalty claim based on certain evidence elicited on the first day of trial. Vantage asserts that it did not learn until the first day of trial that Cross personally solicited LaFollette two days before giving his notice of termination to Vantage. Vantage contends that this evidence is relevant only to a breach of duty of loyalty claim. It also asserts that this issue was tried by implied

consent because Cross' attorney examined two witnesses regarding the timing of Cross' solicitation of LaFollette for himself. Cross responds with the argument that the facts surrounding the timing of his personal solicitation of clients is relevant to the breach of the non-competition covenant, especially as it relates to the calculation of damages should he be found to be in violation of the covenant. Thus, Cross argues that he did not expressly or impliedly try the breach of duty of loyalty claim, and that the amendment after witnesses have been dismissed would be prejudicial to his case.

On the second day of trial, after denial of the motion to amend, counsel for Vantage questioned Cross about when Cross established his own business. In response to an objection based on relevancy, i.e., that the question was outside the scope of the pleadings, counsel for Vantage stated that "[i]f the gentleman is out competing directly with his employer during the actual employment with the employer, that's certainly relevant to the facts of this case." We agree with Cross and Vantage's counsel that the evidence surrounding the timing of Cross' solicitation of LaFollette is relevant to the alleged violation of the non-competition covenant. Moreover, by the time the motion was filed, four witnesses had been examined and dismissed. Granting the motion would have resulted in *650 Cross not being given fair notice or an opportunity to present evidence relevant to a cause of action alleging breach of duty of loyalty. Accordingly, we find that the trial court did not abuse its discretion in denying Vantage's motion to amend its pleadings to conform to the evidence.

C. Choice of Law

[25] Cross raises as an issue on appeal whether the trial court erred in applying Tennessee law rather than Illinois law in determining the enforceability of the covenant not to compete. The basis for the trial court's decision regarding choice of law is paragraph 2(b) of the agreement not to compete signed by Cross. This paragraph provides as follows:

[i]t is the desire and intent of the parties that the provisions of this Section shall be enforced to the fullest extent permissible under the laws and public policies applied in each jurisdiction in which enforcement is sought. Accordingly, if any particular portion of this Section shall be adjudicated to be invalid or unenforceable, this Section shall be deemed amended to delete therefrom the portion thus adjudicated to be invalid or unenforceable, such deletion to apply only with respect to the operation of this Section in the

particular jurisdiction in which such adjudication is made.

[26][27][28][29] The goal of contract interpretation is to ascertain the intent of the parties according to the usual, natural, and ordinary meaning of the words used by the parties. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn.1999). Any ambiguity is to be construed against the drafter. *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 531 (Tenn.1991). Contracts must be construed, as far as is reasonable, so as to give effect to every term. *Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn.App.1996). Interpretation of a contract, being a matter of law, is subject to *de novo* review with no presumption of correctness. *Guiliano v. Cleo*, 995 S.W.2d 88, 95 (Tenn.1999); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn.1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn.1993).

[30] Tennessee follows the rule of *lex loci contractus*. This rule provides that a contract is presumed to be governed by the law of the jurisdiction in which it was executed absent a contrary intent. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 467 (Tenn.1973).

[31] If the parties manifest an intent to instead apply the laws of another jurisdiction, then that intent will be honored provided certain requirements are met. The choice of law provision must be executed in good faith. *Goodwin Bros. Leasing, Inc. v. H & B Inc.*, 597 S.W.2d 303, 306 (Tenn.1980). The jurisdiction whose law is chosen must bear a material connection to the transaction. *Id.* The basis for the choice of another jurisdiction's law must be reasonable and not merely a sham or subterfuge. *Id.* Finally, the parties' choice of another jurisdiction's law must not be "contrary to 'a fundamental policy' of a state having [a] 'materially greater interest' and whose law would otherwise govern." *Id.*, n. 2 (citing restatement (Second) of Conflict of Laws § 187(2) (1971)).

In a February 13, 1998, memorandum opinion relating to this issue, the trial court made the following findings of fact: (1) both parties executed the agreement in good faith; (2) Tennessee had a direct and relevant connection with the transaction in question; (3) there was no evidence of sham or subterfuge; and (4) there was no evidence that Illinois had a materially greater interest. The trial court also concluded, as a matter of law, that the provision was both a choice of law clause and a separability clause and that the parties intended to be governed by the laws of the State of Tennessee in the

event a party sought enforcement of the contract in this state. Based on this conclusion and its findings of fact, the trial court held that Tennessee law applied to the analysis of the covenant not to compete.

*651 Cross argues on appeal that the trial court erred in applying Tennessee rather than Illinois law. He contends that the provision is solely a separability provision because it provides for modification in the event that any portion is adjudicated invalid or unenforceable. Additionally, Cross notes that the provision does not refer to a particular foreign jurisdiction, but rather refers to the laws of "each jurisdiction in which enforcement is sought." In so doing, he argues, the provision does not promote the goal of certainty, predictability and uniformity because it necessarily mutates according to the jurisdiction in which Vantage seeks to enforce the agreement. Vantage responds that the first sentence of the provision is a choice of law clause and that ignoring it would amount to a finding that it is meaningless, a result that offends the established rule that contracts must be construed, as far as is reasonable, so as to give effect to every term.

We find that the trial court did not abuse its discretion in finding that the contract was executed in good faith, that Tennessee had a reasonable relation to the transaction, and that there was no evidence of improper purpose or that Illinois had a materially greater interest than Tennessee. Moreover, we agree that the provision is both a choice of law clause and a separability clause. To construe the first sentence of paragraph 2(b) of the agreement as anything other than a choice of law clause would be to ignore the clear intent of the parties and thus render the sentence meaningless. That the clause, in tandem with the separability clause, might result in a different outcome depending on the jurisdiction in which it is enforced is not an impediment to our decision. This is so because our exercise of jurisdiction over this matter is proper. Our decision is entitled to full faith and credit even though it affects the rights and obligations of the parties with respect to areas outside of Tennessee. Hence, as between Vantage and Mark Cross, the matter may not be re-litigated in another jurisdiction, and as such, the choice of law provision does not offend the goal of certainty, predictability, and uniformity. We therefore hold that the provision is a valid choice of law provision and that the trial court was correct in applying Tennessee, rather than Illinois, law.

IV. Conclusion

The judgment of the trial court is reversed in part,

affirmed in part, and remanded for further determinations consistent with this opinion. Exercising our discretion, we tax the costs on appeal half to each party.

GODDARD, P.J., concur.

INMAN, J., not participating.

Tenn.Ct.App., 1999.

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Nov. 6, 2003 Session. Jan. 30, 2004. Direct Appeal from the Chancery Court for Rutherford County,
No. 02-5739CV;...
...the Appellant, David Udom, and his surety, for which execution may issue if necessary.
Tenn.Ct.App.,2004. Murfreesboro Medical Clinic, P.A. v. **Udom** Not Reported in S.W.3d
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