STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2479

Donald H. Sealock, O.D., F.A.A.O.,
Respondent,

vs.

Jay B. Petersen, O.D., individually, and
Jay B. Petersen, as sole owner, director and officer
of Lost Lake Optical Company, and of Lost Lake
Opticians, LLC, and of Lost Lake Optometry, PLLC, et al.,
Appellants.

Filed February 5, 2008
Affirmed
Willis, Judge

Hennepin County District Court
File No. 27-CV-05-8171

Kimberly M. Ferrier, Franz F. Davis, Ferrier Law Offices, P.A., 310 Fourth Avenue South, Suite 950, Minneapolis, MN 55415 (for respondent)

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Considered and decided by Willis, Presiding Judge; Wright, Judge; and Muehlberg, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges the district court's judgment awarding damages to respondent for breach of a noncompete agreement and enjoining appellant from advertising his optometry practice in certain newspapers. We affirm.

FACTS

The facts that are relevant to the issues on appeal are not disputed. Appellant Jay B. Petersen, O.D., and respondent Donald H. Sealock, O.D., F.A.A.O., are doctors of optometry. Before 2005, Petersen owned an optometry practice that had offices in Mound, Delano, and Watertown. In January 2005, Petersen and Sealock entered into an asset-purchase agreement by which Sealock agreed to purchase Petersen's practice. Of the $782,606 purchase price, $305,000 was designated as being for the purchase of goodwill.

In connection with the sale of Petersen's practice, the parties also entered into a noncompete agreement and an agreement under which Petersen agreed to work for Sealock as an independent contractor. The independent-contractor agreement was of indefinite duration and terminable at any time by either party upon 30 days' notice. The noncompete agreement provided that Petersen would not "participate, compete or be engaged in the business of optical goods . . . within a five-mile radius of . . . [his] former Mound, Delano, and Watertown" offices for the duration of the independent-contractor agreement and for three years thereafter.

After disputes arose between the parties regarding details of the sale, the relationship between them deteriorated, and they terminated the independent-contractor agreement in early March 2005. Shortly thereafter, Petersen began a new practice at the office of an optometrist in Waconia, which is ten miles from the closest of Petersen's former offices, and thus, outside of the three five-mile radii described in the noncompete agreement (the restricted geographic areas). To promote his new practice in Waconia, Petersen advertised in *The Laker*, a newspaper published in Mound; the *Delano Eagle*, a newspaper published in Delano; and the *Carver County News*, a newspaper published in Watertown. The advertisements consisted of a photograph of Petersen accompanied by the following text: "Not retired . . . just relocated! Dr. Jay Petersen, Optometrist, is now available for comprehensive eyecare in Waconia . . . ." During April and May 2005, 35 customers left Petersen's former practice, now owned by Sealock, and took their business to Petersen's new practice in Waconia.

Sealock filed suit against Petersen, alleging, among other claims, breach of the noncompete agreement. Sealock also moved for a temporary restraining order prohibiting Petersen from advertising in *The Laker*, the *Delano Eagle*, and the *Carver County News*. The district court granted the motion, and subsequently issued a temporary injunction on September 29, 2005, explaining that Sealock was likely to succeed on the merits of his claim because Petersen's advertisements in the three newspapers "specifically targeted" the restricted geographic areas and were an "attempt to compete"

with Sealock. In October 2005, Petersen advertised in the *Lakeshore Weekly News*, a newspaper published in Wayzata that circulates into Mound.

The case proceeded to a bench trial that lasted four days. The district court adopted the reasoning of its September 29, 2005 order granting the temporary injunction and concluded that advertising within the restricted geographic areas "is competing and such advertising violates" the noncompete agreement. The district court ruled, therefore, that Petersen breached the noncompete agreement by advertising in the three newspapers in April and May 2005 and that Sealock was entitled to $19,068 in lost profits as a result of that breach. In addition, the district court modified the temporary injunction to apply also to the *Lakeshore Weekly News*. The district court dismissed Sealock's remaining claims and ordered judgment in favor of Sealock on his claim for breach of the noncompete agreement. Petersen appeals.

D E C I S I O N

The construction and effect of a contract are questions of law unless the contract is ambiguous. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). If a contract is ambiguous, its interpretation is a question of fact. *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). A contract is ambiguous if it is reasonably susceptible of more than one meaning. *Collins Truck Lines v. Metro. Waste Control Comm'n*, 274 N.W.2d 123, 126 (Minn. 1979). Whether a contract is ambiguous is a question of law, which this court reviews de novo. *Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674

N.W.2d 176, 179 (Minn. 2004). In determining whether a contract is ambiguous, "a court must give the contract language its plain and ordinary meaning." *Curent Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

I. The district court did not err by concluding that Petersen's advertisements breached the noncompete agreement.

The district court ruled that under the "plain language meaning" of "compete," Petersen breached the noncompete agreement when he advertised in the three newspapers in April and May 2005. In reaching this conclusion, the court looked to the following definitions of "compete" and "competition":

> **Compete**. To contend emulously; to strive for the position, reward, profit, goal, etc., for which another is striving. To contend is rivalry. *See* Competition.
>
> **Competition**. Contest between two rivals. The effort of two or more parties, acting independently, to secure the business of a third party by the offer of the most favorable terms; also the relations between different buyers or different sellers which result from this effort. It is the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time. The term implies the idea of endeavoring by two or more to obtain the same object of result. *See* compete.

Black's Law Dictionary, 283-84 (6th ed. 1990) (citation omitted). Relying on these definitions, the district court reasoned that advertising is an "attempt to secure profit and business of a third party," and, therefore, "advertising is part of competing." The district court concluded that, in this case, Petersen's advertisements "specifically targeted" the restricted geographic areas described in the noncompete agreement and were an "attempt to compete" with Sealock.

Petersen argues that the district court erred by concluding that the term "compete" in the noncompete agreement applies to his advertisements. He contends that "compete" is ambiguous because it could reasonably be interpreted either as including or not including advertising. Therefore, he claims, in light of the rule that ambiguous terms in a contract are generally construed against the drafter, the court should adopt the interpretation more favorable to him because Sealock's attorney drafted the noncompete agreement. Petersen argues alternatively that, even if "compete" is not ambiguous, its unambiguous meaning does not include advertising because advertising was not mentioned in the noncompete agreement or in the definitions of "compete" and "competition" cited by the district court.

We agree with the district court that the plain and ordinary meaning of "compete" includes Petersen's newspaper advertisements. The district court correctly reasoned that the advertisements were an attempt to secure the business of third parties, which constitutes "competition" or an attempt to "compete" as those terms are commonly defined. In addition, we note that "competition" is defined also as the "[r]ivalry between two or more businesses striving for the same customer or market." The American Heritage Dictionary 376 (4th ed. 2000). Here, Petersen's advertisements were certainly striving for the same customers or market for which Sealock was striving. Petersen's advertisements appeared in newspapers that are published in the cities in which Petersen's former offices were located. The advertisements read "Not retired . . . just relocated!" That language assumes that a reader is familiar with Petersen's former

practice; and the readers most likely to be familiar with his former practice are his former customers and other persons who live within the restricted geographic areas. Petersen's choice of language, together with his decision to specifically target readers in the restricted geographic areas by placing the advertisements in newspapers that originate in those areas shows that his advertisements were designed to take away the business of his former customers from the practice that he sold to Sealock and to compete with Sealock for business in the restricted geographic areas.

In support of his argument that the noncompete agreement does not prohibit his advertisements, Petersen claims that there are no published decisions in Minnesota in which a court has held that a party violated a noncompete agreement when the competing business was not physically located within the restricted geographic area. But in *Haynes v. Monson*, the Minnesota Supreme Court held that a party violated a noncompete agreement even though the competing business was physically located outside of the restricted geographic area. *See* 301 Minn. 327, 330, 224 N.W.2d 482, 483 (1974). In that case, Haynes sold his tax-services business and entered into a noncompete agreement. *Id.* at 329, 224 N.W.2d at 483. But he continued to provide tax services to his former customers located within the restricted geographic area but from a location 50 miles outside of that area. *Id.* The court explained that Haynes was able to continue providing tax services to his former customers by getting the necessary tax information by mail at his new location, by delivery to the residence he maintained in the restricted geographical area, or by delivery to the residence of relatives. *Id.* On those facts, the

Minnesota Supreme Court held that the party asserting the claim for breach of the noncompete agreement was entitled to judgment as a matter of law on that claim, even though there had been no showing that Haynes actively solicited any former customers. *Id.* at 330, 224 N.W.2d at 483-84. The court explained that "when one has conducted a business in the same area for many years and has built a sizeable clientele," the individual's ability to solicit the business of former customers based on his "mere reputation and past business practices is more than sufficient" to show that he has competed in violation of the noncompete agreement. *Id.*, 224 N.W.2d at 484. Here, Petersen's competing business was located outside of the restricted geographic areas, but as in *Haynes*, that fact alone does not mean that his activities did not violate the noncompete agreement.

Petersen argues next that the district court's ruling that his advertisements breached the noncompete agreement gives Sealock "more than the benefit of his bargain." He maintains that the bargain was for a restriction on the location of his future practice, not for a restriction on advertising. But the bargain was not simply for a restriction on location, it was for a restriction on competition. Petersen's argument simply restates the central issue that the parties dispute, namely, what the proper scope of "compete" and "competition" is.

Petersen's advertisements appeared in newspapers that originate in the cities where he formerly had offices. The fact that he placed the advertisements in these newspapers, together with the language of the advertisements, shows that they were

directed to his former customers, as well as others living within the restricted geographic areas. Under these circumstances, the advertisements fall within the plain and ordinary meaning of "compete" and, thus, violate the noncompete agreement.

II. The noncompete agreement is enforceable.

Petersen argues that the district court's ruling that the noncompete agreement prohibits his advertisements is contrary to the general rule that noncompete agreements are strictly construed and that the district court's ruling results in a noncompete agreement that is unreasonable. Noncompete agreements are generally "looked upon with disfavor, cautiously considered, and carefully scrutinized." *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998) (quotation omitted). But a noncompete agreement entered into in connection with a sale of a business is enforceable if the restrictions in the noncompete agreement do not (1) exceed the protection necessary to secure the goodwill purchased; (2) place an undue hardship on the covenantor; and (3) have a deleterious effect on the interests of the general public. *Bess v. Bothman*, 257 N.W.2d 791, 795 (Minn. 1977).

Petersen argues that the noncompete agreement fails to meet the first requirement because it exceeds the protection necessary to secure the goodwill that Sealock purchased. He claims that the only restriction needed to protect the goodwill is a restriction against Petersen establishing a practice physically located within the restricted geographic areas. But protecting the goodwill that Sealock bargained for requires more. When purchased in connection with the sale of a business, goodwill includes the favor

won from the public and the "probability that . . . customers will continue their patronage." Black's Law Dictionary, 694 (6th ed. 1990). Petersen's advertisements, which were directed at former customers and persons located within the restricted geographic areas, jeopardized this interest. Prohibiting the advertisements, therefore, is necessary to secure the goodwill that Sealock bargained for when he purchased Petersen's practice.

Petersen argues next that the noncompete agreement imposes an undue hardship on him. He contends that the effect of ruling that the noncompete prohibits his advertisements necessarily means that all advertising is prohibited, and thus, he would be in violation of the noncompete agreement if he advertised in the Yellow Pages or on the Internet. Responding to this same concern, the district court commented:

> The Court is concerned that a broad ban on any and all advertising in the five mile area would be a restraint of trade. However, [Sealock] is not requesting a broad advertising ban only a limited ban of advertising in three newspapers. The Court finds this is appropriate. [Petersen] should keep in mind that any advertising that originates in or has its primary focus the five mile area around the three offices listed in the Non-Compete may be a violation of . . . the Non-Compete and the Court may later prohibit, on [Sealock's] motion, other advertising. However, the Court will not restrain publications with large circulation areas that happen to enter the five mile area (e.g. Minneapolis Star and Tribune).

We agree with the district court's reasoning. Advertising in the Yellow Pages and the Internet, which have large circulation areas that only incidentally enter the restricted geographic areas, therefore, would not be prohibited by the noncompete agreement. Rather, the prohibition is limited to advertisements "specifically targeted" at persons in

the restricted geographic areas. Prohibiting the advertisements at issue here does not place an undue hardship on Petersen.

Next, Petersen argues that the court "should tread lightly when interpreting" a noncompete agreement involving an optometrist because such a noncompete agreement limits the availability of health care, and thus, is against the interests of the general public. But in *Granger v. Craven*, the Minnesota Supreme Court rejected a similar public-policy argument made by a surgeon who agreed not to practice medicine within 20 miles of Rochester for three years under a noncompete agreement. 159 Minn. 296, 298-99, 199 N.W. 10, 11 (1924). The court upheld the agreement and explained:

> . . . We decline to adopt a rule so abridging the right of contract, which is no small part of the liberty of the citizen. We do not so far forget that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or public welfare.

Id. at 299, 199 N.W. at 11.

Petersen points to decisions from other jurisdictions that have invalidated noncompete agreements because they burdened the availability of health care. *See Damsey v. Mankowitz*, 339 So.2d 282, 283 (Fla. Dist. Ct. App. 1976) (refusing to enforce a noncompete agreement because there was a "compelling need" for surgeons); *Ellis v. McDaniel*, 596 P.2d 222, 224-25 (Nev. 1979) (refusing to enforce a noncompete agreement because doing so would prevent the only orthopedic surgeon in town from practicing and would require residents to travel great distances to receive services); *New*

Castle Orthopedic Assocs. v. Burns, 392 A.2d 1383, 1388 (Pa. 1978) (refusing to enforce a noncompete agreement because there was a shortage of orthopedic specialists in the area). Unlike these cases, nothing in the record here shows that the noncompete agreement would hinder the ability of individuals located within the restricted geographic areas to obtain the services of optometrists. Enforcing this noncompete agreement is not, therefore, contrary to the general public's interest.

Finally, Petersen argues that reading the noncompete agreement to prohibit his advertisements is contrary to public policy. He contends that such a conclusion has the effect of expanding "hundreds, if not thousands" of noncompete agreements and is contrary to the policy that noncompete agreements are generally disfavored as being restraints on trade and are strictly construed. Petersen's argument is not persuasive. Although the general rule is that noncompete agreements are strictly construed, the supreme court has noted that many of the reasons for that rule are not present when such an agreement is entered into in connection with the sale of a business. *See B & Y Metal Painting v. Ball*, 279 N.W.2d 813, 815 (Minn. 1979) (noting that "[m]any of the grounds for imposing a stricter test of reasonableness in the context of an employment relationship, however, are not present" when the noncompete agreement arises out of the sale of a business). Consequently, our conclusion that Petersen's advertisements are prohibited by the noncompete agreement does not mean that all types of advertising are prohibited by all types of noncompete agreements, especially those that are not connected with the sale of a business.

Because we conclude that Petersen's advertisements fall within the plain and ordinary meaning of "compete," the district court did not err by determining that Petersen breached the noncompete agreement. And because the noncompete agreement is not contrary to public policy and does not impose restrictions that (1) exceed the protection necessary to secure the goodwill purchased, (2) place an undue hardship on Petersen, or (3) have a harmful effect on the interests of the general public, we conclude that it is enforceable under the circumstances here.

Affirmed.