STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0898

Sysdyne Corporation,
Appellant,

vs.

Brian Rousslang, et al.,
Respondents.

Filed March 10, 2014
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-10-27691

Jessica Lipsky Roe, Bassford Remele, Minneapolis, Minnesota (for appellant)

Pamela Joy Abbate, Joseph M. Sokolowski, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

PETERSON, Judge

In this action for breach of a noncompete agreement and tortious interference with contractual relations, appellant argues that the district court abused its discretion by modifying the terms of the noncompete agreement, refusing to permit appellant to call

respondents' trial counsel as a witness, and denying appellant's request for attorney fees under the contract. We affirm.

FACTS

Appellant Sysdyne Corporation recruits and places technical employees in jobs with engineering and information-technology (IT) companies. Respondent Brian Rousslang began working for Sysdyne in May 2006, first as a "technical recruiter" and then as an "account manager." A "technical recruiter" finds job-seeking candidates; an "account manager" finds employee-seeking companies. For both positions, Rousslang signed an employment contract in which he agreed that he would not "in any manner contact, solicit or cause to be solicited, customers or former or prospective customers" of Sysdyne located in the seven-county metro area. The contract stated that "[i]t is understood by both parties hereto that this protective covenant is meant for the reasonable protection of the business of [Sysdyne] and not to impair the ability of [Rousslang] to earn a living." The contract also provided that if a court construed any portion of the agreement "as less than reasonable, the parties agree to the establishment by such court of obligations for the protection of the Company's business which it deems reasonable." Although Rousslang admitted that he signed the employment agreement, he said that he did not read the noncompete clause.

Rousslang had worked as an employment recruiter since 1999. While working for previous employers, Rousslang met Gregg Phelps, who was a manager responsible for staffing decisions at two companies, Control Assemblies and Railway Equipment Company. Phelps and Rousslang developed a good working relationship that "really

took off" in May 2004 because Phelps appreciated that Rousslang learned about a company's culture to identify suitable candidates for the company. When Rousslang began working for Sysdyne, Phelps did not initially need job candidates, but Rousslang began placing candidates at Phelps's companies in March 2007. In 2008, Railway Equipment Company spun off a segment of its business to form a new company called RRAMAC. Phelps was responsible for staffing needs for this company, and, because of his relationship with Phelps, Rousslang placed candidates at RRAMAC. While working at Sysdyne, Rousslang also placed candidates at companies that were not affiliated with Phelps, including Symmetry Solutions, Clientek, and CHF Solutions. Rousslang was very successful during his time at Sysdyne; in 2008, his placements generated more than $2.4 million in revenue for Sysdyne, and in 2009, his placements generated more than $2.3 million in revenue.

Rousslang became unhappy with his job at Sysdyne. In February 2010, he told a co-worker that he was considering leaving. Rousslang talked with Robert Bernu, a longtime friend and co-owner of respondent Xigent Solutions, LLC, and expressed his dissatisfaction with Sysdyne. Bernu said that there might be a position available at Xigent. Xigent's staffing business also specialized in IT and other technical fields.

Rousslang met with Bernu and with Hugh Voigt, Xigent's other co-owner. Rousslang gave the two a copy of his employment agreement with Sysdyne. Bernu sent a copy of the agreement to his attorney, Joseph Sokolowski. Sokolowski told Bernu that the agreement was overly broad and therefore unenforceable. In discovery, Sokolowski

provided time records that showed 24 minutes billed for reviewing the agreement and 18 minutes billed for discussing the agreement with Bernu.

Xigent offered Rousslang a position leading its employment-recruitment division. Xigent agreed to cover any legal fees that Rousslang incurred because of the noncompete agreement with Sysdyne. During his first year with Xigent, Rousslang placed candidates at Control Assemblies, Railway Equipment Company, RRAMAC, Symmetry Solutions, Clientek, and CHF, which were all companies where he had placed candidates while working at Sysdyne. He also placed candidates at four other companies associated with Phelps, Delta Fabrication, CACO, Lakeland Managed Services, and Lakeland Technical Services[1]. These four companies had not done business with Sysdyne.

Sysdyne sued Rousslang for breach of contract and Xigent for tortious interference with contractual relations and tortious interference with a prospective business relationship.[2] The district court granted partial summary judgment in favor of respondents as to clients with which Rousslang had a relationship before he began working for Sysdyne, including the Lakeland Companies. The court denied respondents' summary-judgment motion as to other companies and held that the noncompete clause was enforceable except as to the preexisting clients. The district court denied the summary-judgment motion on the interference-with-contractual-relations claim and set that issue for trial.

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[1] The seven companies associated with Phelps are described collectively as "the Lakeland Companies."

[2] Shortly before trial, Sysdyne dismissed its claims against Rousslang for breach of fiduciary duty, breach of duty of loyalty, and misappropriation of trade secrets.

According to the district court, the bench trial focused on "(1) the scope of the noncompete agreement (i.e., whether it applies to customers that had a preexisting relationship with [Rousslang]; (2) the amount of damages, if any, caused by the breach of the noncompete agreement; and (3) whether [Xigent] tortiously interfered with the noncompete agreement." The district court found that Rousslang breached the noncompete agreement as to Symmetry Solutions, Clientek, and CHF and awarded damages. The district court modified the damages award on Sysdyne's motion for amended findings. The district court found that Rousslang did not violate the noncompete agreement as to the Lakeland Companies. The district court found that Xigent was justified in interfering with the noncompete agreement because, based on its attorney's advice, it "honestly believed the [noncompete agreement] was unenforceable." The district court also found that Xigent had not tortiously interfered with a prospective business relationship, because it was "an instance of competition in the marketplace."[3]

During trial, the district court did not permit Sysdyne to call Sokolowski, who was Xigent's trial attorney, as a witness. The district court also refused to grant Sysdyne's motion for attorney fees because the employment agreement did not provide a contractual right to recover fees incurred in an action for breach of contract.

D E C I S I O N

I.

Sysdyne argues that the district court erred by "blue-penciling" the employment agreement to exclude Rousslang's preexisting customers from the noncompete clause.

[3] Sysdyne does not challenge this ruling on appeal.

Generally, employment noncompete clauses are "looked upon with disfavor, cautiously considered, and carefully scrutinized." *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965); *see also Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998). Despite this, courts will enforce a noncompete agreement if it serves a legitimate employer interest and is not overbroad. *Kallok*, 573 N.W.2d at 361. A court must balance "the employer's interest in protection from unfair competition against the employee's right to earn a livelihood." *Id.* The district court noted that employers may legitimately protect themselves from an employee who deflects customers "by means of the opportunity which the employment has given him." (quoting *Bennett*, 270 Minn. at 533, 134 N.W.2d at 898). The district court found that Sysdyne had no legitimate business interest in Rousslang's preexisting customers, the Lakeland Companies, because they were customers of Sysdyne only because of their preexisting relationship with Rousslang. In other words, Sysdyne was not guarding against appropriation of its legitimate business interests, it was attempting to appropriate Rousslang's relationship with the Lakeland Companies.

Minnesota law allows a court to "blue-pencil" or modify "an unreasonable noncompetition agreement and enforce it only to the extent that it is reasonable." *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 n.1 (Minn. 1980). The district court blue-penciled the noncompete clause to balance Sysdyne's legitimate interests against Rousslang's right to earn a living. The district court's action is supported by the employment agreement itself, which states that the noncompete clause "is meant for the

reasonable protection of the business . . . and not to impair the ability of [Rousslang] to earn a living" and permits a court to modify the agreement to make it reasonable.

We review the district court's modifications of a noncompete clause for an abuse of discretion. *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88 (Minn. App. 1985). A court abuses its discretion when its determinations are "based on an erroneous view of the law" or "against the facts in the record." *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011). We cannot set aside the district court's findings and substitute our own factual findings except for clear error. *Klick*, 372 N.W.2d at 87-88. If there is reasonable evidence in the record to support a district court's findings, we will not disturb them. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

The district court found that "[i]t was because of [Rousslang's] preexisting relationship with Phelps that Rousslang, during his employment at Sysdyne, was able to place candidates at Control Assemblies, Railway, and RRAMAC." The district court's findings are supported in the record.[4] Phelps testified that he and the companies he represented followed Rousslang from company to company because Phelps wanted to work with Rousslang and that Phelps had no plan to continue working with Sysdyne after Rousslang left. Phelps testified that Rousslang had a success rate of nearly 80 percent in

[4] Citing authority from other jurisdictions, Sysdyne argues that the district court was required to define preexisting customers as only those customers who came to Sysdyne as a result of Rousslang's independent recruitment efforts that Sysdyne did not support financially or otherwise. Sysdyne contends that it supported the development of Rousslang's relationships with the customers that the district court found were preexisting customers. But we understand the district court's finding to mean that the placements were possible because of relationships that Rousslang had developed with these three companies before he began working at Sysdyne, and Sysdyne does not cite evidence that shows that this finding is clearly erroneous.

referring job candidates to the Lakeland Companies, far higher than the industry standard of about 30 percent, and that he intended to continue working with Rousslang. Phelps also testified that he had not established a working relationship with any other Sysdyne employee.

The district court accepted Phelps' testimony as credible, and Sysdyne did not challenge the fact findings regarding Rousslang's relationship with Phelps. The district court's findings are supported by record evidence. The district court's determination that the noncompete agreement was not reasonable is in accordance with Minnesota law, which permits the court to blue-pencil an otherwise overbroad noncompete agreement. The noncompete agreement was overbroad because, as the district court explained,

> it was Rousslang's preexisting relationship with [his preexisting] customers that gave Sysdyne an opportunity to develop a relationship with them. In other words, as regards preexisting customers, Sysdyne is not seeking to prevent Rousslang from appropriating Sysdyne's relationships as his own; rather, Sysdyne is seeking to appropriate Rousslang's relationships as its own. Guarding against appropriation is a legitimate business interest, appropriation is not.

The district court did not abuse its discretion by modifying the noncompete agreement to balance Sysdyne's legitimate business interests against Rousslang's ability to earn a living.

II.

Sysdyne argues that the district court erred by concluding that Xigent was justified in interfering with its contractual relationship with Rousslang. As part of this argument,

Sysdyne contends that the district court abused its discretion by refusing to permit Sysdyne to call Sokolowski, who was Xigent's trial counsel, as a witness.

"[I]f a noncompete agreement is deemed valid and if the elements of tortious interference are established, interference with the noncompete agreement by a third party is a tort for which damages are recoverable." *Kallok*, 573 N.W.2d at 362. A cause of action for tortious interference with a contractual relationship has five elements: (1) there must be a contract; (2) the tortfeasor must know of the existence of the contract; (3) the tortfeasor must intentionally cause a breach of the contract; (4) the breach must be unjustified; and (5) there must be damages. *Id.* The district court concluded that Sysdyne proved the first three elements, but failed to prove the fourth, a lack of justification for the interference. A party who shows a good-faith legally protected interest that might be impaired or destroyed by performance of a contract does not wrongfully interfere with the contract. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994). Also, a party who relies on the advice of outside counsel may be justified in interfering with a contractual relationship. *Kallok*, 573 N.W.2d at 362.

In *Kallok*, the new employer, Angeion, consulted with outside counsel about the prospective employee's noncompete agreements. *Id.* Angeion did not fully inform outside counsel about the employee's position at the previous employer, Medtronic, or about "the intricacies of his noncompete agreements." *Id.* The employee was subject to more than one noncompete agreement and was in a managerial and senior staff position that provided him with access to confidential information. *Id.* at 358-59. During his employment, the employee's "research and development efforts led to the issuance of 15

patents on which he was named as either sole inventor or a co-inventor." *Id.* at 359. When Angeion first contacted outside counsel about the employee's noncompete agreements, outside counsel declined to give an opinion because he had a potential conflict that involved Medtronic. *Id.* at 360. Angeion told outside counsel that the employee had not worked in tachyrhythmia (the area that he would be working in at Angeion) and had no access to confidential materials, but both of these statements were incorrect. *Id.* Although Angeion argued that outside counsel told it that hiring the employee would not violate the noncompete agreement, outside counsel stated that he only "confirmed the obvious" by stating that if the employee is not in violation of the agreement, he is not in violation. *Id.* The supreme court rejected Angeion's claim of justification because it concluded that, if Angeion had been candid with outside counsel, counsel would have advised Angeion that the employee would be in violation of the noncompete agreements. *Id.* at 362.

Xigent's counsel was given a copy of Rousslang's employment agreement with Sysdyne and his offer letter from Xigent, which included a description of the position that Rousslang was offered. Xigent produced the email exchange that it had with its outside counsel and produced its attorney's billing records, which showed time spent reviewing the employment agreement and the offer letter. Bernu viewed Sokolowski as an expert in the area of noncompete clauses, and, for 12 years, he routinely had Sokolowski review noncompete clauses when Bernu's companies hired a new employee. Bernu testified that he relied on Sokolowski's advice and that he paid Sokolowski "a lot of money so that [Bernu] can get really short, clear answers from him." Bernu stated that Sokolowski told

him that he "reviewed the noncompete, he determined that he did not see it as enforceable, that it was overly broad." Bernu testified that he told Sokolowski what kind of work Rousslang did, although he did not describe Sysdyne's business. This evidence supports the district court's findings that Xigent made a reasonable inquiry before hiring Rousslang, which provided justification for interfering in the contract. The district court did not err by concluding that Xigent proved that its interference in the contract was justified.

Sysdyne also argues that the district court abused its discretion by refusing to permit it to call Sokolowski as a witness. Sysdyne contends that it needed Sokolowski's testimony to "explore the nature and extent of the legal advice that Xigent relied upon." The district court's decision on whether a witness may testify is reviewed for an abuse of discretion. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484, 495 (Minn. App. 2005), *aff'd as modified*, 711 N.W.2d 811 (Minn. 2008); *see also Rush v. Jostock*, 710 N.W.2d 570, 574-75 (Minn. App. 2006) (stating that district court has discretion to decide whether to admit evidence), *review denied* (Minn. 2006). An appellate court reviews the record in the light most favorable to the district court's decision. *In re Conservatorship of Smith*, 655 N.W.2d 814, 820 (Minn. App. 2003).

After Sokolowski's firm objected to Sysdyne's request to depose Sokolowski, Sysdyne's attorney withdrew the request, stating "we will presume that [Sokolowski's firm] does not have any facts or additional documents relevant to the advice of counsel defense and will cancel the deposition scheduled for October 13, 2011." Within two weeks before trial, Sysdyne's attorney filed a witness list that included Sokolowski as a

witness. The district court determined that Sysdyne had waived its right to call Sokolowski because it withdrew the subpoena for his deposition and, if Sysdyne had needed his testimony, it would have been proper to determine this earlier in the trial-preparation period and not on the eve of trial.

Whether an attorney may testify in a case in which the attorney is acting as trial counsel is within the discretion of the trial court. *United States v. Watson*, 952 F.2d 982, 986 (8th Cir. 1991). Requests that a trial attorney testify are disfavored, and the party seeking such testimony must demonstrate that the evidence is vital to the party's case and that the inability to present the same or similar facts from another source creates a compelling need for the testimony. *Id.*

Xigent provided billing records showing that the issue of Rousslang's noncompete agreement had been raised with Sokolowski and that Sokolowski had called Bernu with advice. Bernu testified that Sokolowski told him that the noncompete was overbroad and probably unenforceable. Sokolowski's reasoning for why he concluded this is not relevant to the issue here. The issue is whether Xigent acted without justification. Xigent consulted with its long-time attorney, who is experienced in this area of law. Bernu testified as to what advice he received. These facts provide a basis for the district court's decision to exclude Sokolowski's testimony. Because Sysdyne did not demonstrate that there was a compelling need for the testimony, the district court did not abuse its discretion

III.

Sysdyne argues that the district court erred by refusing to award it reasonable attorney fees. Sysdyne contends that its request for attorney fees is based on a provision in the employment agreement and, therefore, this court's review is de novo. Rousslang asserts that the district court's decision whether to award attorney fees is reviewed for an abuse of discretion.

Generally, under the American rule, a party is not entitled to attorney fees, unless there is a statutory or contractual basis for the award. *Kallok*, 573 N.W.2d at 363. We review the district court's conclusion as to whether a statute or contract permits an award of fees de novo. *See Fownes v. Hubbard Broadcasting, Inc.*, 310 Minn. 540, 543-44, 246 N.W.2d 700, 702-03 (1976) (construing de novo statutory basis for attorney fees). But we review the district court's decision whether to award fees and in what amount for an abuse of discretion. *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005).

Sysdyne's request for attorney fees is based on the following clause in the employment contract:

> Remedies. Employee acknowledges and agrees that the confidential information, trade secrets and special knowledge to be acquired by he or she during his or her employment with the Company is valuable and unique and that breach by Employee of the provisions of this Agreement may cause the Company irreparable injury and damage which cannot be reasonably or adequately compensated by damages. Employee, therefore, expressly agrees that the Company shall be entitled to injunctive or other equitable relief in order to prevent a breach of this Agreement or any part thereof, in

> addition to damages, costs and reasonable attorney's fees, and such other remedies legally available to the Company.

The district court concluded that this clause is ambiguous and construed it in favor of Rousslang.

Contract language is ambiguous if it is susceptible to more than one reasonable interpretation. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). The attorney-fee clause is ambiguous because it could be interpreted to mean that Sysdyne is entitled only to attorney fees incurred in obtaining injunctive or equitable relief or that Sysdyne is entitled to attorney fees incurred in any action based on the employment agreement. The reference to attorney fees appears in a sentence that begins by stating that Sysdyne is entitled to injunctive or other equitable relief, which suggests that the reference to attorney fees means attorney fees incurred to obtain injunctive or equitable relief. But the sentence also refers to damages and other remedies legally available to Sysdyne, which could mean that the sentence is intended to list all of the remedies that are available to Sysdyne. Because the contract language is susceptible to more than one reasonable interpretation, it is ambiguous.

If a contract is ambiguous, the ambiguity is construed against the drafter. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). Because Sysdyne drafted the contract, and the attorney-fee provision does not clearly state that Sysdyne may recover attorney fees in an action that does not seek injunctive or other

equitable relief, we agree with the district court that there is no contractual right for Sysdyne to recover attorney fees incurred in this action for breach of contract.

Affirmed.