COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000651-D

CHARLES T. CREECH, INCORPORATED — MOVANT

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2011-CA-000629-MR
and
FAYETTE CIRCUIT COURT
ACTION NO. 09-CI-00779

DONALD E. BROWN and
STANDLEE HAY COMPANY, INCORPORATED — RESPONDENTS

BRIEF OF MOVANT CHARLES T. CREECH, INCORPORATED

CERTIFICATE OF SERVICE

The Undersigned does hereby certify that copies of this Brief were served upon the following named individuals by U.S. mail on this the 15th day of June, 2013: Judge Hon. Kimberly N. Bunnell, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507, Wilma Fields Lynch, Clerk, Fayette Circuit Court,103 Robert F. Stephens Courthouse, 120 North Limestone, Lexington, Kentucky 40507, Hon. Jon A. Woodall, Hon. Ryan C. Daugherty, McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 East Main Street, Suite 1000, Lexington, Kentucky 40507, Hon. David R. Irvin, Hon. James M. Mooney, Moynahan, Irvin, & Mooney, P.S.C.,110 N. Main Street, Nicholasville, Kentucky 40356, Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. The undersigned does also certify pursuant to CR 76.12(6) that the record on appeal was not withdrawn by the undersigned (or the party filing this brief) from the Fayette Circuit Clerk's office on or before this date.

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INTRODUCTION

First, the Court of Appeals' published Opinion of August 17, 2012 (Appx. 1)[1] in this case dramatically complicates – if not reverses - Kentucky's long-standing standard for the enforcement of covenants not to compete (a standard met by the Agreement at issue in this case). Second, "Footnote 1" of the Court of Appeals' Opinion applies CR 76.12(4)(c)(iv) with illogical rigidity, holding that the errors identified and preserved in the Appellant's brief (i.e., the Circuit Court's decision to enter summary judgment based upon a CR 65.07 Court of Appeals Order and without providing any reasonable opportunity to conduct discovery) require reversal insofar as this case concerns the Agreement's non-competition language, *but not insofar as the case concerns the Agreement's non-disclosure language*, even though all of the claims asserted in the Complaint rest upon breach of the Agreement in its entirety.

STATEMENT CONCERNING ORAL ARGUMENT

Because the Court of Appeals' Opinion alters Kentucky law concerning the enforceability of non-competition agreements (which are critically important to Kentucky's industries and economy), and has rendered an otherwise enforced and enforceable agreement a nullity, and because the Court of Appeals has disregarded long-standing law requiring substantial compliance with the appellate procedural rules, Creech respectfully requests that the Court grant an oral argument.

[1] Creech's Petition for Rehearing was denied by Order entered September 26, 2012. (See Appx. 2)

STATEMENT OF POINTS AND AUTHORITIES

5. July 2006 Agreement between Donnie Brown and Charles T. Creech, Incorporated.
6. November 13, 2008, letter from Timothy C. Feld, Esq., Golden & Walters, PLLC on behalf of Charles T. Creech, Incorporated to Donald E. Brown.
7. November 17, 2009, letter from Jeff Stocker, attorney, on behalf of Standlee Hay to Timothy C. Feld, Esq.
8. Order, Fayette Circuit Court, April 23, 2009.
9. Temporary Injunction, Fayette Circuit Court, May 5, 2009.
10. Corrected Order Granting CR 65.07 Relief, Kentucky Court of Appeals, July 10, 2009.
11. Collective group, Orders dismissing and/or granting summary judgment to Defendants, Fayette Circuit Court, entered March 4, 2011, March 10, 2011, March 28, 2011 and April 11, 2011.
12. Motion For Recusal of Judge VanMeter & For Oral Arguments, December 2, 2011 and Order denying entered February 7, 2012.
13. Appellant's (Charles T. Creech Incorporated) Brief, Kentucky Court of Appeals, July 1, 2011, without attachments.
14. *Kegel v. Tillotson*, 297 S.W. 3d 908 (Ky. Oct. 30, 2009).
15. *Hudson v. Hudson*, 2011 WL 3805980 (Ky. Aug. 25, 2011) (unpublished).
16. Kentucky Secretary of State's Organization Search on Standlee Hay Company, Inc., which shows it is a foreign (Idaho) corporation that did not register to do business in Kentucky until April 26, 2012, and that Donald. E. Brown is its registered agent in Kentucky.

STATEMENT OF THE CASE

Creech is in the business of selling hay and straw to farms, particularly those in the horse industry, in Kentucky and all over the world. Brown worked for Creech for approximately eighteen (18) years. (Record on Appeal ("R.A." at 230-233 (Brown Aff.)). In that capacity, Brown obtained confidential information regarding Creech's customers, including names, contacts at various farms, office and cell phone numbers, suppliers, supplier prices, customer prices, and, perhaps most importantly, unique customer supply needs and desires. As part of his job duties, he had personal contacts and rapport with Creech's customers. (R.A. at 14-16 (Creech Aff.), Appx. 3).

In the lower Courts, certain critical facts surrounding this dispute have been repeatedly misrepresented by Standlee and Brown. This case does not, as Standlee and Brown have urged, concern an unskilled, untrained employee who was pressured into signing a non-compete agreement and was then demoted and forever barred from the hay industry. Although the record is limited due to the Circuit Court's dismissal of this action before any meaningful discovery could be conducted, the evidence gathered thus far reflects that Creech's long-time, trusted and well-trained employee was hired by Creech's competitor (arriving into the Kentucky market) for the sole purpose of obtaining Creech's proprietary information and customer base, all in violation of a non-competition/nondisclosure agreement that was supported by consideration and that was properly limited to Kentucky by the Circuit Court[1].

In July 2006, Brown executed a "Conflicts of Interest Agreement" ("the Agreement") with Creech (R.A. at 8; Appx. 5). The Agreement contained both non-

[1] To assist the Court and for its convenience in appreciating the testimony in the record from the hearings, we have included the audio/video of the various 2009 trial court hearings on a CD attached at Appx. 4.

competition and non-disclosure obligations. Those obligations were interconnected and overlapping:

> The company requires that all employees strive to avoid any situation, which does or may involve a conflict between their personal interest and the interests of the company . . .
>
> **The following listing will serve as a guide to the types of activity which might cause conflicts of interest:**
>
> - **Providing information, including but not limited to names, locations, types of purchases, contact names, or contact information about any of the company's customers, employees or suppliers with or without compensation without management's consent, or sharing any such information with anyone outside the company, especially with competitors or potential customers.**
> - Directive, managerial or consultative services performed with or without compensation to any customer, supplier, or other outside concern which does business with or is a competitor of the company.
> - **Competition with the company by an employee, directly or indirectly in the purchase or sale of products or services or property rights or interests either during employment or after leaving the company.**

(R.A. at 8, Appx. 5 (emphasis added)). The Agreement further provides:

> All proprietary information will be held in strict confidence. As an employee of Creech, Inc., you will have access to sensitive company, customer and supplier information. Such information has been obtained through the over 25 years that the company has been in business and is, therefore, the property of Creech, Inc. If at any time, either during employment or after leaving the company, you share such information with competitors of other third parties, Creech, Inc. reserves the right to pursue all legal avenues to recoup damages as well as legal fees accrued in such legal action from the employee or former employee.
>
> The industries that Creech, Inc. operates within are highly competitive. **We require that all employees agree and understand that after leaving the company they are not permitted to work for any other company that directly or indirectly competes with the company for 3 years after leaving Creech, Inc., without the companies [sic] consent.**

(*Id.* (emphasis added)). Brown signed the Agreement in consideration of his continued employment with Creech. (*Id.*, see also R.A. 14, Appx. 3 (Creech February 12, 2009, Affidavit), ¶ 8)).

Creech sought and obtained a temporary injunction enforcing the Agreement within the geographical area of Kentucky. Thus, the Circuit Court found that Creech had a substantial claim on the merits as to the enforceability of the Agreement under Kentucky law.

Throughout this litigation, Brown and Standlee have argued that Creech failed to produce evidence that Brown obtained specialized training and confidential information from Creech. Again setting aside the reality that summary judgment was entered before discovery could be completed, this representation is simply incorrect. By executing the Agreement, Brown expressly acknowledged his access to "sensitive company, customer and supplier information" within a highly competitive field. (R.A. at 9 (Appx. 5)). Brown rose through the ranks at Creech, holding positions as driver, dispatcher, and salesperson. (R.A. 14, Appx. 3 (Creech February 12, 2009, Affidavit, ¶ 4).[2] He obtained confidential information about customer needs. (*Id.*, ¶ 5). Creech invested its resources in Brown, and entrusted him with highly proprietary information. (See also, Creech April 22, 2009, Affidavit, Appx. 3).

Similarly, Brown and Standlee have repeatedly misstated that Brown was demoted after he signed the Agreement. This is a fabrication. Brown's salary did not

[2] Because this action was dismissed before any substantive discovery could be conducted, the Record on Appeal is necessarily limited. On remand, Creech will show that Brown began work at Creech as a truck driver, was trained in operating industrial-sized balers, and then was promoted into a sales position. Contrary to the picture painted by Brown and Standlee on the limited record, Brown did not bring expertise or skill into his employment with Creech. Instead, Creech invested substantially in Brown.

change after he signed the Agreement, and Brown has offered no evidence to the contrary.

There should also be no misunderstanding as to the manner in which Brown's employment with Creech ended. This is not a case in which an employer insisted that an employee sign a harsh non-compete agreement and then abruptly terminated him. In this case, and two years after signing the Agreement, Brown voluntarily chose to quit his job with Creech to take a "sales position" with Standlee. (R.A. at 232 (Brown Affidavit, ¶ 18). Standlee[3] and Creech are competitors. (R.A. at 15, Appx. 3 (Creech February 12, 2009, Affidavit, ¶ 12)).

Brown affirmatively misled Creech as to the nature of his employment with Standlee: prior to leaving, Brown represented to Creech's president, Charles T. Creech ("Mr. Creech") that he did not intend to call on private farms and/or existing customers of Creech. (R.A. at 10-11). He told Mr. Creech that, instead, he would be calling only on "Big Box" stores (such as Walmart, Home Depot, or Tractor Supply Company) on behalf of Standlee.

Based solely and contingent upon that representation, Creech (by counsel) sent the following letter to Brown:

> **Based on the statements you made to Charles T. Creech, Inc.**, we understand that the work you will be doing for Standlee Hay Company will not be related to those pursuits of Standlee Hay Company which are in competition with the interests of Charles T. Creech, Inc.

[3] Standlee is based on the West Coast. During a hearing before the Circuit Court, Standlee's counsel stated that its operations in Kentucky had been "going now for five months" (R.A. Certified copy of video hearings, 4/30/09, 22/9/09 CD 57 1:56:18-3:32:31 at 2:41:09). Interestingly, according to the Kentucky Secretary of State's filings, Standlee Hay Company, Inc. did not register to do business in Kentucky until April 26, 2012. See Appx 16. As noted below, Standlee's decision to hire Brown was part of its "substantial investment" in moving into the Kentucky hay market. Hiring Brown was clearly a critical part of Standlee's plan to take control of Creech's share of the Kentucky market.

(R.A. at 10-11 (Appx. 6) (emphasis added)). The letter further stated: **"[b]ased on the representations made by you,"** Creech was willing to permit Brown's employment with Standlee. (*Id.* (emphasis added)). Standlee's and Brown's repeated attempt to transform this letter into some type of waiver on the part of Creech is completely irreconcilable with its language.

Through its attorney, Standlee responded (but not Brown) by letter dated November 17, 2008, which expressed Standlee's "intent [ ] for Mr. Brown to act as a salesman" and stated that "[t]here is no doubt that in the course of this Mr. Brown may well contact people who have previously been customers of [Creech]." (R.A. at 12-13, Appx. 7). The letter further represented as a "fact" that "Mr. Brown will, without question, at some time or other be contacting your client's customers . . . ." (*Id.*). Brown never specifically responded to the letter from Creech's counsel.

Confronted with the letter from Standlee's counsel, which directly contradicted Brown's assurances to Mr. Creech, Creech filed a Complaint for injunctive relief and damages against Brown and Standlee for breach of the Agreement, intentional interference with Creech's contractual rights, Standlee's aiding and abetting of Brown's breach of contract, intentional interference with current and prospective business contracts, and fraud in the inducement. Neither the Complaint nor any other pleading identified breach of the Agreement's nondisclosure obligation as a "count" or "claim" separate or distinguishable from the other obligations contained within the Agreement (such as the non-competition obligation). Instead, Counts II through IV of the Complaint were based upon Brown's breach of the Agreement in its entirety, and those Counts were based upon both the nondisclosure and the non-competition obligations.

With its Complaint, Creech also filed a Motion for Temporary Injunction, which asked that Brown be enjoined according to the terms of the Agreement as written. (R.A. 20-29; see also R.A. 153, Addendum). Finding the geographic scope of the Agreement to be overly broad, the Court denied Creech's initial Motion. (R.A. copy of video hearings, 3/18/2009, 22-0-09 CD #37 10:01:54 (Appx. 4)).

Creech then sought and obtained permission to file an Amended Complaint, as well as a second Motion for Temporary Injunction based upon the Amended Complaint. (R.A. 88, Motion for Leave to File Amended Complaint; R.A. 169, Order granting leave (Appx. 8); R.A. 235-243, Amended Complaint; R.A. 127-146, Motion for Temporary Injunction). The Amended Complaint asserted the same Counts against Standlee and Brown (and, again, made no distinction between breaches of the non-competition language and the nondisclosure language of the Agreement), but, like the renewed Motion for Temporary Injunction, asked the Court to exercise its equitable power to modify the non-compete language to enjoin Brown from contacting Creech's current customers and to enforce the nondisclosure clauses in the Agreement.

At the hearing on Creech's second Motion for Temporary Injunction, both parties provided evidence and testimony about the scope of Creech's business interests within Kentucky, Standlee's new business interests in Kentucky, and the role that Standlee expected Brown to play within Kentucky.[4] Standlee's counsel informed the Court that

[4] Some of that evidence concerned the proprietary nature of the identities of Creech's customers. Standlee and Brown have repeatedly argued that customers can be identified through the *Thoroughbred Farm Managers' Club Directory*, and so that information cannot be deemed proprietary or confidential. There is no evidence in the record, however, suggesting that the Directory will inform a salesperson about a farm's hay preferences, volume needs, or pricing structure or personal preferences. There is no evidence that the Directory identifies those farms that will and will not be prime customers for a hay supplier. Likewise, on the supplier or source side for Creech, a competitor cannot obtain specific information about Creech's suppliers by looking at a listing of the members of the National Hay Association. The proprietary and confidential information related to Creech's suppliers can only come from inside Creech's organization and

Standlee had made a "very substantial investment" in its Kentucky operations. (R.A. copy of video hearings, 4/30/09, 22/9/09 CD 57 1:56:18-3:32:31 at 2:08-33 (Appx. 4)). Standlee had leased rail cars and a warehouse within the Commonwealth. (*Id.*). Brown was plainly part of that "very substantial investment": Standlee's corporate representative stated under oath that, if Brown was enjoined from working as a salesperson in Kentucky, Standlee would have to "seriously consider" discontinuing his employment because "that's what he was specifically hired to do" – "to sell hay and purchase hay and to hit all the farm accounts and all the tracks" in Kentucky. (*Id.* at 3:13:01). Mr. Standlee further testified that Brown was hired "to specifically target all the farms" in the counties contiguous to Fayette County. (*Id.* at 3:15:30). Also before the Court at the time of the hearing was Mr. Creech's February 12, 2009 Affidavit, which averred that "multiple customers of Creech [ ] have reported to me Brown's effort to solicit their business away from Creech" and "I have witnessed Standlee hay now at a current Creech customer's farm". (R.A. 15, Appx. 3, ¶¶ 15, 17; see also, Creech April 22, 2009, Affidavit, Appx. 3). Yet, Standlee did not register to do business in Kentucky with the Secretary of State until 2012. (Appx. 16).

At the conclusion of the hearing, Judge Bunnell found the Agreement to be enforceable, although she imposed a geographical limitation upon the non-compete obligation by including the word "Kentucky" within that provision. (*Id.* at 3:26:26:-3:28:00). An Order establishing a temporary injunction consistent with the Judge's findings at the hearing was entered on May 5, 2009. (R.A. 244-250, Appx. 9).

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by improperly taking such information. These issues were addressed at the hearings (Appx. 4) as well as through several affidavits filed in the record. (Appx. 3). The affidavits also provided specifics about Standlee and Brown stealing business from Creech and how it was only possible to do that based upon the wrongful taking and use of Creech's proprietary and confidential business information.

Following that ruling, both Brown and Standlee filed Notices of Appeal from the temporary injunction, despite the interlocutory nature of that Order. Those appeals were dismissed.

Brown (but not Standlee) also filed a Motion for interlocutory relief under CR 65.07. The Court of Appeals granted that Motion on July 7, 2009 (R.A. 380), and then entered a Corrected Order on July 10, 2009.[5] (R.A. 388, Appx. 10). Judge Van Meter concluded that the Circuit Court had abused its discretion by imposing a geographic limitation upon the Agreement, that the Agreement was unreasonable because it was presented to Brown years after he began his employment, and that there was insufficient evidence to establish that Brown had acquired confidential and proprietary information while he worked for Creech. (R.A. 388-396, Appx. 10). Judge Van Meter characterized the Agreement as an unenforceable "contract in restraint of trade," despite the fact that Brown chose to leave his employment with Creech and despite the fact that the Circuit Court had limited any "restraint" to the geographical limits of Kentucky.

After the Court of Appeals ruling – which did nothing more or less than vacate the interlocutory temporary injunction – Creech attempted to conduct discovery on its claims. Standlee partially answered a first set of Interrogatories and Requests propounded by Creech; Brown refused to do so.

While a Motion to Compel Brown's responses to Creech's discovery requests was pending (R.A. 691), and before any depositions had been taken in the case, Standlee and Brown moved for summary judgment based upon the argument that the Court of Appeals

[5] In neither Order did Judge Van Meter address Creech's argument that Brown's CR 65.07 Motion was filed too late. Creech's request for relief on this point was simply "denied" by the corrected Order of July 10, 2009. The Court of Appeals' refusal to even consider the argument that the CR 65.07 Motion was untimely is in marked contrast to its highly technical application of CR 76.12(4)(c)(iv) to Creech's appellate brief, discussed below.

CR 65.07 Order was binding upon the Circuit Court and that there had been "no change in Kentucky law since the entry of the Court of Appeals' corrected order." Believing itself to be bound by Judge Van Meter's ruling on Brown's CR 65.07 Motion (the Judge characterized Judge Van Meter's Order as a "directive"), the Circuit Court granted the Defendants' Motion(s) and entered summary judgment in their favor. (R.A. copy of video hearings, 2/4/2011, 22-9-11 CD # 19 8:55-8:56 (Appx. 4; see also Appx. 11[6])). The Order granting summary judgment to Defendants, entered on April 11, 2011, contains no specific findings or conclusions. (R.A. 877, Appx. 11). The nondisclosure obligation and the non-competition obligation contained within the Agreement were not separately analyzed. Instead, Judge Bunnell simply found that Judge Van Meter's CR 65.07 Order was dispositive of the entire case on its merits.[7]

Creech then filed a Notice of Appeal of the entry of summary judgment on April 4, 2011. Judge Van Meter, who had made the ruling that the Circuit Court considered to

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[6] Multiple orders were tendered and entered, including one erroneously styled as "agreed." The end result is simply that all Creech's claims were dismissed without discussion because of the "directive" noted in the footnote below.

[7] Judge Bunnell's ruling (which was quoted in Creech's brief, with citation (Brief, p. 9 (citing R.A. Certified copy of video hearings, 2/4/2011, 22-9-11 CD # 19 8:55-8:56)) was:

> I still think I was right . . . but I thought they [the Court of Appeals] did a thorough job of explaining why they respectfully disagreed with me.
>
> . . .
>
> Mr. Pisacano, I do agree that I could keep going forward, but I don't think they could have been any more clear as to their interpretation of that agreement and as such I will follow what they have told me in this case . . . In this case, **I will follow their directive and I do believe that based upon their ruling that it would be insufficient to go forward on the other claims.** I don't think there's a basis for the other claims. **But that's only because of what they told me** because I – I still thought the other stuff was pretty good . . . I don't think they could have been any more clear. They were pretty clear. Based upon their opinion – and I kind of thought maybe you all had just gone away . . . I now sustain the motion, and totally based upon the Court of Appeals' directive to me.

Id. (emphasis added).

be dispositive, was assigned as a member of the three-Judge panel by the Court of Appeals. Because Judge Van Meter's CR 65.07 Order expressed his clear conclusion that Creech's claims were not able to succeed on the merits, and because that Order had then formed the sole basis for the Circuit Court's entry of summary judgment, Creech filed a Motion with the Court of Appeals asking Judge Van Meter to recuse himself from the panel. (Motion for Recusal of Judge VanMeter and for Oral Arguments, filed December 2, 2011, and Order denying entered February 7, 2012, Appx. 12). That Motion was summarily denied.

Creech's brief with the Court of Appeals (Appx. 13) argued (with citations to the record) that summary judgment should be reversed based upon the following Circuit Court errors[8]:

- The Court of Appeals' "July 7, 2009 Order granting Brown's Motion for CR 65.07 relief was not binding upon the Circuit Court's adjudication of the merits of the case" (Brief, pp. 7-8 (Appx. 13));
- Contrary to the arguments presented in Standlee's Motion for Summary Judgment, the Agreement was supported by consideration (Brief, p. 8 (citing Standlee's Memorandum in support of Motion for Summary Judgment at R.A. 652 (Appx. 13));
- As confirmed by a decision entered a few months after the CR 65.07 Order (*Kegel v. Tillotson*, 297 S.W.3d 908 (Ky. App. 2009)[9]), the Circuit Court had discretion to impose a reasonable geographic limitation on the non-competition obligation (Brief, pp. 10-16 (Appx. 13));

[8] Creech's brief to the Court of Appeals is attached (without attachments) as Appx.13.
[9] A copy of the *Kegel* case is attached at Appx. 14.

- Contrary to the "Appellees' alternative argument" in support of their summary judgment motions, Creech did not waive its rights under the Agreement (*id.*, p. 16); and
- The Circuit Court's entry of summary judgment was premature because it did not afford Creech the opportunity to conduct discovery (*id.*, p. 17). On this point of error, Creech's brief states:

> For example, Creech asked Standlee to identify customers to whom Standlee had sold products since Brown's employment (including contact information for those customers – names, addresses, and phone numbers) and its hay suppliers (including the cost of product sold and contact information). Standlee responded with the remarkable assertion that all of this information is confidential and proprietary. **Judge Van Meter's CR 65.07 Order (on which the Circuit Court's summary judgment was based) states that the Circuit Court's issuance of a temporary injunction was based upon insufficient evidence that Creech's customer information qualified as proprietary. Creech should have been allowed to conduct discovery to determine how and why Creech's customer contact, supplier, and pricing information is not proprietary and confidential, while this very same information in the hands of its direct competitor, Standlee, is somehow entitled to protection.** (Creech Brief, p. 18 (emphasis added)).

Breach of the nondisclosure obligation was not alleged as a separate "error" or ground for reversal because that breach was part and parcel of four (4) of the five (5) expressly identified and "preserved" Circuit Court errors: (a) the error in construing the CR 65.07 Order as binding, (b) the error in concluding (based upon the CR 65.07 Order) that the Agreement lacked consideration, (c) the error in concluding (based upon the CR 65.07 Order) that Creech had waived its rights under the Agreement and, (d) most significantly, the error in refusing to allow Creech to conduct discovery – specifically including discovery as to the confidential nature of customer information in the hay industry.

In their Response briefs, neither Brown nor Standlee complained that any errors related to the nondisclosure provision were "unpreserved." Neither Brown nor Standlee moved to strike Creech's brief as somehow noncompliant with CR 76.12(4)(c)(iv).

On August 17, 2012, the Court of Appeals issued a to-be-published Opinion. (Appx. 1). The Court of Appeals held: "We conclude that Creech, Inc. was entitled to additional discovery to resolve the dispute and entry of summary judgment was premature." (Opinion, p. 2). Despite that holding, which logically requires a remand of all of the claims contained within Creech's Complaint, the Court of Appeals included a footnote erroneously stating that Creech had "made no mention of the nondisclosure clause in its initial appellant's brief" and so the "issue" of the "purported nondisclosure agreement" had not been preserved and raised. (Opinion, p. 2 n. 1). Based upon that inaccurate characterization of the "errors" and "issues" raised in Creech's brief, the Court of Appeals held that its reversal would "affect only Creech, Inc.'s claim of breach of the covenant not to compete and the other claims arising therefrom," and that "[s]ummary judgment on the alleged breach of the nondisclosure provision is not disturbed, and neither is entry of summary judgment on any of the remaining claims to the extent those claims are premised upon breach of the nondisclosure provision." (*Id.*).[10]

In an equally inexplicable holding, the Court of Appeals also created an entirely new test by which the enforceability of non-competition agreements shall be judged, "in nearly every case". The Opinion instructs the Circuit Courts to consider the following "series of factors":

[10] Again, the Amended Complaint did not assert a claim for breach of contract (or tortious interference with contract) based solely upon the nondisclosure provision, as separate from a claim for breach of the non-competition provision. (R.A. at 235-243). Instead, Creech alleged that Brown had breached the Agreement in its entirety. Contrary to the language used in the Court of Appeals' Opinion, summary judgment was not separately entered or even considered as to each provision.

> (1) the nature of the industry; (2) the relevant characteristics of the employer; (3) the history of the employment relationship; (4) the interests the employer can reasonably expect to protect by execution of the noncompetition agreement; (5) the extent to which it hampers the employee's ability to earn a living; and (6) the effect the agreement has on the public.

(Opinion, p. 10). Each "factor" is accompanied by subsets of various questions to be asked by the Circuit Court. For example, as to the "nature of the industry" factor, the Circuit Court must inquire whether the industry is highly competitive, whether there is a limited opportunity to participate, whether there are few or many "players" in the market and whether their respective market shares are large or small, whether there is a history of "poaching" or attempts to gain knowledge of a competitor's data, whether each participant develops its own "competitive strategy, business model, or technology," and whether competitors succeed according to skills which are not confidential (such as "reliability, people skills, reputation, competitive prices, and good service.") As to most of these questions, the Opinion provides no indication as to what type of "answer" will make a non-competition agreement more or less likely to be enforced. It further fails to articulate at what point in the employee/employer relationship these factors are to be applied and considered – i.e., at the execution of the agreement, at the time of termination of employment, or at some point in between.

After the entry of the Court of Appeals' Opinion, Creech filed a Petition for Rehearing and Modification on August 24, 2012. That Petition was denied on September 26, 2012. (Appx. 2). Creech filed a Petition for Discretionary Review on October 9, 2012, and Brown and Standlee jointly filed a Petition on November 8, 2012. This Court granted both Petitions on April 17, 2013.

ARGUMENT

A. The "Errors" Appealed to the Court of Appeals Included (1) the Circuit Court's Entry Of Summary Judgment Based Exclusively Upon a CR 65.07 Order and (2) the Circuit Court's Refusal to Provide Creech With an Opportunity to Do Discovery Prior to Entry of Summary Judgment, and Both "Errors" Were Preserved as to Both The Non-Competition Language and the Nondisclosure Language of the Agreement.

This issue was presented through Creech's filing of a Motion for Rehearing with the Court of Appeals. (Motion, p. 5-9). The Court of Appeals' footnote precluding Creech from relying on the nondisclosure provision contained within the Agreement on remand should be reversed. That provision was not the basis for a separate "claim" or "Count," nor was it a discrete issue to be addressed (or left un-addressed) in the Circuit Court's summary judgment. Instead, the errors and issues identified, raised, and argued in Creech's Court of Appeals brief encompassed all of Creech's claims.

If, as Creech argued and the Court of Appeals held, the CR 65.07 Order was non-binding upon the Circuit Court, then it was equally non-binding as to both the non-competition obligation and the nondisclosure obligation.

If, as Creech argued and the Court of Appeals held, the Agreement was supported by consideration, then both the non-competition obligation and the nondisclosure obligation are supported by consideration.

If, as Creech argued and the Court of Appeals held, genuine issues of material fact exist as to Brown and Standlee's "waiver" argument (because no discovery was taken), then genuine issues of fact exist as to whether Creech waived any specific provision of the Agreement – including both the noncompetition obligation and the nondisclosure obligation.

And, most obviously, if summary judgment was premature as to Creech's "claims" insofar as they were premised upon the noncompetition obligation, then summary judgment was equally premature as to those claims insofar as they were premised upon the nondisclosure obligation. This is especially true in light of the fact that the Motion to Compel pending before the Circuit Court at the time it entered summary judgment pertained to interrogatories and requests that asked Standlee to identify customers to whom Standlee had sold products since Brown's employment – information which Standlee refused to provide by arguing that it was confidential. Creech cited the Motion to Compel that was pending before the Court at the time it entered summary judgment ((Brief, p. 6 (citing R.A. 691), Appx. 13), and, as part of its argument that summary judgment was premature, argued that it should have been allowed to conduct discovery to determine how or why Creech's customer information could not be deemed confidential (an issue as to which the Court of Appeals found insufficient evidence in its CR 65.07 Order), while that same information in Standlee's hands was characterized by Standlee itself as being confidential (Brief, p. 18, Appx. 13).

The "errors" to be preserved, assigned, and identified on appeal have long been understood by Kentucky practitioners and Courts to refer to the issues, arguments, theories, or grounds upon which reversal of a lower Court's judgment is sought – not separate counts of the Complaint or separate paragraphs of the contract on which the Complaint is based. See, e.g,. *Com v. Leap*, 179 S.W.3d 809, 811 (Ky. 2005) (finding that "**the issue** of 'prosecutorial vindictiveness'" had not been preserved); *Com v. Mixon*, 827 S.W.2d 689, 693 (Ky. 1992) (considering whether the Court was prevented from reviewing an error because of trial counsel's failure "**to raise or preserve the issue for**

appeal"); *Goben v. Parker*, 88 S.W.3d 432, 433 (Ky. App. 2002) (finding that an inmate plaintiff had failed to present "**the issue**" of his inability to call a witness to the trial court, and so could not assert that error on appeal); *Daughtery v. Com.*, 572 S.W.2d 861, 863 (Ky. App. 1998) ("[a]n appellate court will not consider **a theory** unless it has been raised before the trial court and that court has been given an opportunity to consider **the merits of the theory**"); *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky. App. 2006) ("**An issue** not timely raised before the circuit court cannot be considered as a **new argument** before this court"). (All emphasis added)). Under the Court of Appeals' reasoning, an Appellant seeking reversal of summary judgment in a breach of contract case must not only preserve and identify the errors which require reversal, but must additionally and redundantly recite (and offer self-evident explanations of how) each error pertains to and affects each claim or defense, and each paragraph within the underlying contract on which the action is based.

Such a requirement would be particularly meaningless in a case such as this one, where the Circuit Court's entry of summary judgment was based exclusively upon its (erroneous) interpretation of the CR 65.07 Order as binding on the merits. That error, which was plainly preserved and identified to the Court of Appeals, led to the Circuit Court's dismissal of all of Creech's claims based upon all the relevant contract provisions. Likewise, the (preserved and identified) error by the Circuit Court in not permitting Creech to conduct any discovery prior to the premature entry of summary judgment resulted in the dismissal of all of Creech's claims, regardless of whether they related to the nondisclosure language or the non-competition language or any other claim or its damages. These errors (as arguments and grounds for reversal) affected and related

to each and every one of Creech's claims. Creech's principal brief quoted the nondisclosure language contained within the Agreement, and specifically argued that discovery should have been permitted on the question of whether the information at issue was confidential and proprietary. (Brief pp. 1-2, 18, Appx. 13). Further, Standlee and Brown well understood the errors that were presented through Creech's appeal; they included arguments concerning the nondisclosure obligation in their briefs, without making any complaint that those arguments had not been preserved.

B. Creech Substantially Complied With CR 76.12(4)(c)(iv), and the Purpose Of That Rule Has Been Satisfied

Kentucky Courts have consistently held that an appellate Court will not refuse to consider an argument for reversal based upon technicalities where the error presented on appeal is apparent and where the record is indisputably undeveloped. For example, in *Cornette v. Holiday Inn Exp.*, 32 S.W.3d 106, 109 (Ky. App. 2000), the Appellee argued that the Court of Appeals should not consider the Appellant's arguments for reversal because the Appellant had not demonstrated in her brief how the issues were preserved for review under CR 76.12(4)(c)(iv). Noting that the record consisted of only a few pleadings, depositions, and brief hearings related to motions for summary judgment, the Court disagreed: "Reference to a specific portion of this brief record is not essential where the proprietary of summary judgment was clearly joined at every stage of the proceeding." *Id.* See also *Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 481 (Ky. App. 2005) (refusing to strike a brief lacking a statement of how or whether arguments were preserved for review because the record was sparse and "it is clear that [the appellant] vigorously opposed [the appellee's] motion to dismiss").

This approach is consistent with this Court's sound policy of refusing to dispose of appeals on technical grounds where the appellant has substantially complied with the Civil Rules. Whether for purposes of trial or appellate proceedings, the Rules have been "interpreted to facilitate decisions on the merits, rather than determinations on technicalities." *West v. Goldstein*, 830 S.W.2d 379, 384 (Ky. 1992) (recounting that, "[f]or a while we followed a policy of strict compliance with rules of appellate procedure for no better reason than it seemed necessary to control the size of the docket," but "[w]e have now turned the same policy for applying civil rules regarding appellate procedure as has always applied in pleadings and practices at the trial level," which is that the Rules should be construed to secure the just, speedy and inexpensive determination of every action). See also *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986) (holding that the policy of substantial compliance "seek[s] to recognize, to reconcile and further three significant objectives of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal"). The Court of Appeals footnote ignores and departs from that standard.

The purpose of the rule requiring preservation and identification of errors has been satisfied in this case. Rule 76.12(4)(c)(iv) was intended to "save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal." *Elwell v. Stone*, 799 S.W. 2d 46, 47-48 (Ky. App. 1990) (citing 7 Bertelsman and Phillips, Kentucky Practice, CR 76.12(4)(c)(iv), Comment 4 (4th ed. 1989PP)). This Court has held that the Rule "emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on

questions before they are available for appellate review." *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987) (reversed on other grounds in *Conner v. George W. Whitesides Co.*, 834 S.W.2d 652 (Ky. 1992)). See also *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012) (the purpose of substantial compliance with CR 76.12 is "not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration."); *Price v. Garcia*, 291 S.W.3d 728, 734 (Ky. App. 2008) (where "the purpose of preservation (giving a trial court an opportunity to rule on alleged errors) [is] satisfied," all of the appellant's allegations are deserving of review). Here, the Circuit Court obviously had the opportunity to deny the Defendants' Motion for Summary Judgment. There was no need for the Court of Appeals to "canvass" the record to determine the grounds on which summary judgment was entered; indeed, there is virtually no substantive record (beyond the evidence offered during the Circuit Court's hearings and by affidavits on the motions for temporary injunction) to search. Creech's brief quoted (with citation) the Circuit Court's basis for entering summary judgment ("I will follow [the Court of Appeals] directive [in its CR 65.07 Order]" (Brief, pp. 6-7, citing R.A. 2/4/2011 Video Hearing), Appx. 13), and Creech argued that it was error for the Circuit Court to view the CR 65.07 Order as binding. Creech's brief cited the Motion to Compel discovery responses that was pending when the Circuit Court entered summary judgment (*Id.*, p. 6 (citing R.A. 691)), and Creech argued that it was error for the Circuit Court to enter summary judgment without allowing Creech an opportunity to conduct discovery (specifically as to the confidential nature of the information). (*Id.*, p. 18). This far exceeds what is required

in order to preserve the errors upon which an appeal of the entry of summary judgment is based.

This Court has held in an unpublished decision that "[e]rror *preservation* is distinct from the requirements of CR 76.12(4)(c)(v)." *Hudson v. Hudson*, 2011 WL 3805980 (Ky. Aug. 25, 2011) (unpublished) (Appx. 15).[11] There, a mother appealed from the family court's decision to deviate from the child support guidelines based upon the child's receipt of Social Security benefits due to the mother's disability. After her brief was filed in the Court of Appeals, this Court held in another case that Social Security benefits received by a child as a result of a parent's disability are not the type of independent financial resources that will permit a deviation from the guidelines. The case became final before the mother's reply brief was due, giving her counsel an opportunity to cite it. Instead, her counsel apparently chose not to file a reply brief at all. The Court of Appeals noted the mother's failure to cite the case, and characterized the case as having facts "virtually indistinguishable" from those in the pending appeal. However, the Court held that the mother had failed to preserve the error because her brief did not comply with CR 76.12(4)(c)(v) insofar as it did not include "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." *Id.* at *2. The Court of Appeals therefore upheld the family court.

Reversing, this Court distinguished between the requirement of error preservation and the requirements of CR 76.12(4)(c)(v):

> The purpose of CR 76.12(4)(c)(v) is "to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal." *Elwell v. Stone,* 799 S.W.2d 46, 47 (Ky.

[11] Counsel for Creech has not located any published decision which confirms the distinction between the requirement of error preservation and the requirements listed in CR 76.12(4)(c)(v), and therefore cites this decision pursuant to CR. 76.28(4)(c). A copy of the *Hudson* decision is attached as Appx. 15.

> App. 1990) (quoting 7 Bertelsman and Phillips, *Kentucky Practice,* CR 76.12(4)(c)(iv), Comment 4 (4th ed.1989 supp.)). However, a failure to comply with CR 76.12(4)(c)(v) does not render a properly preserved issue unpreserved; rather, a substantial failure to comply permits the appellate court to strike the noncompliant brief. CR 76.12(8)(a). The exercise of an appellate court's authority to strike a brief that does not comply with CR 76.12 is, however, discretionary. *Simmons v. Commonwealth,* 232 S.W.3d 531, 533 (Ky. App. 2007) ("While Simmons's brief did not fully comply with the rule, dismissal for failure to comply with the provisions of CR 76.12 is discretionary rather than mandatory."); *Baker v. Campbell County Bd. of Educ.,* 180 S.W.3d 479, 482 (Ky. App. 2005) ("But dismissal based upon a failure to comply with CR 76.12 is not automatic."); *see also Sanderson v. Commonwealth,* 291 S.W.3d 610, 612 (Ky. 2009) (exercising discretion and not striking a brief for a technical violation of CR 76.12).
>
> **In particular, Kentucky's appellate courts have been reluctant to strike a brief for violation of CR 76.12(4)(c)(v) when the record is not voluminous and preservation is clear from the face of the record.** In *Cornette v. Holiday Inn Express,* an appeal from a summary judgment, the appellant's brief failed to comply with CR 76.12(4)(c)(iv) (current CR 76.12(4)(c)(v)). 32 S.W.3d 106, 109 (Ky. App. 2000). The Court of Appeals nevertheless concluded "that the failure to comply with the rule is not fatal in this instance because the record consists only of a few pleadings, a few brief hearings related to the motions for summary judgment, and a few very brief depositions." *Id.* In *Baker v. Campbell County Board of Education,* the appellant appealed from a motion to dismiss, but failed to comply with CR 76.12(4)(c)(v). 180 S.W.3d at 481–82. The Court of Appeals noted that "dismissal based upon a failure to comply with CR 76.12 is not automatic. In fact, as the record in this case is sparse and it is clear that Baker vigorously opposed the [appellee's] motion to dismiss, sanctions for Baker's technical violation of CR 76.12 are not warranted." *Id.* at 482 (footnotes omitted).

Id. at *3 (emphasis added).

Here, as in *Hudson*, the Court of Appeals has confused the issue of error preservation with the issue of compliance with CR 76.12(4)(c)(v). Also as in *Hudson*, the record in this case is not voluminous and preservation of errors is clear from the face of the record (and, indeed, from the citations contained in Creech's brief as well as its

April 20, 2011, Civil Prehearing Statement[12]). This Court has observed that the Civil Rules, whether for purposes of trial or appellate proceedings, have been "interpreted to facilitate decisions on the merits, rather than determinations on technicalities." *West,* 830 S.W.2d at 384. The Court of Appeals' Footnote 1 contravenes that standard.

C. The Court of Appeals' Refusal to Permit Creech's Claims to Proceed Based Upon Both the Nondisclosure and Non-Competition Obligations Contained In the Agreement Would Result In Manifest Injustice

Even if summary judgment against Creech's "claims" insofar as they are based upon the non-disclosure obligation is somehow construed as a separate and unpreserved "error," CR 61.02 states that "[a] palpable error which affects the substantial rights of a party" may be considered by an appellate court on appeal even though insufficiently raised or preserved for review, "and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." *Id.* A palpable error exists where there is a "'substantial possibility' that the result would have been different without the error". *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007).

This case presents an obvious example of the "manifest injustice" which CR 61.02 is intended to prevent. Virtually no discovery has occurred. The Court of Appeals recognized that the evidence was "insufficiently developed" and that summary judgment was therefore premature (Opinion, p. 14), and that the CR 65.07 Order (the sole and express basis for the Circuit Court's entry of summary judgment) was not binding (*id.*, p. 6). Obviously, the result of the entire case – as to <u>both</u> the non-competition obligation and the nondisclosure obligation – would be dramatically different without those errors. In light of that holding, it is inequitable (and illogical) to prohibit Creech from

[12] Creech set out statements therein such as "This case concerns a non-competition and non-disclosure Agreement (the "Agreement")" and "whether the Agreement is enforceable."

proceeding on all of its claims, which rely on the breach of the entire Agreement – not just of the non-competition obligation.

D. The Court of Appeals' New "Series of Factors" Test Is Not Supported By Kentucky Law and Will Create Significant Unpredictability and Unintended Consequences For Kentucky Employers, Employees, and Trial Courts

By establishing a new six-part "series of factors" test, with each factor consisting of a string of unanswered questions with undefined impact, the Court of Appeals has made it nearly impossible for Kentucky employers and employees to draft and evaluate non-compete agreements with any degree of certainty as to whether they will be enforced or are enforceable. The new test is equally unworkable for Kentucky trial courts, who are routinely called upon to efficiently and predictably rule on the enforceability of non-competition agreements. Judge Bunnell did efficiently and effectively hear, consider and rule on the enforceability of the Agreement in this case and that formed the basis for the Temporary Injunction being entered. Non-competition agreements have been acknowledged by Kentucky Courts to be "a valuable business tool." *Hammons v. Big Sandy Claims Servs., Inc.*, 567 S.W.2d 313, 315 (Ky. App. 1978). As is perhaps obvious, a predictable, workable standard for the enforcement of non-competition agreements is critical to Kentucky's ability to attract and maintain employers.

Until now, Kentucky law has been clear: covenants not to compete are enforceable unless they are unreasonable. *Laureau v. O'Nan*, 355 S.W.2d 679 (Ky. 1962) ("There is no basic public policy against such covenants, particularly when they involve professional services. In fact, the policy of this state is to enforce them unless very serious inequities would result.") The familiar rule is that an agreement not to compete is reasonable (and therefore enforceable) "if, on consideration and

circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted." *Cent. Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681, 685 (Ky. App. 1981). See also *Hammons v. Big Sandy Claims Services, Inc.*, 567 S.W.2d 313 (Ky. App. 1978). There is no reason to suppose that Kentucky's Circuit Courts are no longer capable of conducting that analysis, just as Judge Bunnell did.

The Circuit Courts' obligation to consider the circumstances and equities surrounding a particular contract is not unique to the issue of covenants not to compete. "The fairness of the transaction and its freedom of any taint of oppression is always a matter of consideration in weighing the right of a party to the aid of the court . . . ." *Crowell v. Woodruff*, 245 S.W.2d 447 (Ky. 1925). Circuit Courts are (rightfully) entrusted with the task of assessing "reasonableness" in any number of contexts,[13] and there is no basis for concluding that they cannot do so with regard to non-compete obligations.

The Court of Appeals' election to forge an entirely new test for the enforceability of non-competition agreement was particularly inappropriate in this case, where the Circuit Court already determined that a temporary injunction was appropriate but thereafter dismissed the action solely based upon the Court of Appeals rewriting Kentucky law and before any meaningful discovery could be conducted in order to provide answers to the "questions" contained within each factor of this "new" law. Here, the Circuit Court held that a temporary injunction was appropriate but thereafter simply

[13] See, e.g., KRS 403.220 (authorizing trial court in dissolution action to order one party to pay "a reasonable amount" for the cost to the other party of maintaining or defending a proceeding); Ky. R. Civ. P. 60.02 (requiring a motion brought under that Rule to be made "within a reasonable time").

that it was bound by Judge Van Meter's CR 65.07 Order; Creech's appeal was based upon that error, the hand-tying of the trial court by the appellate court, and the Circuit Court's refusal (per the Court of Appeals erroneous directive) to permit discovery for the balance of the Plaintiff's case.

An expansion of the standard by which the reasonableness of non-compete agreements are to be judged presents very real, practical hurdles for Kentucky employers, employees, legal practitioners, and trial Judges. Non-compete agreements are recognized by Kentucky Courts as "valuable business tools." *Hammons*, 567 S.W.2d at 315. The "series of factors" set out in the Court of Appeals' to-be-published Opinion will make it nearly impossible to predict (prior to drafting, during the term, or at the time enforcement is sought) whether any particular non-compete agreement will be enforced. Employers, employees, and drafters must guess at the answers to the Court of Appeals' questions, including whether the employer is sufficiently large (or small?) (Opinion, p. 11), whether there is a provable history of "poaching" (*id.*, p. 10), whether the employer provided enough training to the employee (*id.*, p. 11), or whether the employee has worked in the particular industry for enough time (*id.*, p. 13).

Worse, the answers to the Court of Appeals' questions may change dramatically between the execution of a covenant not to compete and the time when enforcement is sought. This lack of certainty is and will be particularly problematic at the temporary injunction stage, where very little evidence is available and where an employer must act quickly to preserve its rights under a non-compete agreement.[14]

[14] These problematic consequences of the Court of Appeals' decision have already been remarked upon by Kentucky practitioners. Keith Moorman, *Court of Appeals' "Clarifies" Kentucky Law on Noncompetes*, 23 No. 1 Ky. Emp. L. Letter 1, October 2012 (noting that, in attempting to clarify the rules regarding enforcement of noncompetition agreements, the Court of Appeals has "necessarily ma[de] it harder to

The foundation of contract jurisprudence is the importance of carrying out the parties' intentions under the contract. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005) (the primary objective of contract interpretation is to effectuate the intentions of the parties). Creech and Brown entered the Agreement under Kentucky's long-standing rule that covenants not to compete would be enforced insofar as they are reasonable in light of the interests of the employer, the public interest and the degree of hardship imposed on the party restricted. By dramatically changing and expanding the standard governing the enforceability of non-competition agreements and by ignoring its own case law allowing for reasonable restrictions to be inserted by the trial court (i.e., see *Kegel*), the Court of Appeals has frustrated the parties' reasonable intentions and created enormous unpredictability as to the validity of any number of non-competition agreements entered by Kentucky employees and employers. Other than this Court making clear the correction of the unnecessary sidetrack with the Court of Appeals effort to rewrite Kentucky law on employment agreements, this case should be remanded to the trial court with a directive to reinstate the Temporary Injunction with a new full timetable for its application going forward from reinstatement consistent with its terms and existing

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predict whether a given noncompete will be enforced", and that the new analysis will "increase the cost of presenting the evidence necessary to enforce an agreement not to compete"). Mr. Moorman provides an excellent description of the confusion created by the Court of Appeals' Opinion:

> For example, in the past, many decisions presumed that a noncompete involving a physician was inherently necessary. However, based on the factors above, a court might conclude that a noncompete can't be enforced against a doctor who leaves a practice just a month or so after she starts. Similarly, a court could find that a noncompete can't be enforced against an anesthesiologist who has little direct contact with patients. Finally, a court might conclude that a chain of drug stores can't enforce a noncompete against a pharmacist because all drug stores sell the same products and compete through price, service, and location. In other words, a pharmacist who changes employers doesn't give her new employer a competitive advantage.

Id.

Kentucky law and as it was applied by the Circuit Court by and through its prior hearings and determination.

CONCLUSION

For the reasons set forth above, Creech respectfully requests that this Court (1) affirm the reversal by the Court of Appeals as to Creech's claims insofar as they are based upon the non-competition obligation, but (2) reverse the Court of Appeals' "Footnote 1" holding and the new "series of factors" test.

Creech further requests that this Court hold that non-competition agreements in Kentucky continue to be enforceable where they are reasonable in light of the interests of the employer, the employee, and the public, without the need for the "series of factors" test, and therefore direct upon remand to the Circuit Court the reinstatement of the Temporary Injunction and for the balance of Creech's case to proceed.

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