COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012–SC-000693

CHARLES T. CREECH, INCORPORATED — APPELLANT

v.

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2011-CA-000629-MR
and
APPEAL FROM FAYETTE CIRCUIT COURT
ACTION NO. 09-CI-000779

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

JOINT BRIEF OF APPELLANTS, DONALD E. BROWN AND STANDLEE HAY COMPANY, INCORPORATED

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this Motion were served upon the following named individuals by U.S. Mail, postage pre-paid, on this the 17th day of June, 2013: Hon. Kimberly N. Bunnell, Fayette Circuit Court Judge, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507; Wilma Fields Lynch, Fayette Circuit Court Clerk, 103 Robert F. Stephens Courthouse, 120 North Limestone, Lexington, KY 40507; Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Carroll M. Redford, Hon. Don A. Pisacano and Hon. Elizabeth C. Woodford, Miller, Griffin & Marks, P.S.C., 271 West Short Street, Suite 600, Lexington, KY 40507, and by hand-delivery to: Susan Stokley Clary, Clerk, Kentucky Supreme Court, 700 Capitol Ave., Frankfort, KY 40601.

The undersigned does also certify pursuant to CD 76.12(6) that the record on appeal was not withdrawn by the undersigned, or by the party filing this brief.

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INTRODUCTION

This is a case in which an employee and his current employer appeal from an August 17, 2012 order of the Kentucky Court of Appeals, which affirmed in part and reversed in part, an April 11, 2011 order of the Fayette Circuit Court granting summary judgment and dismissing all claims filed therein against them. This case involves issues related to whether a non-compete agreement lacking any geographic scope is enforceable; what authority, if any, a trial court has to "blue-pencil" or otherwise reform an unreasonable and invalid non-compete between an employer and its employee; and whether continued employment in a non-technical, non-specialized sales position, followed by a demotion from that position, can alone provide adequate consideration for a non-compete agreement.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request oral arguments in this case. Oral argument will be helpful to this Court in deciding the issues presented on appeal because this Court's opinion may depend largely upon the particular facts and/or procedural posture of this case. Further, oral arguments may be beneficial due to the significant public policy issues pertinent to the consideration of this case. Finally, the holding in this case will have wide-spread application throughout Kentucky in terms of how non-compete agreements are interpreted and in terms of how non-compete agreements are drafted. Therefore, oral arguments are particularly appropriate.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In accordance with CR 76.12(4)(c)(iv), Appellants, Donald E. Brown and Standlee Hay Company, Incorporated set forth those matters which they consider essential to a fair and adequate statement of the case, as follows:

MATERIAL FACTS AND PROCEDURAL HISTORY

A. Donald Brown Employment History: Movant, Donald E. Brown ("Brown") was 54 years old when this litigation began, and he has lived in the Central Kentucky area his entire life. (RA 230-233 at paras. 1, 2). He has worked in the hay business since he was fourteen years old, long before he went to work for Respondent, Charles T. Creech, Inc. ("Creech"). (RA 230-233 at paras. 1, 2). From September 4, 1990 through October of 2008, Brown was employed by Creech, where he was at various times a delivery driver, a sales representative and dispatcher, and as such, was responsible for accommodating the sale and/or transport of hay to customers. (RA 230-233 at paras. 3, 4, 9). Brown's job responsibilities did not require any specialized training, degrees, certifications, or the completion of any apprenticeships. (RA 230-233 at para. 5). Moreover, Brown was not provided with any specialized on-the-job training. (RA 230-233 at para. 6).

During the course of his employment with Creech, Brown utilized the Kentucky Thoroughbred Farm Managers' Club Directory (the "Directory") to generate sales. (RA 230-233 at para. 7). The Directory is published each year and lists the names of, and contact information for, every horse farm in Kentucky that chooses to be included. (Directory, RA 486-488). The Directory was Brown's primary source to identify potential customers, and its contents are in the public domain. (RA 230-233 at para. 9.) The Directory is sold at the Keeneland Race Course

gift shop, Pinkston's Leather Goods, the Kentucky Thoroughbred Farm Managers' Club office, and Joseph-Beth Booksellers in Lexington. (RA 486-488).

B. Conflict of Interest Agreement: Charles Creech is the President/CEO of Charles T. Creech, Inc. Approximately one month prior to July 20, 2006, Charles Creech's daughter, who had just begun working for Creech, announced that she expected all of Creech's employees to execute a document entitled "Conflicts of Interest" (the "COI Agreement") (RA 8-9, Exhibit A). See **App. Item 1,** hereto. Though the COI Agreement purports to be two pages of a larger document, it was presented to Brown as a stand-alone document. Brown had no other written employment agreement with Creech. (RA 8-9, Exhibit A at para. 12). The COI Agreement purports to establish various company policies, including the non-competition provision at issue herein:

> . . . **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.**

Brown did not sign the COI Agreement until July 20, 2006, after Charles Creech asked if he would sign it to "get my daughter off our backs." (RA 230-233 at para. 13). On the date Brown signed the COI Agreement, he had been actively employed by Creech for over sixteen (16) years, was working as a hay salesman, and received no additional consideration whatsoever. (RA 14-16, Exhibit C at para. 8).

C. Brown's Departure from Creech, Inc.: Shortly after Brown signed the agreement, Charles Creech's son took over all Brown's sales responsibilities, and Brown's employment classification changed from "salesman" to "dispatcher." (RA 230-233 at para. 14). Though his salary remained roughly the same, his responsibilities and stature changed dramatically. (RA 230-233 at para. 15). He no longer had consistent customer contact nor did he

actively solicit sales. Instead, each day for the last eighteen (18) months before his resignation, Brown simply received a list of daily orders and was responsible for making sure that the orders were loaded on the truck and placed en route to the customer. (RA 230-233 at paras. 16, 17).

On or about October 17, 2008, Brown resigned from his employment with Creech to accept a position with Standlee Hay Company, Incorporated ("Standlee") as its Eastern Equine Sales Representative. (RA 230-233 at paras. 18, 20). Before resigning, Brown met privately with Charles Creech and explained his plans to work for Standlee, including that he planned to work as a salesman and that he intended to sell all Standlee products to farm managers and other customers in Kentucky and surrounding states. (RA 230-233 at para. 19). A series of letters followed, between Creech, Brown, Standlee, and counsel.

On or about November 13, 2008, Timothy Feld (then counsel for Creech) sent a letter to Brown, acknowledging that Charles Creech had previously spoken with Brown regarding his employment with Standlee. (RA 10-11, Exhibit B). In a November 13, 2008 letter to Brown and in a November 14, 2008 letter to Standlee, Creech expressly waived the purported employment prohibitions in the COI Agreement to allow Brown to work for Standlee. (RA 10-11, Exhibit B and RA 47-49).

On behalf of Standlee, attorney Jeff Stoker replied to Mr. Feld in a letter dated November 17, 2008 (the "Stoker letter"). (RA 12-13, Exhibit B). The Stoker letter re-confirmed to Creech "what Standlee's plan is," precisely that Brown would: be employed as a salesman at Standlee; would contact any and all horse farms in Kentucky and the surrounding states; be given a list of horse farms in Kentucky; and that Brown planned to sell Standlee products to horse farms using the Directory as a source of leads for potential customers. (RA 12-13, Exhibit B; RA 234, Trial Court hearing, 22/9/09/CD/57 at 2:21:08; RA 10-11, Exhibit B). See **App. Item 2, hereto.** No

response was ever received from Mr. Feld or Creech, and during this time, Brown began working for Standlee as Creech had conceded he could. Meanwhile, Creech apparently waited "to see what happened . . . to see if there have been any damages . . . and 'til there had actually been a sale," and after Creech realized that Standlee would become a viable competitor, it initiated the present action in Fayette Circuit Court on February 16, 2009. (RA 234, Trial Court Hearing, 22/9/09/CD/57 at 2:34:05).

D. Procedural History: Creech initiated this underlying action on February 16, 2009. (RA 1-16, RA 20-22). On March 9, 2009, Brown and Standlee filed Motions to Dismiss and Responses to Creech's Motion for Temporary Injunction. (RA 52-73). Creech's first Motion for a Temporary Injunction was heard on March 18, 2009, but was overruled because the Circuit Judge announced she did not "believe this is the type of case where the court can infer and make a ruling as to what the territory is," and that the covenant not to compete was not enforceable. (RA 85, Trial Court hearing, 22/9/09/CD/37 at 10:40:30).

Weeks later, Creech renewed its Motion for a Temporary Injunction. Creech continued to assert that the Circuit Court could insert its own geographic scope therein to make the otherwise unreasonable, and thus, unenforceable clause, enforceable. (RA 127-146). In support, Creech pointed to a "blue-pencil test," which it argued under certain sets of fact *may* allow a trial court to *strike offensive and divisible provisions* of a non-competition clause within a contract for the sale of a business, without voiding the entire contract. (RA 127-146).

Brown and Standlee's Motions to Dismiss were heard and overruled the following day, during which the Circuit Judge announced a dramatic shift in her belief as to whether she had the authority to modify the covenant not to compete at issue in this case. (RA 147, Trial Court hearing, 22/9/09/CD/50). Shortly thereafter, on April 30, 2009, the Circuit Court held another

hearing on Creech's renewed Motion for a Temporary Injunction. During said hearing, the Circuit Court Judge reviewed a list of Creech's customers *in camera*, and heard testimony regarding what Standlee hired Brown to do, which was "to specifically target all the farms" that have their contact information publicly listed in the public Thoroughbred Farm Managers' Club Directory (herein the "Directory") to generate sales. (RA 234, Trial Court hearing, 22/9/09/CD/57 at 3:08:25 and 3:15:30). At this hearing, Creech offered no evidence that the COI Agreement made reference to any particular geographic scope or which tended to show that at the time the parties executed the COI Agreement, they contemplated any specific geographic scope that was reasonable under Kentucky law. (RA 234, Trial Court hearing, 22/9/09/CD/57). Nonetheless, the Court granted Creech's renewed Motion for Temporary Injunction, by inserting the word "Kentucky" into the non-competition clause. (RA 244-251). See **App. Item 3,** hereto.

On May 26, 2009, Brown and Standlee each filed timely CR 65.07 Motions for Emergency Interlocutory Relief. The Court of Appeals thereafter issued an Order granting such relief ("hereinafter referred to as the CTA 65.07 Order"),[1] holding that that the COI Agreement, including the non-compete clause, is invalid and unenforceable for the following reasons:

(a) **it is "legally unreasonable,"** because it "does not contain a geographic limitation" (*citing* Hodges v. Todd, Ky. App. 698 S.W.2d 317, 318 (1985));

(b) in the instant case, **a trial court may not "establish a reasonable geographic limitation** based upon the intention of the parties at the time the contract was executed" **to "transform an otherwise unenforceable covenant not to compete into an enforceable one";**

(c) **it is unreasonable because "Brown worked for Creech for 16 years before being presented with the agreement** for which he received no additional compensation," **and because "Creech has made no claim that it expended time, energy, effort or money in training Brown";**

(d) and generally that **it is "a covenant in restraint of trade".** (RA 388-395 at 5-6).[2]

[1] A Corrected Order Granting CR 65.07 Relief followed on July 10, 2009. (RA 388-395).

The CTA 65.07 Order also held that Creech "clearly waive[d] the [COI agreement] to the extent that it prohibited Brown from working for a competitor. (RA 388-395). See **App. Item 4,** hereto. In addition to the afore-mentioned rulings on pure points of law, the CTA 65.07 Order also stated that "[t]his was not a specialized field," and that Creech had failed to produce evidence sufficient to show that pricing information, horse farm lists, hay supplier information, farm managers names, cell phone numbers, etc. was proprietary and/or confidential information to warrant the Injunction.

Creech thereafter filed a Motion to Vacate the Court of Appeals' 65.07 Order, which was denied on April 22, 2010. (RA 396-433; RA 436-485).

On November 10, 2010, Brown and Standlee each filed Motions for Summary Judgment in the Circuit Court, which set forth detailed arguments on why summary judgment was appropriate, and which extended beyond the pure fact that 65.07 relief was granted. Brown and Standlee's Motions for Summary Judgment were granted following Creech's response and a hearing on the record. (RA 641-688, RA 835, Trial Court hearing 22/9/11/CD/19). At said hearing, the Circuit Court Judge emphasized that the Court of Appeals had spoken regarding whether she had the authority to modify the otherwise unreasonable, and thus invalid, non-compete agreement between Brown and his employer, Creech, and stated:

> [though] I still think I was right . . . I thought they [the Court of Appeals] did a thorough job of explaining why they respectfully disagreed with me . . . I don't think they could have been any more clear as to their interpretation of that agreement [the COI Agreement] . . . I don't think they could have been any more clear. They were pretty clear.
> (RA 835, Trial Court hearing, 22/9/11/CD/19 at 8:55-8:56).

See **App. Item 5,** hereto.

Creech thereafter appealed the Circuit Court's grant of summary judgment. The Court of Appeals issued an Order on August 17, 2012, reversing in part and affirming in part, summary judgment (hereinafter referred to as the "CTA 8.17.12 Order"). See **App Item 6,** hereto. The Order held, in pertinent part:

> We conclude that Creech, Inc. was entitled to additional discovery to resolve the dispute and entry of summary judgment was premature
>
> . . .
>
> **The general rule that covenants not to compete "are not enforceable where they are. . . . unlimited as to space but limited as to time," in the context of employment contracts has never been explicitly overturned.**
>
> . . .
>
> [Footnote 2 to the CTA 8.17.12 Order] *But see* Hodges v. Todd, in which [the Court of Appeals] held "that the trial court had the authority to enforce [a noncompetition] covenant [which wholly omitted a geographical limitation] by establishing a reasonable geographical limitation based on the intention of the parties at the time the contract was executed. (citation omitted) **Hodges admittedly addressed only those noncompetition agreements which were part of a contract for the sale of business.** However given the persistent tendency of Kentucky courts to apply rules governing noncompetition agreements in the contracts of the sale of business to those included in employment contracts, and vice versa, **we believe it likely that the old rule that employment contracts whose covenants not to compete fail to state a geographic limitation are invalid is probably no longer the law;**
>
> . . .
>
> **however, [the Court of Appeals] has arguably determined that the "blue pencil rule," extends to all provisions of a noncompetition agreement.** Kegel v. Tillotson (citation omitted) ("[O]ur courts have adopted a 'blue pencil' rule, whereby we are empowered to reform or amend restrictions in a non-compete clause if the initial restrictions are overly broad or burdensome.").

The CTA 8.17.12 Order thereafter set forth the "proper approach" for determining the reasonableness of a covenant not to compete," which included a series of factors to be considered in nearly every case, as follows below, and remanded the case to the trial court for resolution of claims related to the non-compete provision under this analysis.

> . . . (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 degree of hardship the agreement imposes upon the employee, in particular

the extent to which it hampers the employee's ability to earn a living; and (6) the effect the agreement has on the public.

The Court of Appeals also reversed entry of summary judgment on claims related to the non-compete provision "to the extent it . . . may have been premised upon the court's conclusion that the noncompetition agreement lacked consideration," this time citing Higdon Food Servs., Inc. v. Walker, 641 S.W.2d 750 (Ky. 1982), which it described as a "strongly criticized" case, for the premise that employer-employee agreements may be executed in exchange for continued employment. CTA 8.17.12 Order.[3] The CTA 8.17.12 Order also reversed summary judgment on claims related to the non-compete provision to the extent summary judgment was based upon waiver.

Creech's Motion for Reconsideration was denied on September 26, 2012. It has now been over six (6) years since Brown signed the COI Agreement and it has been four (4) years and eight (8) months since Brown left Creech. Appellants' Motion for Discretionary Review followed therein and Brown and Standlee requested that this Court review the following critical issues of law: (1) whether, generally, trial courts may modify an otherwise unreasonable, and thus invalid and unenforceable, non-compete agreement between an employer and employee, to make it reasonable and enforceable; (2) whether, more specifically, trial courts may insert a geographic scope into a non-compete agreement between an employer and employee, when the language of that agreement contains no geographic scope whatsoever; (3) whether continued

[3] The Court also held that because Creech made no mention of the non-disclosure clause in its initial appellant brief, and because its first mention of the issue is in the final paragraphs of its reply brief, and because it failed to include a statement of preservation of the error as required by CR 76.12, that argument was not preserved or raised on appeal. The Court of Appeals relied on Catron v. Citizens Union Bank, 229 S.W.3d 54, 59 (Ky. App. 2006) ("Catron has not shown where and in what manner this argument was preserved for appeal. Furthermore, he raises it for the first time in his reply brief.").] CTA 8.17.12 Order, fn 1. Brown and Standlee reserve arguments related to the preservation of such claims for their response to Creech's brief, as such arguments are relevant to Creech's Motion for Discretionary Review (12-SC-00651).

employment and subsequent demotion alone can provide adequate and continued consideration for a non-compete agreement between employer and employee, when that agreement was entered sixteen years after employment began and when the employer makes no claim that it expended time, energy, effort or money to train the employee; and (4) whether the Court of Appeals erred in reversing, in part, the Circuit Court's summary judgment in favor of Movants. Creech filed a separate Motion for Discretionary Review, which was also granted (12-SC-00651). Those issues will be addressed by Brown and Standlee in their Response to Creech's Brief, and thus are not fully addressed herein.

ARGUMENT

Pursuant to this Court's April 17, 2012 Order, discretionary review was granted on several critical issues related to the enforceability of non-compete agreements between an employer and its employee.[4] The first issue presents two questions of law, one more general and one more specific to the undisputed facts of this case. How the Court decides these issues will have a dramatic effect on how business is done in the Commonwealth. More generally, Appellants assert that Kentucky law does not, and should not, authorize trial courts to re-write or wholly "reform" invalid and unenforceable non-compete agreements between an employer and its employee. First, it is unclear whether the so-called "blue-pencil" rule may be used at all to alter non-compete agreements that are between an employer and its employee, rather than incident to the sale of a business. Further, even if this Court determines that trial courts do, in fact, have some authority to utilize a "blue-pencil" to strike offensive and divisible provisions within a employer/employee non-compete agreement, such authority is, and should be, reasonably limited. For the various legal and public policy reasons set forth below, such

[4] Discretionary review was also granted on certain issues raised by Creech in its Motion for Discretionary Review, which will be addressed by Brown and Standlee in their response briefs to be filed in 13-SC-00651.

authority should not be expanded to authorize the re-writing of wholly unreasonable, invalid and unenforceable non-compete agreements that have no divisible provisions, such as the one at issue in this case.

More specific to this case, it is still good law in Kentucky that non-compete agreements between an employer and its employee are not enforceable if they contain no geographic scope. Calhoun v. Everman, 242 S.W.2d 102 (Ky. 1951)[5]. Non-compete agreements that omit a geographic scope altogether do not present divisible language that can be struck with a "blue-pencil." Further, for the various legal and public policy reasons discussed forth below, trial courts have not, and should not, be given authority to insert an un-contemplated and un-negotiated geographic scope into a non-compete agreement between an employer and its employee to "reform" or save an otherwise wholly unreasonable, invalid and offensive restraint on trade.

The second issue presented by Appellants for review also raises two potential questions of law. First, Kentucky law lacks clarity on the subject of whether continued employment alone can provide adequate consideration for a non-compete agreement. More specifically, this case presents the question of whether continued employment in a non-technical sales position, followed by subsequent demotion from that position, can alone provide adequate and continued

[5] "Contracts in restraint of employment or personal services are not favorites of the law and will not be enforced where they imperil individual rights which our fundamental laws have declared to be inalienable. Restraint of employment tends to deprive the public of efficient service as well as to impoverish the individual and reduce him to the status of a public charge. In this country there has recently arisen a school of thought which places much importance on the plight of the individual who might be needlessly pauperized while ready, able and willing to work at his usual occupation for the support and independence of himself and family. Equity will not enforce the naked terms of a negative covenant restraining a man from other employment unless the employer has a substantial right peculiar to his business which it is the duty of the court to protect, if it can do so without imposing an undue hardship upon the employee." Calhoun at 103.

consideration for a non-compete agreement between employer and its employee. The question of law presented in this case may be further narrowed by the undisputed fact that the agreement at issue was entered into sixteen (16) years after employment began, and by the un-refuted fact that no expense of time, effort or money to train Brown accompanied or followed his signing of the non-compete agreement.[6] (RA 230-33; RA 835).

Finally, the overarching question before this Court is whether the Court of Appeals erred in reversing, in part, the Circuit Court's summary judgment in favor of Appellants. As set forth in detail below, the Fayette Circuit Court properly granted summary judgment because the non-compete agreement Creech seeks to enforce through its various claims[7] is invalid and unenforceable. It is invalid and unenforceable both because the COI Agreement lacked adequate consideration and because the non-compete provision therein was wholly unreasonable because it lacked any geographic scope. As discussed below, the non-compete agreement is also not subject to reform under current Kentucky law, via the "blue-pencil" rule or otherwise. Without an enforceable agreement, all Creech's claims below must fail.

[6] In fact, there has been no allegation within this litigation that Brown was provided any training relevant to his sales position, or any other, position held at Creech. Rather, Creech had worked in the hay industry all his life, and prior to his employment with Creech.

[7] Creech's claims included a claim for breach of the non-competition provision of the COI Agreement, a claim for breach of non-disclosure provision of the COI Agreement, and fraud in the inducement claim. As will be addressed in more detail in Brown and Standlee's Response to Creech's brief, and as recognized in the CTA 8.17.12 Order, any appeal of the Circuit Court's grant of summary judgment on this claim was not properly preserved for appeal. Any appeal of the Circuit Court's grant of summary judgment on Creech's fraud in the inducement claim also was not properly preserved for appeal.

I. Brown and Standlee are Entitled to Summary Judgment Because the Non-Compete Agreement Between Brown and Creech is Invalid as an Unenforceable Restraint on Trade.

A. The Covenant Not to Compete Between Brown and Creech is Invalid and Unenforceable on its Face Because it Contains No Geographic Scope:

Creech does not dispute that the COI Agreement contains no geographic scope whatsoever, and in its earlier CTA 65.07 Order granting from temporary injunction, the Court of Appeals properly recognized that "the only intent implicit from the facts [-- including the COI Agreement itself --] is Creech's intent that none of its employees leave its employ and work for a direct or indirect competitor for a period of 3 years after termination. (RA 388-395; *See also* RA 234, Trial court hearing 22/9/09/CD/57 at 3:62:50, **App. Item 2**).

Under Kentucky law, covenants not to compete are valid and enforceable only if "the terms of such covenants are reasonable in the light of the surrounding circumstances." Crowell v. Woodruff, 245 S.W.2d 447, 449 (Ky. 1951). In order to determine whether the terms of the covenant not to compete are reasonable in light of the surrounding circumstances, Kentucky courts have long been directed to consider the following basic factors: (1) the "nature of the business or profession and employment;" (2) the duration of the restriction; and (3) the territorial extent of the restriction (a/k/a the geographic scope). Id. Looking at these factors,[8] a non-compete agreement is only reasonable, and thus enforceable, if the restraint imposed is no more restrictive than necessary to "afford fair protection to the legitimate interests of the employer."

[8] Appellants recognize that the Court of Appeals has now articulated a more detailed set of factors to consider; however, such factors neither abandon these basic considerations nor existing case law. Further discussion of the newly articulated facts has been reserved for Brown and Standlee's Response to Creech's brief in 13-SC-00651, as the same was a topic of Creech's Motion for Discretionary Review. Brown and Standlee maintain that such an inquiry, regardless of any need for the same or clarifying benefit it provides, is not pertinent to this case because the agreement at issue herein is wholly invalid and unenforceable and may not be reformed under current Kentucky law.

Id. (See, also Hammons v. Big Sandy Claims Service, Inc., 567 S.W.2d 313, 315 (Ky. App. 1978) (a covenant not to compete "is reasonable if ... the restriction affords fair protection to the interests of the covenantee and is not so large as to interfere with the public interest or impose undue hardship on the party restricted.").

More specific to this case, it is still good law in Kentucky that non-compete agreements (between employers and employees) without any geographic scope are invalid and unenforceable, because they are unreasonable restraints of trade. Calhoun v. Everman, 242 S.W.2d 100, 102 (Ky. 1951) ("[t]he general rule is that contracts in restraint of trade are not enforceable . . . where they are unlimited as to space but limited as to time."); See also Hodges v. Todd, 698 S.W.2d 317, 318 (Ky. App. 1985) (citing this general rule and making an exception in the context of sale of a business) (RA 388-395; DKT #33, **App. Item 6**. ("The general rule that covenants not to compete are not enforceable where they are . . . unlimited as to space but limited as to time in the context of employment contracts has never been explicitly overturned")).

In Calhoun v. Everman, 242 S.W.2d 100 (Ky. 1951), the Court was confronted with facts wherein Everman sought to enjoin his former employee from "either directly or indirectly, for himself, or any other person, firm or corporation, in any way enter[ing] into competition in the aforesaid business of dry cleaning and laundry with [Everman]". Id. at 102. Emphasizing the greater degree of certainty that is required in the terms of a contract to be specifically enforced than in a contract that supports an action for damages, the Court held that the covenant not to compete was invalid as a contract in restraint of trade. Id. at 103. The Court expressly stated that ***"[t]he general rule is that contracts in restraint of trade are not enforceable . . . where they are unlimited as to space but limited as to time."*** Id. at 102 (citations omitted). The Court

further emphasized that ***the inclusion of a "reasonable territory" is the most important factor in determining whether a covenant not to compete is valid*** when it stated that even if "contracts are unlimited as to time but are confined to a reasonable territory, they are enforceable." Id.

Wholly dispositive of the case at bar is the fact that ***the non-compete provision at issue herein contains absolutely no geographic limitation as to its scope***. Instead, said non-compete provision broadly prohibits employees from "work[ing] for any other company that directly or indirectly competes with the company for 3 years after leaving Creech, Inc. without the companies(sic) consent." **App. Item 1**. The scope of employment prohibited by this agreement is potentially all-encompassing, because it prohibits former employees - - even those like Brown who have no specialized skills, no technical knowledge, and limited, if any, recent customer contact - - from seeking employment with any other company throughout the world, the efforts of which may have any detrimental impact upon Creech's profits. The determination as to which companies, country or world-wide, might "directly," or moreover, "indirectly compete with" Creech is highly subjective and overly broad. Even if Creech had some unilateral idea of what geographic scope it intended to restrain, the agreement provides no guidance to Brown or Standlee regarding its geographic limits.

Frankly, though less extensively briefed in this litigation, the non-compete agreement is equally untailored as to the nature of the work being restrained (job responsibilities restrained; industries restrained; contact or conduct restrained, etc.),[9] which only adds to the conclusion it is an unreasonable restraint of trade that cannot be enforced under Kentucky law as it exists today.

In sum, the non-compete provision at issue herein is fatally defective as drafted and is unenforceable on its face. Further, as discussed in more detail below, this is not the type of

[9] The non-compete agreement purports to restrain Brown from any type of work at any company aimed to directly or indirectly compete with Creech regardless of whether Brown's new position would relate in any way to the type of work he did at Creech.

agreement that can be revised by what is typically referred to as the "blue-pencil rule," and neither current Kentucky law nor sound public policy support granting trial courts' liberal authority to completely reform non-compete agreements between employers and their employees. Thus, without a valid and enforceable non-compete agreement, the trial court properly granted summary judgment and the Court of Appeals erred in reversing, in part, the same.

B. Kentucky Trial Courts are not, and Should not be, Authorized to Use a Blue-Pencil or Otherwise Reform the Non-Compete Agreement Between Brown and Creech.

In its August 17, 2012 Order, reversing summary judgment in part, the Court of Appeals noted that it had "arguably determined that the 'blue-pencil rule' extends to all provisions of a non-compete agreement," which may include geographic scope, and that this rule may apply to non-competes between employers and their employees. (DKT #33, CTA 8.17.12 Order, (*citing* Kegel v. Tillotston, 297 S.W.3d 908 (Ky. App. 2009)). A comprehensive discussion of why Kentucky law does not, and should not, authorize trial courts to apply the "blue-pencil rule" or otherwise reform employer/employee non-compete agreements (including why Kegel is inapplicable to the current case) follows below. However, it is first important to note that the non-compete provision at issue herein is simply not the type of provision that can be cured by applying what is traditionally referred to as the "blue-pencil rule". Typically, "blue-pencil rule," named as such for blue pencils once used in copy editing, is only applicable when faced with a provision that includes both an unreasonable restraint on trade (a/k/a an "offensive" term) and another narrower reasonable restraint, which are "divisible" from one another by striking the offensive term with the blue pencil. 54Am. Jur.2d Monopolies and Restraints of Trade Sec. 963.

Blue-pencil rule.[10] What remains then, after use of the "blue-pencil" is a reasonable, enforceable term (time scope; geographic scope; scope of the job type restrained, etc.), which was already contemplated by the parties and which had always appeared within the language to the agreement itself.

The non-compete agreement between Brown and Creech simply, broadly and unreasonably states that Brown may not "work for any other company that directly or indirectly competes with [Creech] for three (3) years after leaving Creech . . ." As much as the trial court or the Court of Appeals may want to strike this offensive language with a blue-pencil and leave behind, instead, a divisible and reasonable geographic scope, a more reasonable geographic scope was simply never contemplated, negotiated or written into the agreement. This is just not the type of divisible provision that can be cured by the traditional "blue-pencil rule."[11] The traditional "blue-pencil rule" is the more widely-used, and less radical approach to curing

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[10] ". . . the 'blue-pencil rule,' was adopted from the first Restatement of Contracts and provides that unreasonableness of any non-divisible term of a covenant not to compete renders the entire covenant unenforceable. Although courts may not add terms or re-write provisions to covenants, courts will 'blue-pencil' restrictive covenants, eliminating grammatically severable, unreasonable provisions. Where the restraint imposed is in excess of what is reasonable and the terms of the agreement indicate no line of division that can be marked with a blue-pencil, courts applying this standard hold the whole contract to be illegal and void".

[11] As evidence of the indivisible nature of this agreement and the fact that it is not the type of agreement contemplated under the traditional "blue-pencil rule," the Fayette Circuit Court thoughtfully began the original temporary injunction hearing, at which it eventually cured the non-compete agreement by inserting the word "Kentucky" where no geographic scope existed, by stating as follows:

> [I am] prepared to impose on a temporary basis a geographic limitation by I [am] needing information, I don't want to just randomly say you know, Fayette County, nor do I want to say Kentucky, or Kentucky and all states that touch Kentucky, or all [Creech's] current customers, so I don't want to just do that because I don't have any concept of what that really means." RA 234, Trial Court hearing 22/0/09/CD/57 at 2:00:09.

Nonetheless, the trial court believe[d] that [it could] do that . . . even though the agreement leaves no boundaries whatsoever. RA 234, Trial Court hearing 22/9/09/CD/57 at 03:26:50.

unreasonable non-compete agreements and it is the only approach that is even vaguely referenced in Kentucky jurisprudence in the context of an employer/employee non-compete.[12]

Rather, in order to enforce the non-compete agreement between Brown and Creech, a trial court would have to be granted authority not only to strike offensive and divisible provisions consistent with the "blue-pencil rule," but also to completely re-write or "reform" the agreement. Granting such authority would require a significant expansion of Kentucky law, far beyond confirming authority to use the traditional "blue-pencil rule". Such authority would require Kentucky to join the ranks of the most liberal states, to allow complete and unabashed re-writing of non-compete agreements between employers and their employees whenever an employer attempts to enforce a wholly unreasonable restraint on trade. Allowing trial courts to reform employer-employee non-competes however they see fit is inconsistent with Kentucky law, which has long recognized the unique nature of employer-employee non-competes. Further, such a liberal expansion could have real consequence in terms of restraining the continual employability of Kentucky workers, and would also abandon a long-standing express desire in Kentucky law to strike a reasonable balance between protecting legitimate interests of employers and rights of employees. These policy considerations are discussed in more detail below.

Importantly, there are no published decisions of this Court which authorize trial courts to utilize the "blue-pencil rule" or to more liberally reform unreasonable restraints of trade between an employer and its employee. More specifically, this Court has never authorized trial courts to insert a geographic scope into a non-compete agreement between an employer and its employee when the language of the agreement wholly omits the same. Creech's arguments for re-writing

[12] As discussed in more detail below, and briefly setting aside arguments that discussion regarding the "blue-pencil rule" in Kegel is merely dicta, the agreement at issue therein was, unlike in this case, the type of agreement in which the offensive provisions could arguable be struck with a blue-pencil to leave behind language that formed a reasonable, and thus enforceable, restraint.

the agreement relied purely upon: (1) brief dicta referencing possible use of the "blue-pencil rule" contained within Kegel, a distinguishable case that was decided by the Court of Appeals during the pendency of the current case; and (2) its own desire for this Court to liberally expand Kentucky law. With due respect to the Court of Appeals, even its August 17, 2012 Order is tentative, because this Court, has, understandably, never granted trial courts such broad authority to reform and enforce unreasonable restraints on trade in the context of employer/employee agreements.

1. Non-Compete Agreements Between an Employer and its Employee are Unique and are Distinguishable from those Incident to the Sale of a Business.

Creech does not dispute that this is a non-competition agreement between an employer and its employee, rather than incident to the sale of a business. (Affidavit of Charles T. Creech, RA 14-16, App. Item 3, Exhibit C at paras. 3, 4 and 8). This is a critical distinction with respect to Kentucky law, which is still applicable to, and dispositive of, this case. (App. Item 14 at pages 13-21). This distinction is not novel; it is a long-held tenant of Kentucky law.

Even Hodges, upon which the Court of Appeals relied in its CTA 8.17.12 Order, articulated this distinction. (DKT #33; Hodges at 319 ("Here, the sale of a business was involved, not simply the termination of an employer-employee relationship."). In Hodges, the parties agree that there was a valid contract for the sale of the Defendant's business. At issue was whether the trial court had "authority to enforce a noncompetition covenant ***contained in a [valid] contract for the sale of a business . . .***" even though it "failed to specify [a] specific geographical limitation." Hodges at 318. It is important that the anti-competition provision in Hodges, is part of an agreement to sell a business, because what this Court really attempted to do in Hodges was to determine, based on the intent of the parties when the contract was made,

precisely how much goodwill was sold to the plaintiff therein. In Hodges, this Court stated that "the plaintiff should always be permitted to show the actual extent of the goodwill that is involved and that the defendant has committed a breach within that extent," because he continued to use something that now belonged to the purchaser. Id. at 319. The Court went on to discuss that whatever goodwill was sold, constituted "over one-half of the $10,000 given for the business." Id.

This is quite a different determination than is required in the current case. This is a distinction that Hodges further and unmistakably articulates when it compares Calhoun, 242 SW2d 100 (1951) to Hodges, stating that ***"a critical distinction exists between the facts as stated by the Calhoun Court and the facts herein. . . . because [h]ere, the sale of a business was involved, not simply the termination of an employer-employee relationship."*** Id. at 319.

Similarly, in Crowell v. Woodruff, 245 S.W.2d 447 (Ky. 1951), the Court clearly stated: "Let it be borne in mind that covenants restrictive of future employment are not viewed with the same indulgence as those between a vendor and a vendee of a business and its goodwill where there arises an unjust competitive encroachment." (*citing* Ky. Jur. Contracts §12-6 (2001); See also 17A C.J.S. Contracts §258 (2007)). ("A distinction is made between covenants as incident to an ordinary commercial transaction involving the sale of a business or the transfer of property, and such covenant as incident to an employment contract . . . [and] ***covenants in restraint of trade in employment contracts are not viewed by the courts with the same indulgence as are such covenants in connection with the sale of a business or a transfer of property . . . ."***). This the same distinction was also later made in Hall v. Woolsey, 471 S.W.2d 316 (Ky. App. 1971), when the court stated that "in gauging reasonableness [of a covenant not to compete], ***there is a distinction between a covenant ancillary to the sale of a business and to a contract of***

employment". In its July 10, 2009 Order granting Brown CR 65.07 relief from injunction, which followed extensive briefing by the parties hereto on this specific issue, the Court of Appeals originally, and properly, accepted this distinction, stating: ". . . Hodges is distinguishable as the covenant at tissue was ancillary to the sale of a business and the court took into consideration the amount of the purchase price as evincing (sic) the intent of the parties to sell the goodwill involved". (RA 388-395). Not only is this a long-standing distinction in Kentucky law, but it is an important one from a public policy standpoint, the details of which are discussed in more detail below. It should not be disrupted now.

Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951), upon which the Hodges court relied, also took place in the context of the sale of a business. (App. Item 8, page 3). In Ceresia, the Plaintiffs bought a wholesale fruit and vegetable business from the Defendants. Ceresia at 361. The Court held that in light of the relatively small value of the physical assets transferred, the sale price also clearly included the sale of the goodwill. Id. at 362. In Ceresia, the covenant not to compete had the effect of ensuring that the defendants were not still using the goodwill that it had just sold to the plaintiff. Since the contract of sale was "ineptly drawn," it was necessary for the court to determine exactly what amount of goodwill had been sold, and thus, what geographic scope was necessary to ensure that the seller was not still using such goodwill. Throughout this litigation, Creech has cited to a portion of Ceresia which discusses the reasoning behind "the best considered modern cases."

> In a good many cases it was held that if the contract itself indicated no geographical line between the reasonable and the unreasonable, it was 'indivisible' and illegal as a whole. Thus, ***if a seller promised not to compete*** anywhere in England the whole was void, but if he promised not to compete in London or elsewhere in England, partial enforcement was possible in case the business had extended throughout London.

> In very many cases the courts have held the whole contract to be illegal and void where the restraint imposed was in excess of what was reasonable and terms of the agreement indicated no line of division. In the best considered modern cases, however, the court has decreed enforcement as against a defendant whose breach has occurred within an area in which restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint. ***Thus, the seller of a purely local business who promised not to open a competing store anywhere in America has been prevented by injunction from running such a store within the same block as the one that he sold.*** In some cases it may be difficult to determine what is the exact limiting boundary of reasonable restriction; but often such a determination is not necessary. The question usually is whether a restriction against what the defendant has in fact done or is threatening would be a reasonable and valid restriction. ***The plaintiff should always be permitted to show the actual extent of the goodwill that is involved*** and that the defendant has committed a breach within that extent. If a restriction otherwise reasonable has no time limit, it is quite possible for the court to grant injunctive relief for a specific and reasonable time.
> Ceresia at 362-63.

This portion of the Ceresia opinion begins with a discussion of the traditional approach, which favored automatically throwing out any non-competition provision if it contained an unreasonable geographic scope. Creech has been quick to assert that this traditional approach has changed, but fails to mention that Ceresia discusses such "modern changes" only in the context of the sale of a business. When Ceresia gives examples of the traditional approach and of "the best considered modern cases," it gives examples in the context of the sale of a business. As such, Ceresia can, at its broadest reading, only be said to stand for an extension of Kentucky law that allows the geographic scope of covenants not to compete to be modified when such covenant is between the buyer and seller of a business. Clearly, when the Court of Appeals decided Ceresia it was not contemplating such an extension of law in the context of an employee-employer relationship, especially one involving employees with no highly specialized skills or training. In fact, no real discussion of such a liberal extension has occurred, until this

case. As discussed in more detail below, this important distinction has not been altered by the brief dicta expressed in Kegel v. Tillotson, 297 S.W.3d 908 (Ky. App. 2009), which is distinguishable and was decided by the Court of Appeals during the pendency of this action.

Thus, this Court's review of this case does not require a comprehensive review of the inquiry articulated by the Court of Appeals in its CTA 8.17.12 Order, or any other broad new holding. Regardless of any need or desire to provide trial courts with guidance when faced with a questionably valid non-compete agreement, this is just not one. Only two undisputed facts are required to decide this case, (1) that the non-compete agreement contains no geographic scope and (2) that the non-compete was entered in the context of an employer-employee relationship, not in the context of the sale of a business, and thus cannot be modified. No other steps are necessary to find that the agreement between Brown and Creech is invalid and unenforceable, and thus, that the trial court properly granted summary judgment on all claims. Additional discovery will not reveal that any geographic scope existed within the language of the COI Agreement, or that Brown was not an employee of Creech. These facts have not changed and will not change. [13]

2. Kegel is Distinguishable, Misinterprets Kentucky Law on Non-Compete Agreements Between Employers and Employees and is Inapplicable to the Instant Case.

In an understandable attempt to keep its claims alive, Creech pointed to Kegel v. Tillotson, 297 S.W.3d 908 (Ky. App. 2009), in its appeal of the Fayette Circuit Court's summary judgment order. Creech argued, based upon brief dicta therein (set forth fully below), that

[13] To support its argument that summary judgment was premature, the Appellant takes issue with the fact that Brown objected to the production of information and documents regarding whether he had a non-competition agreement with Standlee, the terms of such agreement, and regarding the specifics of his customer contacts while at Standlee. Brown properly objected to the production of such matters as the COI Agreement was not valid, and thus any such information was irrelevant to the trial court's further determinations. Further, all information relevant to whether this non-compete agreement is valid is, and always has been, within Creech's knowledge.

Kentucky had completely abandoned its long-standing principles, and that it had (or should) liberally extend trial courts' authority to wholly reform (or re-write) otherwise unreasonable restraints on trade between employers and their employees. It asserted that by mentioning the "blue-pencil rule," Kegel now gives trial courts broad authority to insert language into employer/employee non-compete agreements, even when that agreement completely omits a geographic scope, to make it suddenly reasonable and enforceable again. Creech's reading of Kegel is flawed, and with due respect, the Court of Appeals placed unwarranted emphasis on opportune dicta contained therein. Such an extension is contrary to this Court's prior and long-standing rulings, and presents significant real-world consequences. Kegel is also factually distinguishable from the current case.

First, Creech states in its appeal of summary judgment that Kegel concerns a non-compete agreement between a salesperson and a business, implying that it is also in the context of an employee/employer relationship that is akin to the relationship between Creech and Brown, and subject to the special relationship and imbalance of powers consistent therewith. However, the plaintiff in Kegel was actually the purchaser of a business whose prior owners had an existing non-compete agreement with the defendant. The primary issue argued by the parties on appeal was whether that non-compete had been assigned from the prior owner to the purchaser/defendant. Kegel at 911. The defendant was also not the prior owner's employee, rather she was an independent contractor who purchased products from the prior owner to sell to her own customers. Kegel at 909. This relationship is not at all akin to the relationship between Creech and Brown in the instant case, but is more in line with a determination of what rights Kegel actually purchased from the former employer. Kegel at 911. This clarification is important because when the Court of Appeals spoke in that case to the possibility that the trial

court may be able to utilize the "blue pencil test," it did so without considering the differences between non-compete agreements in the context of the sale of business and in the context of an employer-employee relationship, and that issue was not briefed by the parties in Kegel. (Kegel Court of Appeals Briefs, RA 802-834; See **App. Item 7**, hereto).

Perhaps more importantly, the Court of Appeals' discussion in Kegel about potential use of the "blue-pencil test" was extremely limited. It did not constitute a precedential ruling on whether the "blue-pencil test" was now available in the context of employer/employee non-compete agreements, and surely its limited discussion does not present a wide-sweeping change in Kentucky law so liberal that trial courts may now wholly reform (or re-write) employer/employee non-competes that do not even attempt to include a geographic scope. Unlike in the present case, the distinction between modifying covenants not to compete incident to the sale of a business, versus in the context of an employer-employee relationship, was not substantively discussed or briefed therein. This is reflected in this Court's brief discussion of the "blue-pencil rule" in Kegel, the entirety of which follows:

> In addition, our courts have adopted a "blue pencil" rule, whereby we are empowered to reform or amend restrictions in a non-compete clause *if the initial restrictions are overly broad or burdensome*. As stated by this Court in Hammons,[14] supra, at 315 '[w]here the courts have had no difficulty in restricting it to its proper sphere and enforcing it only to that extent." See also Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951).[15]

[14] Hammons involved a non-compete agreement that restricted employment only within 200 miles of the plaintiff's business. The Court of Appeals did not rule in that case that the restriction, which was also extremely limited in terms of the job title, responsibilities, etc. it restricted, that the agreement was necessarily unreasonable or unenforceable on its face. The brief dicta from Hammond that was relied upon in Kegel merely referred to the fact that the plaintiff pled only to restrict the defendant's employment within 200 miles from the location where he actually worked, rather than any real attempt to use a blue-pencil or otherwise reform the agreement. The case is devoid of any lengthy or substantive discussion of such issues, as is Kegel.

[15] As discussed herein above, Ceresia involved a non-compete agreement in the context of the sale of a business, not an employer/employee agreement.

> Accordingly, we believe it appropriate to *remand this matter to the court below for additional findings on the issue of unconscionability, as well as a determination as to what, **if any,** action is appropriate by the court under the "blue pencil' rule".*

Further, unlike the non-compete agreement between Creech and Brown, the non-competition agreement in Kegel was not completely devoid of a geographic scope. Rather it restricted competition as follows:

> upon termination of this contract the Contractor agrees that he/she shall not engage in the business of marketing, selling or taking orders for the purchase of promotional or advertising merchandise *in the territory that the Owner sells merchandise, which is an area of at least three hundred fifty (350) mile radius from the Owner's business address, for five (5) years*."

The provision at issue in Kegel contained the type of divisible offensive provision that may be sticken by applying what is traditionally referred to as the "blue-pencil rule,"[16] as was discussed in more detail herein above. The non-compete provision at issue in the current case is instead, completely devoid of a geographic scope and its language gives no clues regarding what or whether any scope was contemplated by the parties when it was signed. Kegel simply is not authoritative in this case.

Further, regardless of whether the Court of Appeals has abandoned the sound ruling this Court issued in Calhoun, that "contracts in restraint of trade are not enforceable where they are . . . unlimited as to space but limited as to time," that case is still good law and should not be overruled by this Court. Calhoun at 102. Employers currently may not, and should not be allowed to, draft extremely unreasonable and invalid non-compete agreements that are clearly in restraint of trade, exchange those agreements for nothing more than continued employment (or a demotion in Brown's case), knowing that whenever the employment relationship ceases, a trial

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[16] The term "the territory in which the Owner sells merchandise" can be divided from the more specific restraint "350 miles."

court will simply re-write the however it sees fit to ensure its business against competition, no matter the cost to its former employee. That is precisely what Creech has attempted to do, and precisely what the Court of Appeals has tentatively said may be the new law of the Commonwealth. This would be a substantial expansion of trial courts' authority, would overrule long-standing rulings of this Court, and as discussed below, would not be sound public policy.

3. Public Policy Considerations.

Underlying the afore-mentioned legal arguments are substantial public policy issues that warrant consideration. Importantly, the Kentucky legislature has not spoken on the reformation of non-compete agreements, and all recent case law addressing the same in the context of employer-employee agreements comes from the Court of Appeals, which, even in the instant case, has taken inconsistent, in fact adverse, positions. As such, it is still important and appropriate to address relevant public policy concerns herein.

a. Non-Compete Agreements Between Employers and Employees are Unique Agreements Typically Negotiated with Unequal Bargaining Power.

Creech may wish it had utilized legal counsel to craft a more tailored, reasonable, non-compete agreement, rather than pulling one from a book. However, its situation presents no equitable argument sufficient to warrant an overhaul of Kentucky law and a vast expansion of trial courts' authority to re-write non-compete agreements between employers and their employees. While Kentucky law does recognize the validity of reasonable non-compete agreements not in restraint of trade, and while there are obviously legitimate and practical uses therefore, employers are almost always in the best position to assess the appropriate scope of a non-compete agreement with its employee necessary to protect its own business interests.

Employers are also in a superior, if not dominating, position when negotiating the scope of the non-compete agreement. As such, they may, under most circumstances, craft the temporal and geographic scope of the non-compete as they see reasonably fit. Finally, employers are in the best position to know when a revision of the agreement is necessary to account for a business expansion or some change in the circumstances of its business, and are typically in the best position to draft and require that revision.[17]

Further, even considering a legitimate public interest in aiding Kentucky businesses' ability to secure and enforce reasonable non-compete agreements, it is important to realize that for every business that wins by allowing the reformation of a facially invalid non-compete, there is not only an employee who suffers, but there is also another business or businesses (potential subsequent employers) that suffer. This point is often lost in discussion of non-compete agreements. In this case, that business is Standlee, who has now spent four and one-half (4 ½) years litigating whether it could legitimately hire Brown, a hay dispatcher at the time, because he had signed an non-compete agreement that was, on its face and under published Kentucky caselaw, clearly invalid as in restraint of trade.

Importantly, there are also significant public policy considerations relevant to the limited bargaining power most employees have to negotiate a non-compete agreement with a prospective or current employer. This is particularly true of non-technical, un-specialized employees, like

[17] Appellants realize that an employers' position with respect to revising or amending a non-compete agreement may change slightly depending upon whether this Court holds that continued employment alone is sufficient consideration to support an employer-employee non-compete agreement. However, even the requirement of some additional consideration does not present such an obstacle to revising non-competes as to overcome the significant disparity in bargaining power between the employee and his/her employer.

Brown, who employers can often be replaced with one of a pool of other available workers.[18] It is rare, if not unheard of, that such an employee would be given any leeway to actively negotiate the scope of his or her non-compete. The reality is that, except in cases of highly specialized, highly-trained or highly-educated individuals, employees are often compelled to sign whatever non-compete is presented for fear of losing a much needed job. This is particularly true in the current economic climate that has existed throughout this litigation. Thus, the impact that granting trial courts broader authority to reform employer-employee non-competes would have on Kentucky workers is a very valid and important consideration.

The same concerns are not present when the non-compete is entered in the context of the sale of a business, which is a much different type of transaction. In such agreements, not only do buyer and seller have relatively equal bargaining power, but negotiations regarding the scope of the non-compete agreement (which really involves what territory or how much goodwill is being purchased) are accompanied by a reciprocal and theoretically equal negotiation of the purchase price. That is why this Court has correctly and repeatedly recognized this distinction for so many decades.

b. Expanding Trial Courts' Authority to Reform Non-Compete Agreements Between Employers and Employees will Create Unnecessary and Harmful Uncertainty for All Parties Involved.

Authorizing trial courts to use a "blue-pencil" to strike offensive and divisible provisions would create some uncertainty regarding the extent to which an employer will be able to enforce the covenant. Authorizing trial courts to wholly reform non-compete agreements, however, presents a much more tenuous situation in which it becomes difficult, if not impossible, for anyone to assess what employment is restrained. Initial (or former) employers will experience

[18] In fact, Brown was replaced shortly after signing the COI Agreement by Creech's son, who had no known experience or training in hay sales.

increased uncertainty, at the time of hiring, regarding the extent to which its proposed non-compete agreement will be enforced. With respect to subsequent employers, they will likely refuse to hire employees subject to any non-compete that vaguely purports to include its business, regardless of how unreasonable and offensive the restraint on trade. The fear of committing an unintentional violation by hiring an employee for a position or at a location that might be deemed later by a trial court to be within the scope of a "reformed" agreement post-litigation would cause employers to overlook otherwise qualified and viable candidates. The same considerations would cause employees to find it impossible to break free from even the most clearly unreasonable restraints on trade, without engaging first in costly and lengthy litigation, as Brown had been forced to do herein.

c. Expanding Trial Courts' Authority to Reform Non-Compete Agreements Between Employers and Employees will Encourage the Use of Overly Broad Non-Compete Agreements.

In reality and with few exceptions, non-compete agreements between an employer and its employee are not negotiated. Rather, as in the current case, the employer presents an agreement and the employee signs. Often, the employee may not obtain or retain his or her job if he or she refuses to sign the presented agreement, though there is no evidence of threatened termination in this current case. Without the risk that it the non-compete agreement will be invalidated if it is overly broad and unreasonable, there is little to no incentive for an employer to draft a non-compete agreement that is reasonable and tailored in geographic and temporal scope. If trial courts are authorized to use the "blue-pencil" to strike offensive and divisible terms within a non-compete, then, while there will be no real incentive to remove unreasonable or offensive terms, there will at least be some incentive for employers to include some more specific scope within the agreement that more clearly defines its scope. However, trial courts are authorized by

rulings of this Court to reform non-compete agreements at whenever the employment relationship is severed and the agreement litigated, there will remain no incentive whatsoever for an employer to draft and present its employees with anything other than an overly broad and unreasonable restraint on trade. In such cases, the employee is presented with an agreement that purports to restrain him or her from vague and potentially numerous job positions throughout the nation or world, should he or she choose to leave or be fired from his or her current employment. However, the employer then receives what amounts to a free ride on a contractual provision that it is well aware should never be enforced and will never be fully enforced.

Not only could this practice lead to increased and lengthy litigation, but it has real potential to cause substantial harm to Kentucky workers by causing what has been described in other states as an "*in terrorum* effect" The non-compete agreement most harms those employees not aware of the peculiar nature of the covenant. See Rita Personnel Services, Inc. v. Kot, 229 Ga. 314, 191 S.E.2d 79, 81 (Ga. 1972) (*citing* Meissel v. Finley, 198 Va. 577, 95 S.E.2d 186, 188 (Va. 1956)). While the word "terrorize" may have an overly-dramatic connotation, the word may nonetheless best describe the effect that an overly broad covenant not to compete has on an employee who is unaware of the tentative nature of such a broad agreement. For every agreement that makes its way to court to be evaluated, interpreted, edited with a "blue-pencil," or reformed at the whim of a trial court, there are many more that do not. Thus, the broad words of the covenant have an *in terrorem* effect on departing employees, or those who wish to depart to seek better working conditions, better pay, better benefits, or even those who seek or must relocate. Allowing the reformation of a non-compete after the fact permits an "*in terrorem* effect on an employee, who must try to interpret the ambiguous provision to decide whether it is prudent, from a standpoint of possible legal liability, to accept a particular job or whether it

might be necessary to remain unhappily at his current position." See Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 298 S.E.2d 906, 916 (W. Va. 1982) (criticizing the use of overly broad provisions, "where savage covenants are included in employment contracts so that their overbreadth operates, by *in terrorem* effect, to subjugate employees unaware of the tentative nature of such a covenant."); Valley Medical Specialists v. Farber, 171 W. Va. 368, 298 S.E.2d 906, 916 (W. Va. 1982) ("for every agreement that makes its way to court, many more do not" and thus, the words of the non-compete have an i*n terrorem* effect on departing employees because "employers may therefore create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable"); See also Rita Personnel Services v. Kot, 229 Ga. 314, 191 S.E.2d 79, 80 (Ga.1972) (noting that because most non-competes are not litigated, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.).

In addition, the routine use of overly broad non-compete agreements by employers, is likely to encourage and substantially increase litigation, because, in such circumstances, litigation will be the only way to effectively determine the employment from which the employee is actually restricted. The reality is that litigation is likely to increase regardless of how clear the Court of Appeals or this Court articulate the factors that must be considered by trial courts attempting to determine the enforceability of a non-compete agreement between an employer and its employee, and regardless of how much guidance trial courts have to guide them in reforming overly broad non-competes. This litigation is likely to be expensive and lengthy, as it lends itself to significant discovery and the presentation of the facts relevant to the parties' understanding at the time of the non-compete was signed and facts relevant to the scope and reach of the former employer's operations.

II. Brown Did Not Receive Adequate Consideration for the COI Agreement.

Creech also does not dispute -- in his Complaint, in any hearing before this Court, in his Response to Brown's CR 65.07 Motion, in his CR 65.09 Motion, in his Responses to Brown and Standlee's Motions for Summary Judgment (RA 717-748; RA 749-761), or in its appeal of the same – that Brown signed the COI Agreement after being employed by Creech for over sixteen (16) years, or that Brown was not promoted nor received a raise in consideration for signing the COI Agreement. (Affidavit of Charles T. Creech, RA 14-16 at paras. 3 and 4). It has not offered evidence or testimony to the contrary, despite its possession and control of all relevant information. Rather, Creech has consistently argued that Brown's sole consideration for signing the COI Agreement was his continued employment. (Affidavit of Charles T. Creech, RA 14-16, App. Item 3, Exhibit C at para. 4). Finally, Creech has presented no evidence -- by affidavit, testimony, or otherwise -- that Creech provided Brown any training, or specialized knowledge. Creech expressly admits that Brown was at all times employed as a driver, dispatcher or hay salesperson, rather than in any highly-skilled or technical position. (Affidavit of Charles T. Creech, RA 14-16, App. Item. 3, Exhibit C at para. 4). Of course, all evidence of training, specialized knowledge or additional more highly skilled positions or duties are naturally in the possession, control and knowledge of Creech, the employer, and requires no further discovery from Brown. Additional discovery could not provide Creech with any unknown information regarding Brown's position, job responsibilities, pay increases, or training while Creech employed him. In fact, Charles T. Creech, president of Creech, has sworn that Brown entered into the COI Agreement in consideration for keeping his job as a driver, dispatcher and hay salesperson – period. (Affidavit of Charles T. Creech, RA 14-16, App. Item 3, Exhibit C at para. 4).

Throughout this litigation Creech has relied upon Higdon Food Service, Inc., v. Walker, 641 S.W.2d 750 (Ky. 1982) to assert that Brown received adequate consideration for the COI Agreement. Setting aside for a moment, recent criticism of Higdon as noted in in the CTA 8.17.12 Order, Higdon is distinguishable from the current case. In Higdon, this Court actually required that there be something more than mere continued employment to constitute adequate consideration for a covenant not to compete. Id. at 752. In fact, this Court clearly noted that it thought that the employee "did acquire something more [than continued employment]" under the contract. Id. It explained that the additional provisions contained within the same contract also imposed an obligation of "good faith" upon his former employer, so as it could no longer terminate his employment at-will. Id. This is a notable additional benefit to the employee, one that Brown did not likewise receive. It is also important that in Higdon, the employee continued to work in the same position that he worked in when he signed the agreement, for years, before he decided to leave. Id. In contrast, just after signing his noncompetition agreement, Brown was quickly demoted from his sales position to the position of a "dispatcher," making him responsible only for loading hay order for transport to customers. His sales position was filled by Charles T. Creech's son. (RA 230-233, App. Item 1 at para. 15).

This case was ripe for summary judgment in Brown's favor because the COI Agreement was not supported by adequate consideration. Kentucky law does not, and should not, allow continued employee in such an unskilled, non-technical position alone to serve as adequate consideration for an employer/employee non-compete agreement. Some other consideration – training, acquisition of technical skills at the employers expense, cash, some guarantee of employment for a period of time or until given cause for termination, promotion, etc. – even if small, is required. In this case, Creech has presented no evidence (all of which should be within

its knowledge and possession) that Brown received anything other than continued employment, if that. He received no additional training, acquired no technical knowledge, obviously was not promoted, received no raise, and Creech remained free to demote or fire him at-will.

Further, beyond receiving mere continued employment in exchange for signing a very broad restraint of trade, Brown was not even allowed to retain his continued employment in the position he held when he signed the agreement. Thus, the instant case is distinguishable from Higdon. Finally, the application of Higdon to this case, or the interpretation of Hidgon as license for employers to offer nothing but continued employment in any type of position in exchange for signing non-compete agreements is harsh. Such a holding would serve only to encourage employers to negotiate non-competes long after an employee is hired, relocates, commits to their company, and/or builds a career therein, rather than negotiating the same at the time of hire, when the employee may actually retain some bargaining power.

III. The Court of Appeals Erred in Reversing, in part, the Trial Court's Order Granting Summary Judgment.

For the reasons set forth above, the Fayette Circuit Court properly granted Brown and Standlee summary judgment on all claims filed herein against it. The Court of Appeals erred in reversing, in part, the same. The Circuit Court did not merely rule that summary judgment was appropriate because the Court of Appeals deemed an injunction unwarranted. Instead its ruling was based upon sound and clear rulings of law set forth in the CTA 65.07 Order, holding that the COI Agreement was invalid and unenforceable, and thus, that Creech has no right which had been, or could be, harmed by Brown. (RA 244-251, App. Item. 10; RA 388-395, App. Item 11). These rulings, which were squarely before the Court of Appeals during its initial consideration of

the factors set forth in Maupin v. Stansbury, 575 S.W.2d 695, 698 (Ky. App. 1978),[19] along with the arguments set forth in Brown and Standlee's Motions for Summary Judgment related to whether the COI Agreement was valid, provided a sound basis for the Circuit Court's grant of summary judgment. Appellants arguments were extensively briefed for the Circuit Court, and despite Creech's insistence, went well beyond a mere assertion that the CTA 65.07 was dispositive. (RA 717-748; RA 783-834). Creech was afforded ample opportunity to respond in writing and at an oral hearing. (RA 749-780; RA 835). The Circuit Court agreed with the points of law set forth in the CTA 65.07 Order, argued in the Appellants' Motions for Summary Judgment, and set forth in detail herein, and correctly ruled that with no valid agreement existed, Creech's claims necessarily fail.

CONCLUSION

For the reasons set forth above, the non-complete agreement between former employer, Creech, and its former employee, Brown, is unreasonably broad, invalid and unenforceable, and may not be reformed. Thus, this Court should reverse the Court of Appeals rulings related to Creech's claims for breach of the non-competition provisions, and the Order of the Fayette Circuit Court granting summary judgment in favor of Appellants, Donald E. Brown and Standlee Hay Company, Incorporated, should be reinstated as effective on day on which it was originally entered.

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[19] See Maupin at 698 ("In order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right. While the nature of this right may be, and usually is, disputed, it is clear that some substantial claim to a personal right must be alleged"). Maupin is the pivotal case which sets forth the requirements for a temporary injunction, which includes that: (1) there is a "concrete personal right" to be protected; (2) this right will be immediately and irreparably impaired; (3) that equities weigh in favor of issuing an injunction; and that consequently (4) there remains a substantial question on the merits. Maupin at 698-99.

Copies of the Circuit Court Order granting summary judgment and the Court of Appeals Order, affirming in part and reversing in part, from which this appeal follows, are attached hereto at **App. Items 6 and 8**, respectively.

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