

1990

Kasco Services Corporation v. Larry D. Benson and Connie A. Benson dba Tri-B-Supply : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

900260

IN THE UTAH SUPREME COURT

KASCO SERVICES CORPORATION,)	
)	
Plaintiff-Appellant,)	
)	Case No. 900260
vs.)	
)	
LARRY D. BENSON and)	Priority No. 11
CONNIE A. BENSON dba)	
TRI-B-SUPPLY,)	
)	
Defendant-Appellee,)	
)	

BRIEF OF APPELLANT KASCO SERVICES CORPORATION

On Interlocutory Appeal from the
Third Judicial District Court of Salt Lake County
Honorable David S. Young, District Judge

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FILED

OCT 10 1990

Clerk, Supreme Court, Utah

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LIST OF ALL PARTIES

The following are all the parties to these proceedings:

1. Plaintiff/Appellant:
 - a. Kasco Services Corporation.
2. Defendant/Appellees:
 - a. Larry D. Benson, dba Tri-B-Supply
 - b. Connie Benson, dba Tri-B-Supply
3. Robert Benson, dba Tri-B-Supply.

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STATUTES AND RULES

Utah Code Ann. §78-2-2(3)(j)

Rule 5, Utah Rules of Appellate Procedure

IN THE UTAH SUPREME COURT

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Defendant-Appellee,)	
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BRIEF OF APPELLANT KASCO SERVICES CORPORATION

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j); Rule 5 Utah Rules of Appellate Procedure. The Utah Supreme Court granted this interlocutory appeal on July 17, 1990. (R. 947).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Did the district court abuse its discretion by refusing to extend the preliminary injunction against Larry Benson for 18 months following termination of his employment with Kasco as the parties agreed, and not merely for 12 months as the district court ordered?

"' [T]he granting or refusing of injunction rests to some extent within the sound discretion of the trial court, and its judgment . . . will not be disturbed on

appeal unless it can be said the court abused its discretion, or that the judgment rendered is clearly against the weight of the evidence.' " System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983), quoting Johnson v. Ward, 541 P.2d 182, 188 (Okla. 1975). The trial court's discretion must have been exercised consistently with sound equitable principles, "taking into account all the facts and circumstances of the case." System Concepts, 669 P.2d at 425.

2. Did the district court abuse its discretion by refusing to enjoin Connie Benson and Robert Benson (who were not parties to Larry Benson's employment agreement with Kasco) from exploiting Larry Benson's contract breaches?

The standard of review for the grant or refusal of injunctive relief identified for issue 1 above also applies to Issue 2. To the extent the district court concluded that privity of contract is a prerequisite to injunctive relief against Connie and Robert Benson, the court's holding is a legal conclusion reviewed de novo. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)("[W]e accord conclusions of law no particular deference but review them for correctness"). See also Las Vegas Novelty, Inc., v. Fernandez, 787 P.2d 772, 774 (1990)(whether strangers to

non-competition covenant may be enjoined was decided as "a matter of law").

3. Is Kasco entitled to prospective injunctive relief against Bensons and Tri-B-Supply even though the 18-month post-employment provisions have expired during the pendency of this appeal?

This issue was not ruled upon by the district court but is a legal issue of first impression in Utah which arose during the pendency of this appeal.¹

4. Did the district court abuse its discretion by refusing leave to amend Kasco's Verified Complaint to add Robert Benson as a defendant and to add claims against Larry and Connie Benson?

A trial court's refusal of leave to amend pleadings is reviewed for abuse of discretion. Kelly v. Utah Power & Light, 746 P.2d 1189, 1190 (Utah App. 1987).

¹ This issue was not specifically raised in Kasco's Petition for Interlocutory Appeal (R. 948) but was identified as a necessary issue during proceedings concerning Kasco's Motion for Injunction Pending Disposition of Petition under Rule 5 and Pending Appeal. This Motion was argued before the Utah Supreme Court on August 13, 1990.

DETERMINATIVE CONSTITUTIONAL OR STATUTORY
PROVISIONS OR RULES

There are no constitutional or statutory provisions or ordinances or rules whose interpretation is deemed determinative in this action.

STATEMENT OF THE CASE

1. Nature of the Case

This is an interlocutory appeal from the district court's denial of injunctive relief against Larry D. Benson, Connie Benson and Robert Benson. Kasco commenced this action for injunctive relief and damages based upon contractual covenants against post-employment competition entered into by Larry D. Benson.

2. Course of Proceedings and Trial Court Disposition

On March 17, 1989, Kasco filed a verified complaint against Larry Benson, his wife Connie Benson, and Tri-B-Supply, seeking injunctive relief and damages (R. 2). On the same date, the district court entered a temporary restraining order against the defendants. (R. 85). On March 21, 1989, following a hearing, the district court granted a preliminary injunction against Larry Benson. (R. 126, R. 973, pp. 5-11). The district court signed an order of preliminary injunction on April 10, 1989.

(R. 139). Subsequently, Kasco filed the following motions: (1) Motion for Preliminary Injunction Against Connie Benson and Order to Show Cause Why Connie Benson Should Not Be Held in Contempt of Court, dated April 7, 1989 (R. 156); (2) Motion for Leave to Amend Complaint (naming Robert Benson, Larry's son, as a defendant and modifying Kasco's claims), dated August 24, 1989, (R. 353); (3) Motion for Preliminary Injunction Against Robert Benson, dated January 5, 1990, (R. 461); and (4) Motion for Modification of the Court's April 7, 1989, Order of Preliminary Injunction, dated January 17, 1990. (R. 846). The district court denied Kasco's motions without findings of fact or conclusions of law. (R. 942).

Kasco filed its Petition for Permission to Appeal Interlocutory Order on May 29, 1990. (R. 948). This Court granted interlocutory appeal to Kasco on July 17, 1990, (R. 947) and on August 14, 1990, it granted Kasco's Motion for Injunction Pending Disposition of Petition Under Rule 5 and Pending Appeal filed on June 20, 1990. (Addendum M).

STATEMENT OF FACTS

1. Introduction

This is an employment case involving contractual covenants against post-employment competition. The action is based upon an employment agreement that defendant Larry

Benson entered into with Kasco.² The Agreement contains post-employment restrictions which the district court found reasonable and enforceable. (R. 973, pp. 5-6). The district court enjoined Larry Benson from undertaking a business--Tri-B-Supply--which competes with Kasco in violation of the Agreement. (R. 139). However, the district court shortened the length of the injunction from eighteen months (the period specified in the Agreement) to twelve months from the date of Mr. Benson's resignation. (R. 973, p. 7; Addendum A ¶ 4.3). The district court refused to enjoin Connie and Robert Benson (Larry Benson's wife and son) who continued the competing business after Larry Benson was enjoined. (R. 834).

2. Larry Benson's Employment with Kasco

Kasco is engaged in the business of selling, renting and regularly servicing products throughout the United States which are used in the meat-cutting trade (the "butcher supply business"). (R. 41 ¶ 4). Examples of products it sells or rents include chopper plates or knives,

²Kasco is the successor-in-interest to Keene Corporation which entered into the employment agreement with Mr. Benson on August 2, 1982 (the "Agreement"), attached as Addendum A. The rights and obligations under the Agreement were assigned to Kasco as Mr. Benson agreed. (Addendum A, ¶ 8.1). Keene and Kasco are collectively referred to here as "Kasco."

saw blades, seasonings, cutlery, butcher supplies, and retail grocery market case decorations. (R. 41 ¶ 4).

In approximately February 1977, Kasco hired Larry Benson and assigned him to Kasco's Utah territory which comprises the State of Utah and parts of Idaho and Wyoming. (R. 41 ¶¶ 5, 6; R. 117). Kasco provided Larry Benson with classroom and on-the-job training. (R. 41 ¶ 6; Addendum B, pp. 43, 57-58).³ As part of Kasco's sales operations, Mr. Benson was trained to develop and foster close, on-going relationships with Kasco's customers and to visit them regularly (no fewer than three times per year) to provide Kasco's services. (R. 41 ¶ 6). This sales method allowed Mr. Benson, as Kasco's agent, to develop and nurture a unique, hard-earned familiarity with Kasco's customers that "cannot be replaced without much time and effort." (R. 41-42 ¶ 6).

On August 2, 1982, Larry Benson entered into the employment agreement at issue here. Larry Benson agreed that "for a period of eighteen months immediately following the termination of his employment" with Kasco, he would not:

(i) call upon any Keene Customer for the purpose of soliciting, selling, renting and/or servicing Butcher Products,

³Addendum B contains pertinent pages of Larry Benson's deposition transcript.

(ii) directly or indirectly, solicit, divert, take away or attempt to take away any Keene Customer, or the business or patronage of any such customer for Butcher Products, or

(iii) directly or indirectly, engage in any manner in the business of the sale, rental or servicing of Butcher Products in any geographic territory in which [Larry Benson] had called upon Keene Customers during the period of his employment with Keene

Addendum A, ¶ 4.3.) The Agreement also prohibited Larry Benson from using or disclosing Confidential Information. (Addendum A, ¶¶ 1.1(c), 3, 4.4). Mr. Benson was given confidential customer and pricing lists and was entrusted with pre-existing customers. (R. 41-43 ¶¶ 6, 11; R. 99 ¶¶ 10-11).

Larry Benson and Kasco agreed that the provisions of the Agreement could not be "modified or supplemented in any respect, except by a subsequent written agreement. . . ." (Addendum A, ¶ 10). It is uncontested that Larry Benson and Kasco have not entered into a subsequent written agreement affecting terms of the 1982 Agreement. Larry Benson acknowledged in the Agreement that were he to breach the post-employment provisions, Kasco would be irreparably injured and entitled to enjoin any such breach. (Addendum A, ¶¶ 4.1, 6.1).

It took Larry Benson "a couple" of service calls before customers would begin developing trust in his abilities. (Addendum B, pp. 83-84). However, Mr. Benson utilized Kasco's sales methods successfully and developed a unique, hard-earned familiarity and acceptance with Kasco's customers that cannot be replaced without much time and effort. (R. 42 ¶ 6). Because of Larry Benson's favored status with Kasco, he had direct access to Kasco's executive officers. (R. 41 ¶ 6).

In the summer of 1988, following the merger leading to Kasco's incorporation (R. 40-41 ¶ 3), employment contracts were distributed to Kasco's employees including Larry Benson to ensure that all territory managers had employment agreements. (R. 921). At that time, Kasco acknowledged that similar agreements were already in effect with Keene (the predecessor company employing Larry Benson). (R. 921). Kasco stated that the preexisting agreements were expressly "restated for the record." (R. 921). Under Larry Benson's Agreement, the parties' rights and obligations "bind and inure to the benefit of any successor or successors of Keene . . . by merger" (R. 98 ¶ 7); (Addendum A ¶ 8.1). Larry Benson did not execute the 1988 contract. (R. 62-63, ¶ 3). Larry Benson alleges that he advised Kasco personnel in August 1988 that he considered

the non-competition provisions of the 1982 Agreement he entered "null and void." (R. 916-17 ¶ 8).

3. Tri-B-Supply

During 1988, before leaving Kasco, Larry Benson began telling Kasco customers that he planned to quit his job with Kasco and start his own business. (Addendum C, pp. 18, 28; Addendum D, pp. 24-26).⁴ In January 1989, Larry Benson and Connie Benson orally agreed that Larry Benson would undertake his own butcher supply business with Connie's help as Tri-B-Supply. (Addendum E, pp. 24-25).⁵ They agreed that as Tri-B-Supply, Larry would conduct a butcher supply business with Connie doing its bookkeeping and secretarial work. (Addendum E, pp. 24-25). Connie would simultaneously conduct a ceramic's business. (Addendum E, pp. 24-25).

Larry Benson was aware of the non-competition provisions of his Agreement with Kasco and discussed them with an attorney. (Addendum E, p. 75). Connie Benson was also aware of the non-competition Agreement and Larry Benson's visit with an attorney. (Addendum E, p. 75).

⁴Addendum C and D contain pertinent pages of deposition transcript for former Kasco customers Craig Smart and F. Scott Doxey respectively.

⁵Addendum E contains pertinent pages of Connie Benson's deposition transcript.

In February 1989, while still Kasco's employee, Larry Benson began purchasing his own equipment and inventory to be used in Tri-B-Supply's butcher supply business. (Addendum E, pp. 191-92, 241-48; Addendum B, pp. 149-51, 183). Larry Benson also began establishing distributor relationships with other suppliers and conducting sales to Kasco customers using Tri-B-Supply's invoice. (Addendum B, pp. 234-238; Addendum C, pp. 26-28). On February 1, 1989, Larry Benson personally delivered a butcher supply product to a then-Kasco customer, Craig Smart of Mountain West Meats, using a Tri-B-Supply invoice. (Addendum C, pp. 7, 21-28).

Larry and Connie Benson obtained a \$30,000 loan using their jointly-owned residence as security to finance the purchase of inventory and equipment for their butcher supply business. (Addendum E, pp. 193-196; Addendum B, pp. 170-74, 249-52). Larry and Connie Benson also used jointly-held personal savings and \$9,000 from stock that Larry Benson owned separately. (Addendum E, pp. 193-96; Addendum B, pp. 170-74, 249-52).

On February 15, 1989, Mr. Benson provided written notice to Kasco that he would resign effective March 1, 1989. (R. 23). A Tri-B-Supply letter dated March 10, 1989, was sent to Kasco's customers informing them that Mr. Benson

was operating a butcher supply business with Connie Benson under the name Tri-B-Supply. (Addendum F).⁶ The letter bore both Larry and Connie Benson's names and announced that "we have started our own business, in butcher supplies" (Addendum F)(emphasis supplied). The Tri-B-Supply letter thanked its recipients "for your support in the past", promising "more frequent service" and "less expensive service in the future." (Addendum F)(emphasis supplied).

Many Kasco customers who received this letter immediately requested that Kasco remove its equipment because they were giving their business to Larry and Connie Benson's new business, Tri-B-Supply. (R. 42-43, ¶¶ 8, 10; R. 96-97, ¶¶ 2-4; R. 146-149, ¶¶ 2-13). Connie Benson testified that every customer Tri-B-Supply had acquired was a former Kasco customer to whom Tri-B-Supply's March 10, 1989, letter was mailed. (Addendum E, pp. 41-44).

On March 17, 1989, after Kasco discovered that Larry Benson had begun competing against Kasco and diverting Kasco's customers to Tri-B-Supply, Kasco filed a Verified Complaint against Larry Benson, Connie Benson and Tri-B-Supply. (R. 2). The district court entered a temporary restraining order against the defendants on the

⁶Addendum F is a copy of the March 10, 1989, letter.

same date. (R. 85). On March 21, 1989, following a hearing, the district court entered a preliminary injunction order against Larry Benson. (R. 139). The district court expressly found that Larry Benson's employment Agreement was supported by consideration, that the post-employment covenant was necessary to protect Kasco's goodwill and business, that the non-competition restrictions were reasonable as to time and area and that it was not executed in bad faith. (R. 973, p. 6). The district court did not enjoin Connie Benson. (R. 973, pp. 7-9).⁷

After Larry Benson was enjoined, Kasco learned that Connie Benson had taken steps to continue Tri-B-Supply's butcher supply business with Robert Benson, Larry Benson's son. (R. 834). Connie and Robert Benson used the money Larry Benson invested in Tri-B-Supply. (Addendum E, pp. 267-68; Addendum B, pp. 193-95; Addendum G, pp. 54-57). Robert Benson did not pay any amount to obtain an interest in Tri-B-Supply, nor was Larry Benson compensated for his interest and investment in Tri-B-Supply. (Addendum E, pp. 18-21, 91-92, 190; Addendum G, pp. 28, 73-74, 143).

Connie and Robert Benson approached Kasco's customers to divert their business to Tri-B-Supply.

⁷ This decision is discussed fully in Argument point 2 infra.

(R. 834). Every customer they approached knew Larry Benson. (Addendum E, pp. 152, 165). Connie and Robert Benson introduced themselves as Larry Benson's wife and son. (Addendum G, p. 101). They were always greeted openly after they informed the customer who they were. (Addendum E, p. 146). Connie and Robert Benson told Kasco's customers that because Larry Benson was restrained by the District Court, business with Tri-B-Supply could be conducted through them. (Addendum E, pp. 149-50, 154, 156; Addendum G, pp. 94, 100-02; R. 834). Connie and Robert Benson either expressly told Kasco's customers or left them with the impression that Mr. Benson would be involved again with Tri-B-Supply when the year was over. (Addendum E, p. 156; Addendum G, pp. 122-123).

Connie Benson described how she and Robert used the customer relationships Larry Benson nurtured as Kasco's agent:

- A. And these customers love Larry -- if Larry's not there, they love us and they will accept what they've done to Larry but they still want us. And the service is there, we are here locally, we can get our equipment, and they want to be treated as a person. They don't want to be a number any more.
- Q. They want to be treated the way Larry's been treating them?

- A. That's right. And they say as long as you treat me the way Larry has done in the past, we will be with you.

(Addendum E, p. 97).

Kasco's customers testified that they left Kasco to do business with Tri-B-Supply because of their association with Larry Benson whom they had grown to trust as Kasco's agent:

a. F. Scott Doxey of Champion Meats, Inc., did business with Kasco because of his familiarity with Larry Benson. (Addendum D, p. 10). Mr. Doxey received a letter from Tri-B-Supply bearing Mr. Benson's name which indicated that Larry and Connie Benson wanted to continue service; not as Kasco, but as Tri-B-Supply. (Addendum D, p. 22). Mr. Doxey decided to give his business to Tri-B-Supply because of Mr. Benson's "past service and reputation." (Addendum D, p. 28).

b. Leland Child of Child's Custom Meat Cutting met Mr. Benson for the first time when Mr. Benson was being trained by Ed Mason, Larry Benson's Kasco predecessor in the Utah territory. (Addendum H, pp. 7, 10, 17). After receiving Tri-B-Supply's letter announcing the Bensons' own business, Mr. Child advised Kasco that "I've been with Larry Benson for a long time and Larry's been good to me and he's starting out on his own now . . . I think

I'll just stay with him." (Addendum H, p. 18). Mr. Child stated: "I decided to stay with [Tri-B-Supply] because of the good service I got from Larry." (Addendum H, p. 27).

c. Randall Heath, meat manager for Bowman's Market, did business with Kasco through Larry Benson. (Addendum I, p. 13). Connie Benson of Tri-B-Supply contacted Mr. Heath in early April and said she wanted to talk to him before he had his "next scheduled delivery from Kasco." (Addendum I, pp. 25-27). Connie and Robert Benson met Mr. Heath on April 5, 1989, and advised him that a Kasco representative would be stopping by. (Addendum I, pp. 36-37). Mr. Heath gathered his Kasco equipment and returned it to the Kasco representative who appeared later that day or shortly thereafter. (Addendum I, pp. 36-37). Mr. Heath explained to his supervisor that he changed from Kasco to Tri-B-Supply because he knew Mr. Benson and Tri-B-Supply was "his family's company" and the service would be the same. (Addendum I, p. 30).

d. Craig Smart of Mountain West Meats gave his business to Kasco because he was familiar with Mr. Benson even though other companies also solicited his business. (Addendum C, pp. 7, 10-14). Mr. Smart testified that he believed Tri-B-Supply was Mr. Benson's own business. (Addendum C, p. 28). Mr. Smart advised Kasco he would no

not require privity of contract and because Bensons did not oppose Kasco's other proposed changes to its complaint, the district court abused its discretion by not freely granting leave to amend.

ARGUMENT

1. Larry Benson Should Be Enjoined For A Total Of 18 Months Following His Resignation

Larry Benson agreed to observe the terms of his post-employment covenants "for eighteen months immediately following termination of his employment." (Addendum A ¶ 4.3). The district court expressly found these provisions "reasonable" and enforceable. (R. 973, p. 6). Yet, the district court varied these terms and reduced the injunction period to twelve months following Larry Benson's termination. (R. 973, p. 7). We will show that the district court's alteration of the Agreement's post-employment provisions was improper. First, however, we will show that the district court correctly decided that the Agreement was enforceable.

a. Larry Benson's Non-Competition Agreement is Enforceable

In System Concepts, Inc. v. Dixon, 669 P.2d 421 (1983), this Court outlined the requirements for injunctive relief in cases where, as here, post-employment

non-competition covenants are involved. First, there must be apparent entitlement to injunctive relief. Id. at 425. Entitlement is shown when the restrictive covenant is (1) supported by consideration; (2) negotiated in good faith; (3) necessary to protect the goodwill of the business; and (4) reasonably restricted as to time and space. Id. at 425-26, citing Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823, 828 (1951). The employee must also be "special, unique or extraordinary." 669 P.2d at 426.

Second, great or irreparable harm must result if injunctive relief is not granted. 669 P.2d at 425. This element is met if the harm is "likely or threatened"; actual harm need not be established. Id. at 428. Third, the activity in question tends to render a final judgment ineffectual. Id. at 425, 428-29. Kasco satisfied these elements as the district court found. (R. 973, p. 6).

(i) Entitlement

Under the Agreement, Larry Benson's covenants were given "in consideration for [Kasco] employing [Larry Benson]". (Addendum A, p. 1). Such an "offer of continued employment" provides abundant consideration for the Agreement. (R. 973, p. 6). See System Concepts, 669 P.2d at 426; Allen, 120 Utah at 610-614, 237 P.2d at 824-26 ("continuing contract of employment" was consideration for

employee's non-competition covenant in the agreement entered after the employee began work). Further, Kasco showed that Mr. Benson was special, unique or extraordinary because he, like the employee enjoined in Allen, was responsible for creating and nurturing "the goodwill and business to which it attaches . . . in an area where his personal reputation will detach the old customers from [Kasco's] business." 237 P.2d at 827. Larry Benson was responsible for sales and service through Kasco's Utah territory and made regular visits to Kasco's customers. (R. 41-42, ¶ 6). Mr. Benson successfully nurtured and developed close, on-going relationships with Kasco's customers and potential customers. (R. 41-42, ¶ 6; Addendum B p. 163). Plainly, Mr. Benson was not a mere "salesman" as Bensons contend. Compare Allen, 120 Utah at 610-11, 616-19, 237 P.2d at 824, 827-28 (court enjoined employee who was responsible for creating the employer's goodwill and who dealt with "many friends and neighbors who patronized the store" because of the close relationship he developed with the customers"), and Robbins v. Finlay, 645 P.2d 623, 627-28 (Utah 1982) (hearing aid salesman not enjoined because nothing indicated "that [he] was largely responsible for plaintiff's goodwill", unlike the employee enjoined in Allen).

These same reasons establish that Larry Benson's non-competition Agreement is necessary to protect Kasco's goodwill. This Court has explained that:

"[A] covenant not to compete is necessary for the protection of the goodwill of the business when it is shown that although the employee learns no trade secrets, he may likely draw away customers from his former employer, if he were permitted to compete nearby."

System Concepts, 669 P.2d at 426, citing Allen, 237 P.2d at 827-28. Accordingly, the district court held that Larry Benson's non-competition covenant was necessary to protect Kasco's goodwill and business. (R. 973, p. 6).

The district court also recognized that Larry Benson's non-competition covenant was reasonably restricted as to time and area. (R. 973 p. 6). Mr. Benson agreed not to compete with Kasco within the area where he had called upon Kasco customers. (Addendum A, ¶ 4.3). This limitation would endure for a period of 18 months beginning "immediately following termination of his employment". (Addendum A ¶ 4.3). These restrictions are not only reasonable, but conservative. See System Concepts, 669 P.2d at 427 (the Court enforced a two-year non-competition agreement containing no geographic limitation); Allen, 120 Utah at 618-19, 237 P.2d at 828 (the Court enforced a

five-year non-competition agreement involving a two mile radius of the employer's business).

(ii) Irreparable Harm

As we have shown, Bensons have misappropriated Kasco's goodwill which Larry Benson nurtured and developed as Kasco's agent. (See pages 10-17 supra). Like the plaintiff is System Concepts, Kasco established that it has been--and is being--irreparably harmed because "the damages that may result from misappropriation of confidential information and goodwill ' could be estimated only by conjecture and not by any accurate standard.' " 669 P.2d at 428, citing Columbia College of Music & School of Dramatic Art v. Tunberg, 64 Wash. 19, 116 P. 280, 282 (1911).

(iii) A Final Judgment Would Be Ineffectual

Because it is inherently difficult to restore the benefits of a business' goodwill to its owner after the goodwill has been misappropriated, a final judgment is rendered ineffectual in cases such as this. See System Concepts, 669 P.2d at 429 (final judgment would be ineffectual because it "would not be able to effectively restore to [the plaintiff] the benefits of its goodwill attached to the defendant").

The district court correctly found "each of those requirements met in this contract" and enjoined Larry

Benson. (R. 973, p. 6). This decision was correct and not an abuse of discretion. See System Concepts, 669 P.2d at 425-29.

b. The District Court Abused Its Discretion By Varying the Agreement's Terms

Inconsistently, the district court found that the Agreement was "reasonable" and enforceable, and yet varied the Agreement's terms. (R. 973, p. 6). Instead of enjoining Larry Benson for 18 months beginning "immediately following termination of his employment" (March 1, 1989, (R. 23)) as the parties agreed, the district court ordered the injunction period to begin in August 1988 when Larry Benson failed to sign a second employment agreement while still Kasco's employee. The district court reasoned as follows:

The preliminary injunction will be granted to expire 18 months from August, 1988, because I believe at that time the company was on notice that Mr. Benson did not wish to retain any restrictive covenants in his employment, thereafter, the company would be willing to either -- required to terminate him or deal otherwise with him. At that point the restrictive covenant would be terminated as to its application to Mr. Benson except for 18 months thereafter.

(R. 973, p. 7). This holding is incorrect for two reasons.

First, in deciding to apply retroactively the Agreement's post-employment provisions, the district court erroneously concluded that Larry Benson breached the

Agreement by not signing another agreement in 1988 and/or by allegedly telling Kasco personnel that he did not wish to be bound by the post-employment provisions of his earlier contract. (R. 973, p. 7). However, even assuming that Kasco had the "notice" described by the district court, the validity and enforceability of Larry Benson's Agreement did not "terminate".

Larry Benson's duty to perform (and concomitant ability to breach) his non-competition covenant did not arise until "immediately following termination of his employment", not before. (Addendum A, ¶¶ 4.2-4.6). Larry Benson had not terminated his employment as of August 1988, and there is no evidence that he was competing against Kasco at that time. Thus, his conduct and alleged remarks were neither a breach of his non-competition Agreement nor a basis to excuse him from its obligations. Further, his failure to sign another agreement in 1988 did not breach the 1982 Agreement because the Agreement did not require Larry Benson to enter into another agreement. (Addendum A).

Second, Larry Benson cannot avoid his contract obligations simply by expressing disapproval of contract terms after entering into the Agreement, contrary to the district court's apparent holding. See Siler v. Read Investment Co., 273 Wis. 255, 77 N.W.2d 504, 509 (1956) ("It

must be borne in mind that the office of judicial construction is not to make a contract conform to the wishes of a party manifesting itself after the agreement has been made, but to determine what was agreed and set forth in the instrument itself"). This Court has observed that "the court is powerless to relieve a party from the affects of his [non-competition] contract" that is reasonably necessary to protect the covenantee's business and is not rescindable upon equitable grounds. Allen, 120 Utah at 614, 237 P.2d at 826. As already noted, the district court correctly found the Agreement was necessary and reasonable and it identified no basis for rescision.

In summary, because Larry Benson's refusal to sign another contract and his alleged remarks were not a breach, Kasco's alleged awareness of his conduct did not justify any "enforcement" measures or warrant retroactive application of post-employment provisions. Thus, Larry Benson should be enjoined for eighteen months (not just twelve) following his termination, as the parties agreed. (Addendum A ¶ 4.3).

2. Connie and Robert Benson Should Be Enjoined From Exploiting Larry Benson's Contract Breaches

Although the district court properly found all necessary elements to enjoin Larry Benson, it incorrectly refused to enjoin Connie and Robert Benson who aided and

assisted Larry Benson in violating his Agreement or who exploited Larry Benson's breaches. The district court made no specific findings of fact or conclusions of law (R. 942), but apparently denied injunctive relief because it believed that a direct contract with Kasco was a prerequisite to an injunction:

JUDGE YOUNG: . . . AND YOU [KASCO] FUNDAMENTALLY HAVE NO RIGHT TO ENFORCE ANYTHING AS TO MRS. BENSON IN RELATION TO THIS AGREEMENT

. . . .

MR. RICHMAN: YES, YOUR HONOR. I WOULD ASSUME THAT THIS COURT'S ORDER IS NOT PRECLUDING US FROM SEEKING A PERMANENT INJUNCTION AGAINST MRS. BENSON AT A LATER TIME, JUST A DENIAL AT THIS TIME.

JUDGE YOUNG: WELL, I DON'T SEE THAT I HAVE ANY BASIS FOR HAVING JURISDICTION OVER HER IN RELATION TO A CONTRACT AT ALL.

(R. 973, pp. 7, 9).

Whether a non-contracting third party may be enjoined from aiding or inducing a covenanting party to violate his/her non-competition covenants or from exploiting a covenantor's breaches is a question of first impression in Utah. In other states, "the rule that a stranger to a [non-competition] covenant may be enjoined from aiding and assisting the covenantor in violating his covenant is supported by an overwhelming weight of authority." McCart v. H&R Block Inc., 470 N.E.2d 756, 760 (Ind. Ct. App. 1984),

quoting West Shore Restaurant Corp. v. Turk, 101 So. 2d 123, 129 (Fla. 1958).

For example, the court in Chemical Fireproofing Corp. v. Bronska, 542 S.W.2d 74, 80 (Mo. App. 1976), affirmed an injunction against the signatory to a non-competition agreement and his non-signing wife and corporation. The former employee, like Mr. Benson, formed a competing business before leaving his employment. Id. at 77. The non-signing spouse, like Connie Benson, performed paper work for the competing company. Id. at 80. (Addendum E, pp. 24-25). The Bronska court found the wife's opposition to injunction "devoid of merit" based upon her involvement with her husband. Id. at 80. The court stated that "[u]nder these circumstances it is reasonable to enjoin a stranger to a covenant from aiding or assisting the covenantor in violating his contract or receiving any benefits therefrom." Id.

The court in McCart v. H&R Block, Inc., 470 N.E.2d 756 (App. Ind. 1984) enjoined the spouse of a party to a non-competition agreement where the couple "'treated the operation as their joint business . . . and held themselves out to the public that way.'" Id. at 762 (quoting favorably from trial court findings). The court stated that under case authority, it is unnecessary to show a spouse's

signature on a non-competition agreement before enjoining the spouse from assisting the breach of the agreement by the signing spouse. Id. Similarly, the court in Arwell Division of Orkin Exterminating Co. v. Kendrick, 131 Ill.

App. 2d 632, 267 N.E.2d 352 (1971) noted that:

[w]e know of no rule of law which holds that appellant merely because she was not a party to the employment agreement may thereby avoid the consequences of her conduct designed to aid in the violation thereof nor does appellant cite any cases to support this position.

267 N.E.2d at 354. The court also stated that if the covenant is enforceable against signatory spouse, "then equitable considerations authorized or required injunctive relief against [the non-signing spouse] in order to make the injunction against [the signatory spouse] effective." Id. The court concluded that in conducting the couple's business, the non-signing spouse perpetuated a "thinly veiled subterfuge designed to avoid her husband's obligation under the contract." Id. See also Madison v. LaSene, 44 Wash. 2d 546, 268 P.2d 1006, 1013 (Wash. 1954)(son prohibited from competing under father's name and his own name because of the competitive advantage he had obtained from his father's previous violation of a restrictive covenant while using that name).

These authorities mandate injunctive relief against third parties such as Connie Benson because she aided and induced Larry Benson to breach his Agreement. Connie Benson conspired with Larry Benson to start and operate Tri-B-Supply's butcher supply business, contrary to Larry Benson's Agreement. (Addendum E, pp. 24-25, 54). Connie Benson was aware of Larry Benson's Agreement and that Larry had discussed its provisions with an attorney. (Addendum E, p. 75). Connie's knowing participation with Larry Benson in breaching his Agreement constitutes inducement to violate the Agreement (McCart, 470 N.E.2d at 761), and "[a] party who induces another to violate his [non-competition] contract may be restrained from such conduct." Id.

Further, Connie and Robert Benson should be enjoined from exploiting Larry Benson's contract breaches through their business association with him. Before Larry Benson was enjoined, Tri-B-Supply's March 10, 1989, letter was sent to Kasco's customers, announcing the association of Larry Benson and Connie Benson in "our own business, in butcher supplies." (Addendum F). Larry Benson invested money, bought inventory, established distributor relationships, and actually did business as "Tri-B-Supply". (Addendum B, pp. 149-51, 183; Addendum C, pp. 26-28). In

the minds of some of Kasco's former customers, Tri-B-Supply was Larry Benson's business even after he was enjoined. (Addendum D, p. 28). Neither Connie nor Robert Benson have contended that they had any butcher supply experience before they took over Tri-B-Supply. (Addendum G, pp. 31-32). Yet, Connie and Robert Benson have successfully exploited their business association with Larry Benson and Tri-B-Supply and admit that they are warmly received when customers learn they are Larry's wife and son. (Addendum E, p. 146). This, and this alone, is why Connie and Robert Benson, without prior experience, have diverted so many of Kasco's customers to their business. (Addendum J). This is also why Bensons should be enjoined. See Alexander & Alexander, Inc., v. Danahy, 21 Mass. App. Ct. 488, 488 N.E.2d 22, 31 (1986)(injunction was necessary to prevent third parties "from obtaining benefits from [the covenantor's] violation of the non-competition covenants" where the covenantor was closely identified with the third party in the "mind of the public"); Ingredient Technology Corp. v. Nay, 532 F. Supp. 627, 631 (E.D.N.Y. 1982)(wife and son enjoined with covenantor from exploiting breaches of the non-competition agreement that the husband entered).

Further, third parties such as Connie and Robert Benson must be enjoined to give meaning to the

non-competition provisions of Larry Benson's Agreement. In practical terms, as the above decisions attest, if Connie and Robert Benson are not enjoined and are permitted to continue their business (which was presented to the public as Larry Benson's business (Addendum F)) with the same customers, "the Court would be ignoring the business realities of the situation, frustrating the proper purpose of . . . [the non-competition] contract, and affording [the covenantor] indirect benefit in specific violation of the contract terms." McCart, 470 N.E.2d at 762.

3. Prospective Injunctive Relief Should be Granted

Bensons erroneously argue that Kasco's request for injunctive relief is now moot because the Agreement's non-competition period expired during the pendency of this appeal (September 1, 1990 was the date 18 months following Larry Benson's March 1, 1989, resignation). (Addendum A, ¶ 4-3). As we will show, Bensons cannot avoid injunctive relief simply by opposing enforcement efforts until the contract period expires.

The purpose of a non-competition covenant is to "preserve" the employer's goodwill. Allen, 120 Utah at 616, 237 P.2d at 827 (when the individual responsible for creating the business' goodwill and the business entitled to the goodwill separate, "it is necessary to preserve that

goodwill to the business by covenant on the part of the individual that he will not compete"). Kasco's Agreement with Larry Benson provided Kasco eighteen months after Larry Benson's termination to consolidate and preserve Kasco's goodwill in the territory manager replacing Larry Benson. (Addendum A, ¶ 4.3). This covenant is necessary to protect Kasco's goodwill, and it is reasonably restricted as the district court found. (R. 973, p. 6). The legacy of lost Kasco customers reflects that any effort to preserve Kasco's goodwill cannot be attempted successfully while Bensons compete. (Addendum J).

Bensons have actively opposed injunctive relief. Connie and Robert Benson so far have evaded an injunction and Larry Benson was only enjoined for a total of twelve months (not eighteen months) following his termination. (R. 973, p. 7). In such circumstances, Kasco is entitled to prospective injunctive relief even after the contract term has expired. See Roanoke Engineering Sales Co., Inc. v. Rosenbaum, 290 S.E. 2d 882, 886 (Va. 1982)(employee was enjoined under non-competition agreement for the time specified even though the contract period had run, because the employee had successfully opposed injunction); Orkin Exterminating Co., Inc., v. Bailey, 550 So. 2d 563, 564-65 (Fla. Dist. Ct. App. 1989)(injunction under non-competition

agreement must run from date of order following remand, not date of termination, where the trial court did not provide the full period of injunction to which the employer was entitled). See also Fullerton Lumber Co., v. Torberg, 270 Wis. 133, 70 N.W. 2d 585, 592 (1955); Capelouto v. Orkin Exterminating Co. of Florida, 183 So. 2d 532, 534-535 (Fla.).⁸

While no reported Utah decision has analyzed this issue, this Court has employed the wisdom expressed in these authorities. The Court in System Concepts remanded the case by its August 8, 1983, decision "for the purpose of the entry of a preliminary injunction" under a non-competition agreement whose terms expired in March 1983. 669 P.2d at 421, 424, 430. Prospective injunctive relief was apparently granted.

The reasoning of these cases makes sense. If Bensons are not enjoined for the full eighteen-months, even though the contract term has expired, they would "reap the profits of [Larry Benson's] breach [and] also render the judicial system impotent to redress it, simply by forcing

⁸ Compare Professional Business Services, Inc. v. Gustafson, 285 Or. 307, 590 P.2d 729, 730 (1979)(en banc), where the court ruled that a request for injunction was moot when the underlying agreement had expired by its own terms. The opinion provides no analysis for its holding unlike the reasoned decisions noted above.

the other party to go through lengthy litigation to obtain relief." Roanoke Engineering, 290 S.E. 2d at 886. Bensons' position "would reward the breach of contract, encourage protracted litigation, and provide an incentive to dilatory tactics." Id. See also Capelouto, 183 So.2d at 535.

Bensons should be enjoined for a period of at least six additional months whether or not the contract term has run.

4. The District Court Abused its Discretion by Denying Kasco's Motion to Amend Complaint

Bensons opposed Kasco's Motion for Leave to Amend Complaint, contending that Robert Benson could not be enjoined without privity with Kasco. (R. 414). The district court apparently agreed. (R. 372, p. 54; R. 342-43). However, as Kasco has shown, Robert Benson should be enjoined from exploiting Larry Benson's contract breaches and misappropriating Kasco's goodwill. (See Point 2 supra). Robert Benson's lack of "privity" is not prerequisite. McCart, 470 N.E.2d at 762. Thus, Bensons argue in vain that the denial of Kasco's motion to amend its complaint to add Robert Benson as a defendant was "futile" or made in "bad faith". (R. 416-420).

Bensons do not contend that granting Kasco's motion in all other respects would prejudice them in any way. Indeed, they have not opposed Kasco's other proposed amendments. (R. 414; R. 356-95). Kasco's motion should

have been freely granted because justice requires now, as it did before, that Kasco receive the injunctive relief to which it is entitled. The denial of leave to amend Kasco's complaint was an abuse of discretion. See Cheney v. Rucker, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963).

CONCLUSION

For these reasons, Kasco is entitled to injunctive relief against Bensons even though the non-competition period under Larry Benson's agreement has expired during the pendency of this appeal. Kasco requests the following relief: (1) that Larry Benson be enjoined prospectively for a total of 18 months as the parties agreed and not 12 months as the district court ordered; (2) that Connie and Robert Benson be similarly enjoined from exploiting Larry Benson's contract breaches; and (3) that Kasco be allowed to amend its complaint to add claims and name Robert Benson as a defendant.

DATED this 10th day of October, 1990.

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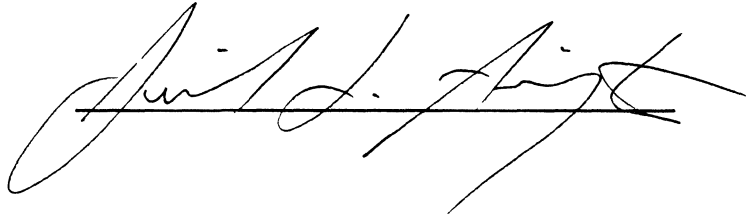
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CERTIFICATE OF SERVICE

I hereby certify that I caused four copies of the foregoing Brief and Addendum of Appellant Kasco Services Corporation to be hand delivered this 10th day of October, 1990, to the following:

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A handwritten signature in cursive script, appearing to read "Reid Tateoka", is written over a horizontal line.