

1990

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Reid Tateoka; McKay, Burton and Thurman; Attorney for Appellee .

Michael F. Richman; David L. Arrington; Van Cott, Bagley, Cornwall and McCarthy; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Kasco Services Corporation v. Benson*, No. 900260.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3051

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
\$9
DOCKET NO. _____

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,)	
)	

REPLY 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

REID TATEOKA
of
McKAY, BURTON & THURMAN
Attorneys for Appellees
Larry D. Benson and
Connie A. Benson
dba Tri-B-Supply
1200 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

DAVID L. ARRINGTON (4207)
of
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
Attorneys for Appellant
Kasco Services Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84144
Telephone: (801) 532-3333

FILED

DEC 10 1990

Clerk, Supreme Court, Utah



DATE DUE

2/28/08

GAYLORD

#3523PI

Printed in USA

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,)	
)	

REPLY 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

REID TATEOKA
of
McKAY, BURTON & THURMAN
Attorneys for Appellees
Larry D. Benson and
Connie A. Benson
dba Tri-B-Supply
1200 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

DAVID L. ARRINGTON (4207)
of
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
Attorneys for Appellant
Kasco Services Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84144
Telephone: (801) 532-3333

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
ARGUMENT	2
1. Kasco's Petition Was Timely	2
2. The District Court Abused Its Discretion By Denying Kasco's Motion To Modify The Order Of Injunction .	2
3. Larry Benson's Post-Employment Restrictions Are Enforceable	4
a. Consideration Was Provided	5
b. Larry Benson Was Unique	7
c. Kasco is Being Irreparably Harmed	8
4. District Court Erred by Shortening the Period of Injunction	10
5. Equitable Modification	13
6. Connie and Robert Benson Should be Enjoined . . .	15
a. Privity is Not Required	15
b. Case Authority	16
c. Kasco's Verified Complaint and Proposed Amended Verified Complaint	17
d. Connie and Robert Benson exploited Larry Benson's Contract Breaches	18
e. Corporations Can Enforce Contract Rights . .	21
7. The Trial Court Abused its Discretion by Denying Kasco's Motion to Amend Complaint	22

8.	Kasco Has Shown Its Entitlement to Prospective Injunctive Relief	23
	CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<u>Allen v. Rose Park Pharmacy</u> , 120 Utah 608, 237 P.2d 823 (1951)	5, 8, 9, 13
<u>Alexander & Alexander, Inc. v. Danahy</u> , 21 Mass.App. Ct. 488, 488 N.E.2d 22 (1986)	20
<u>Breuer-Harrison, Inc. v. Combe</u> , 146 Utah Adv. Rep. 26 (Utah Ct. App. 1990)	12
<u>Capelouto v. Orkin Exterminating Co. of Florida, Inc.</u> , 183 So.2d 532 (Fla. 1966)	24
<u>Cheney v. Rucker</u> , 14 Utah 2d 205, 381 P.2d 86 (1963)	23
<u>Einot, Inc., v. Einot Sales Co.</u> , 154 Neb. 760, 49 N.W.2d 625, 627 (1951)	11
<u>Hansen v. Edwards</u> , 83 Nev. 189, 426 P.2d 792 (1967)	3, 4
<u>Ingredient Technology Corp. v. Nay</u> , 532 F.Supp. 627 (E.D.N.Y. 1982)	21
<u>In re Arkansas Railroad Rates</u> , 168 F. 720 (E.D. Ark. 1909)	3
<u>Kodekey Electronics, Inc. v. Mechanex Corp.</u> , 500 F.2d 110 (10th Cir. 1974)	3, 24
<u>Las Vegas Novelty, Inc. v. Fernandez</u> , 787 P.2d 772 (Nev. 1990)	16
<u>Mail-Well Envelope Co. v. Saley</u> , 262 Or. 143, 497 P.2d 364 (1972)	5, 6
<u>McCart v. H&R Block, Inc.</u> , 470 N.E.2d 756 (App. Ind. 1984)	15, 16, 19, 22
<u>McCombs v. McClelland</u> , 223 Or. 475, 354 P.2d 311 (1960)	6
<u>McMahon v. Fiberglass Fabricators, Inc.</u> , 17 Ariz. App. 190, 496 P.2d 616 (1972)	11
<u>Perthou v. Stewart</u> , 243 F.Supp. 655 (D. Or. 1965)	5, 6

<u>Rancho Pescado, Inc. v. Northwestern Mutual Ins.,</u> 140 Ariz. 174, 680 P.2d 1234 (1984)	11
<u>Rees v. Albertson's Inc.,</u> 587 P.2d 130 (Utah 1978)	3
<u>Roanoke Engineering Sales Co., Inc. v.</u> <u>Rosenbaum,</u> 223 Va. 548, 290 S.E.2d 882 (1982)	23
<u>Robins v. Finlay,</u> 645 P.2d 623 (Utah 1982)	7, 8
<u>Siler v. Read Investment Co.,</u> 273 Wis. 255, 77 N.W.2d 504 (1956)	12
<u>Sitlington v. Fulton,</u> 281 F.2d 552 (10th Cir. 1960)	11
<u>System Concepts, Inc., v. Dixon,</u> 669 P.2d 421 (Utah 1983)	5, 6, 9, 25
<u>System Federation No. 91 v. Wright,</u> 364 U.S. 642, 81 S.Ct. 368, 5 L.ed. 2d 349 (1961)	2
<u>University Club v. Invesco Holding Corp.,</u> 29 Utah 2d 1, 504 P.2d 29 (1972)	12
<u>Zoller v. Schneider,</u> 297 P.2d 40 (Cal. App. 1956)	10

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Constitution Art. XII § 4.	21
Rule 8(a), Utah Rules of Civil Procedure.	17
Rule 60(b), Utah Rules of Civil Procedure	5

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,)	
)	

REPLY BRIEF OF APPELLANT KASCO SERVICES CORPORATION

INTRODUCTION

Kasco has established its entitlement to injunctive relief against Larry, Connie and Robert Benson. Bensons concede that Larry Benson and Kasco entered into the 1982 employment Agreement. They have not disputed its terms and they have not appealed the district court's ruling that the covenant was reasonable and necessary. Instead, Bensons resurrect their arguments opposing Kasco's petition for interlocutory appeal (which this Court already decided) and arguments involving matters outside the Agreement that ignore principles of contract law and rules governing non-competition agreements in Utah.

We will answer in full each of Bensons scatter-shot arguments.

ARGUMENT

1. Kasco's Petition Was Timely

For the third time during these appellate proceedings, Bensons contend that Kasco's Petition for Interlocutory Appeal (not Kasco's brief) is "untimely" and should "be denied." (Red Brief, p. 10).¹ Kasco has answered this and will not restate its entitlement to interlocutory appeal again here. (See Kasco's Reply Memorandum in Support of Injunction Pending Disposition of Petition Under Rule 5 and Pending Appeal, pp. 3-5). Because this Court already granted interlocutory appeal (R. 947), Bensons' argument, which is incorrect, is moot.

2. The District Court Abused Its Discretion By Denying Kasco's Motion To Modify The Order Of Injunction

Bensons incorrectly argue that, once entered, the district court's injunction order became immutable, beyond judicial power to correct absent some change in circumstance or law. (Red Brief, p. 12).² Courts have no such constraint. Courts are empowered with plenary authority and procedural rules to modify any order in the interests of justice.

¹Respondents' brief is referred to here as "Red Brief"; Kasco's opening brief is referred to here as "Blue Brief".

²Bensons base their position on System Federation No. 91 v. Wright, 364 U.S. 642, 81 S. Ct. 368, 5 L.ed. 2d 349 (1961), which involved the narrow question of whether post-injunction changes in law or the circumstances would warrant modifying an injunction. The decision did not hold, as Bensons imply, that such changes were the only grounds for modification. 364 U.S. at 647, 81 S. Ct. at 371.

In cases where injunctions issue under a non-competition covenant, as here, "[a] preliminary injunction may be modified at any time whenever the ends of justice require such action." Hansen v. Edwards, 83 Nev. 189, 426 P.2d 792, 794 (1967)(injunction under non-competition agreement modified on appeal with no change in law or circumstance). The court in Kodekey Electronics, Inc. v. Mechanex Corp., 500 F.2d 110, 112-13 (10th Cir. 1974), based upon its plenary powers and Rule 60(b), affirmed a trial court's grant of a motion, like Kasco's, "to modify injunction" to extend the injunction under a non-competition agreement. As Kasco explained to the trial court, under Rule 60(b) courts may "in the furtherance of justice" modify any final judgment or "order" for "any other reason" justifying relief from its terms. Rule 60(b), Utah Rules of Civil Procedure; (R.929). See also Rees v. Albertson's Inc., 587 P.2d 130, 132 (Utah 1978)(it is "the unquestioned prerogative of the Court, either upon its own motion, or application of a party, to change or correct any order which it judges to have been entered by 'mistake, inadvertence, surprise, or excusable neglect' as provided by Rule 60(b), U.R.C.P. "). The long-recognized and understandable judicial power to modify an injunction to effect justice is "beyond question" and may be exercised "by the trial court . . . [or] upon appeal by the appellate tribunal." In re Arkansas Railroad Rates, 168 F. 720, 722 (E. D. Ark. 1909).

As these authorities show, both the trial court and this Court may correct the trial court's injunction to conform to the parties' Agreement. Hansen, 426 P.2d at 794.

3. Larry Benson's Post-Employment Restrictions Are Enforceable

During argument before the trial court, Bensons' counsel conceded that Larry Benson should be enjoined:

YOUR HONOR, ADMITTEDLY, THOSE KINDS OF THINGS, LETTERS GOING OUT WITH LARRY'S NAME ON IT, EVEN THOUGH HE DIDN'T SIGN THIS ONE, LARRY'S -- GOING OUT WITH HIS NAME ON IT OUGHT NOT TO BE DONE AND IT OUGHT TO BE ENJOINED

NOW, ADMITTEDLY, LARRY DID SOME THINGS THAT HE SHOULDN'T HAVE DONE. LARRY WAS INVOLVED EARLY ON. HE MADE SOME PURCHASES OF EQUIPMENT AND HE SHOULDN'T HAVE DONE THAT. THAT MAY BE CONSTRUED AS COMPETING. BUT, ADMITTEDLY, LARRY MADE A SALE OR TWO, ADMITTEDLY, LARRY CONTACTED A CUSTOMER OR TWO PRIOR TO THE INJUNCTION

(R. 972, pp. 43, 48).

Ignoring their admissions, (and having not appealed the district court's finding that the Agreement was enforceable) Bensons now belatedly challenge enforceability, contending that Kasco has not shown (1) sufficient consideration for the Agreement; (2) that Larry Bensons was "special"; and (3) irreparable harm. (Red Brief, pp. 13-16). Each of these elements has been established here, as the district court found. (Blue Brief, pp. 19-20, R. 973, p. 6).

a. Consideration Was Provided

The trial court expressly found adequate consideration for the Agreement and never wavered from its holding. Under the Agreement, Larry Benson's covenant was given "in consideration for [Kasco] employing Sales Representative [Larry Benson]." (Addendum A, p. 1). This is a promise of continued employment, contrary to Bensons' characterization. (Red Brief, p. 13). In Utah, an offer "of continued employment" is "adequate consideration for the [employee's] submissions to the terms of the [non-competition] covenant." System Concepts, Inc. v. Dixon, 669 P.2d, 421, 426 (Utah 1983). The promise of employment provides abundant consideration regardless of whether the employment contract is entered at or after the date of hiring. See Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d at 823, 824-26 (1951) ("continuing contract of employment" was consideration for employee's non-competition covenant in agreement signed after the employee began work); System Concepts, 669 P.2d at 426.

Neither of the Oregon cases Bensons cite holds, as Bensons imply, that all non-competition covenants not executed "soon" after the employee begins work lack consideration. See Perthou v. Stewart, 243 F. Supp. 655 (D.Or. 1965); Mail-Well Envelope Co. v. Saley, 262 Or. 143, 497 P.2d 364, 366 (Or.

1972)).³ Bensons failed to note that, even in Oregon, "where one already employed" enters a subsequent non-competition agreement, consideration is provided "by a promise of continued employment, express or implied, or some other good consideration." McCombs vs. McClelland, 223 Or. 475, 354 P.2d 311, 315 (1960). Here, in addition to the express promise in Larry Benson's Agreement, a promise of continued employment was clearly implied from the circumstances as Larry Benson admits:

Q. So you knew as a condition of continued employment that you'd be required to sign the agreement; is that correct?

A. It certainly appeared that way, yes, at the time. (Addendum O, pp. 271-72;⁴ Red Brief, p. 18). Plainly, the district court's finding of consideration was not an abuse of discretion. Systems Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983)(grant of injunction will not be disturbed on appeal absent abuse of discretion, or unless rendered clearly against the weight of the evidence). Bensons offer no basis to overturn this finding which is consistent with the law in Utah and

³Indeed, neither decision even sets forth the precise terms of the covenants in question. Perthou v. Stewart, 243 F.Supp. 655 (D.Or. 1965); Mail-Well Envelope Co. v. Saley, 497 P.2d 364 (Or. 1972). Moreover, Bensons do not explain why consideration is provided in agreements entered "soon" after the employee starts work, but is lacking when agreements are entered later if the promise of continued employment is the same in each.

⁴Addenda O and P are attached hereto and lettered in continuing sequence with Kasco's Addendum previously filed.

contrary to the different situations and holdings of the Oregon cases Bensons cite.

b. Larry Benson Was Unique

Bensons again attack the trial court's order, arguing that Larry Benson's status immunized him from injunction. (Red Brief, pp. 14-16). Relying on Robbins v. Finlay, 645 P.2d 623 (Utah 1982), Bensons contend that Larry Benson was a mere fungible "salesman", lacking special or unique attributes justifying injunctive relief. (Red Brief, pp. 14-15). As we have shown, Larry Benson was much more. He was required to nurture and develop close, on-going relationships with Kasco's customers and potential customers. (R. 41-42). The success of Kasco's business in the Utah territory depended upon the good will Larry Benson generated as Kasco's agent. This is reflected in the testimony of Kasco's former customers who promptly left Kasco to do business with Tri-B-Supply. (Addenda C, D, H and I; R. 42-43). Larry Benson was responsible for sales and service and made regular visits to Kasco's customers. (R. 41-42). He successfully employed Kasco's business techniques and became one of Kasco's top five territory managers, with direct access to Kasco's executive officers. (R. 41-42); Blue Brief, pp. 20-21).

These facts readily distinguish Larry Benson from the employee in Robbins who sold (not serviced) hearing aids. 645 P.2d at 627. There is no mention that the Robbins salesman ever met the same customer twice, yet alone that he made regular (if

any) service calls like Larry Benson. Understandably, the Robbins court found that the hearing aid salesman was not responsible for the employer's good will. Id. at 627-28. Larry Benson is different. He had management responsibility for customers and product promotion in three states. (R. 41-42). He maintained strong, long-standing customer relationships in a business, as Bensons concede, "that thrives on sales to regular clients." (Red Brief, p. 20). Here, like the employee enjoined in Allen, "all the good will of the employer was associated with, and created by, the employee." Id. at 627.

c. Kasco is Being Irreparably Harmed

Bensons half-heartedly contend that Kasco suffers no irreparable harm and that there is no need for Kasco to protect its good will by enjoining Larry Benson. (Red Brief, p. 16). As support, Bensons cite to a statement by the trial court, opining that Kasco need only "continue or to begin to create the good will" misappropriated by Larry Benson in order to become whole. (Red Brief, p. 16). Bensons are incorrect for two reasons. First, the court's remarks were not a "finding of fact." (R. 972, p. 54). Indeed, the court specifically found that the requirement that the "covenant be necessary to protect the good will of the business . . . is met in this contract and thus the preliminary injunction [against Larry Benson] will be granted." (R. 973, p. 6). Second, Kasco submitted evidence establishing that it had replaced Larry Benson and was working

in the territory but that clients continued to leave Kasco for "Larry Benson's" business. (R. 146-49). Bensons have not disputed this and no contrary evidence was offered.

Utah courts have found that the "irreparable harm" requirement is satisfied where the misappropriation of a company's good will is "threatened" in violation of terms of a non-competition agreement. System Concepts, 669 P.2d at 428 ("irreparable harm" is shown by the "likely and threatened misappropriation of [the employer's] confidential information and good will"); Allen, 257 P.2d at 826-27. Kasco established irreparable harm by showing that Bensons have misappropriated its good will through Larry Benson's contract breaches and Connie Benson's and Robert Benson's exploitation of that breach. (Blue Brief, pp. 19-23, 25-31). Bensons ignore this and other evidence showing that they and Tri-B-Supply have taken over numerous "former" Kasco customers and were seeking more prior to this Court's order of injunction on appeal. (Addenda J and M; R. 42; R. 96-100; R. 146-49). Kasco's damages from these losses are not readily calculable, contrary to Bensons' unsupported claim. System Concepts, 669 P.2d at 429 ("any final judgment would not be able to effectively restore to [the employer] the benefits of its good will attached to the defendant"). Bensons have not disputed these authorities.

4. The District Court Erred by Shortening the Period of Injunction

Bensons argue that Larry Benson's failure to sign another employment agreement in 1988 and his alleged open disapproval of post-employment restrictions put Kasco on "actual notice" that Larry Benson did not "feel bound" by his non-competition Agreement. (Response to Plaintiff's Motion for Injunction Pending Disposition of Petition Under Rule 5 and Pending Appeal p. 28 ("Bensons' Response to Motion"); Red Brief, p. 12). Bensons incorrectly suggest that because Kasco took no responsive action to Larry Benson's alleged behavior in 1988, Kasco "waived" a "known breach" and is now prohibited from enforcing Larry Benson's 1982 Agreement. (Red Brief, pp. 18-19). Such "notice", according to Bensons, also justified the district court in varying the Agreement's terms. (Red Brief, p. 18).

Even assuming Kasco had the "notice" Bensons describe, Larry Benson cannot evade his contract obligations for three reasons: First, Bensons' vague argument erroneously assumes that Larry Benson's actions and alleged words constitute a "breach" of the Agreement. Significantly, Bensons do not identify the contract provision supposedly breached. (Red Brief, pp. 17-20).⁵ Under the plain terms of the 1982

⁵The cases Bensons cite are not helpful. These cases simply deal with election of remedies (not waiver of breach) or the rule that rescission is nullified by the subsequent acceptance of the benefits by a non-breaching party. See Zoller v. Schneider, 297

Agreement, Larry Benson could not breach the post-employment non-competition provisions until "immediately following termination of his employment", not before. (Appendix A, ¶¶ 4.2-4.6.) The Agreement does not require him to enter into another agreement or allow him to terminate the Agreement unilaterally. (Addendum A).

Further, Larry Benson's actions in 1988 were not an anticipatory breach of the Agreement, and Bensons do not contend otherwise. No anticipatory breach will occur without a "positive and unequivocal manifestation on the part of the repudiating party that he will not render the required performance when it is due." Rancho Pescado, Inc. v. Northwestern Mutual Life Ins., 140 Ariz. 174, 680 P.2d 1235, 1247 (1984) citing McMahon v. Fiberglass Fabricators, Inc., 17 Ariz. App. 190, 192, 496 P.2d 616, 618 (1972). Based upon Larry Benson's 1988 actions and alleged statements that he "would not continue employment under the non-compete agreement" or that he felt the Agreement was "null and void" etc., one could only guess whether he would (by implication) actually compete after leaving Kasco. This simply falls short of anticipatory breach:

P.2d 40, 40-42 (Cal. App. 1956); Sitlington v. Fulton, 281 F.2d 552 (10th Cir. 1960); and Einot, Inc. v. Einot Sales Co., 154 Neb. 760, 49 N.W.2d 625, 627 (1951). Election of remedies is not an issue here and Kasco has not sought rescission. Finally, as we have shown, no breach of Larry Benson's Agreement occurred prior to the time Larry Benson began competing against Kasco in violation of his Agreement. Kasco did not waive Larry Benson's violations but promptly sought to enjoin them. (R. 40-43).

"A mere implication that a party will not perform is insufficient." Id.; University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29, 30 (1972)(anticipatory breach arises when a party "definitely indicates" he/she cannot or will not perform). In any event, even if Larry Benson committed anticipatory breach (and he did not), Kasco "waived" nothing: "A party that has received a definite repudiation from the breaching party to the contract should not be penalized for its efforts to encourage the breaching party to perform its end of the bargain." Breuer-Harrison, Inc., v. Combe, 146 Utah Adv. Rep. 26, 31 (Ut. Ct. App. 1990)(explaining the "modern rule" of anticipatory breach and outmoded common law "waiver" theory). Larry Benson's alleged remarks and "refusal" to sign another contract caused no breach, and do not excuse his performance under the Agreement.

Second, Larry Benson cannot avoid his contract obligations by expressing disapproval of contract terms after entering the Agreement. 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"). Because the Agreement's restrictions as to time and geography are reasonably necessary to protect Kasco's business and there are no equitable

grounds for rescission (as the trial court previously held), "the court is powerless to relieve a party from the effects of his contract." Allen, 237 P.2d at 826.

Finally, the issue appears moot. Bensons concede that at the time Larry Benson failed to execute another contract, Kasco "could insist on compliance with the provision" prohibiting post-employment competition. (Red Brief, p. 18). If Larry Benson's post-employment covenant was enforceable then, it is enforceable now, as the trial court found by enjoining Larry Benson. (R. 973, p. 6).

Nothing in the Agreement or Larry Benson's actions or the law allowed the district court to vary the Agreement's terms -- terms that the court had already found reasonable. (R. 973, p. 6). The district court's ruling was error.⁶

5. Equitable Modification

Bensons erroneously imply that the district court was justified in cutting short Larry Benson's injunction -- contrary to the Agreement's terms -- because the court "could" have found the length unreasonable and subject to equitable modification.⁷

⁶Moreover, the district court's ruling and findings conflict. While ruling that Larry Benson's actions in 1988 somehow "terminated" the non-competition provision, inconsistently, the trial court enforced them. (R. 973, p. 7). Moreover, even if "notice" were some operable event under the Agreement (and it is not), the Agreement does not permit retroactive running of the non-competition provisions which expressly apply only after Larry Benson's termination. (Addendum A, ¶ 4.3).

⁷Kasco has discovered no Utah case permitting judicial alteration of covenant terms.

(Red Brief, pp. 20-21). Bensons know this is incorrect. According to the district court's express holding, the requirement that the non-competition covenant "be reasonable in its restrictions in terms of time and area . . . is met in this contract." (R. 973, p. 6). The court did not revisit this point. (R. 971, 972, 973). The eighteen-month post-employment limitation period is well within the bounds of reasonableness recognized by courts in similar cases. (Blue Brief, pp. 21-22).

Bensons push their point one step further, arguing that the injunction should not be reinstated as the contract requires because Kasco supposedly no longer needs protection and Bensons would experience hardship. (Red Brief, pp. 20-21). Again, Bensons cite for support the trial court's speculative remarks concerning motions filed after Larry Benson was already enjoined, and they ignore the trial court's undisputed finding that each of the enforceability "requirements is met in this contract." (R. 973, p. 6). They also ignore the harm evidenced by undisputed evidence showing the steadily growing list of customers lost to Tri-B-Supply. (Addendum J).

Bensons erroneously claim the injunction should not be reinstated because they would lose their "client base" and associated income. (Red Brief, pp. 20-21). Bensons have no entitlement whatsoever to any customers or income they misappropriated from Kasco. Further, Bensons are protected by

the bond Kasco posted from any loss they could wrongfully incur during these proceedings. (Addendum M).

Bensons also suggest that the Court should balance the parties' "differing financial strength" and force Kasco to bear the brunt of Larry Benson's contract breach. (Red Brief, p. 21). This is baseless. The relative size, nature or financial position of the non-breaching party does not excuse the other party's contractual obligations or limit contractual remedies.⁸

6. Connie and Robert Benson Should be Enjoined

Bensons argue that Connie and Robert should not be enjoined because (1) they lack privity of contract; (2) Kasco's authorities are inapposite; (3) Kasco's pleadings are deficient; (4) evidence of their wrongdoing is lacking; and (5) Kasco is a larger business than Tri-B-Supply. Bensons are incorrect.

a. Privity is Not Required

Predictably, Bensons argue that Connie Benson and Robert Benson should not be enjoined because they lack privity of contract with Kasco. (Red Brief, p. 21). As we have

⁸Bensons also contend that consumers "would" suffer if Bensons are enjoined, implying that Kasco would monopolize the market with over-priced, "inferior goods and services". (Red Brief, p. 21). Such disparaging remarks are baseless and beside the point. Moreover, as Larry Benson knows, the butcher supply business is competitive and Kasco has competitors besides Tri-B-Supply which, as Larry Benson admits, "on many occasions" were "working the very same accounts [that Larry Benson as Kasco's agent] was working the very same day I was working them." (Addendum O, p. 101).

explained, however, privity is not required. (Blue Brief, pp. 25-31).

b. Case Authority

Bensons claim that Kasco's supporting "cases" are distinguishable but only refer to one -- McCart v. H & R Block, Inc., 470 N.E.2d 756 (App. Ind. 1984). McCart, however, like Kasco's other authorities (which Bensons do not question) is on point. The covenanting party in McCart, like Larry Benson, sent the employer a letter of resignation and then, with the non-signing spouse, undertook a competing business. Id. at 759. Like the Bensons, the couple wrote to the employer's former customers announcing their new joint business. Id.; (Addendum F). Further, like Larry and Connie Benson, the couple in McCart worked together to capitalize on the employer's good will. Id. at 760. Both Connie Benson and the non-signing spouse in McCart were aware of their spouse's non-competition covenant. Id. at 758; (Addendum E, p. 75). Finally, like the couple in McCart, Connie Benson "acted together" with Larry Benson to breach his agreement. Id. at 762; (Addendum E, pp. 24-25, 54). Thus, like the couple in McCart, Bensons should be enjoined from perpetuating a "mere subterfuge designed to avoid [the covenantor's] obligation under the contract. Id. at 762; (Blue Brief, pp. 25-31). More recent case authority is in accord. In a case of an apparent first impression, the Nevada Supreme Court in Las Vegas Novelty, Inc. v. Fernandez, 787 P.2d 772, 774 (Nev.

1990), adopted the "better" view that a non-signatory to a non-competition agreement may be enjoined without privity of contract.

c. Kasco's Verified Complaint and Proposed Amended Verified Complaint

In desperation, Bensons pick at Kasco's Verified Complaint, contending it "fails to allege any wrongdoing" on the part of Connie Benson. (Red Brief, p. 22). The Verified Complaint, however, alleges that "Defendants have already misappropriated plaintiff's . . . good will by soliciting customers away from plaintiff" and that Kasco will suffer irreparable injury to "its good will" if Larry Benson, Connie Benson and/or Tri-B-Supply are allowed "to continue in the business of selling and [servicing] butcher products and to use [Larry Benson's] special relationships with and unique knowledge of plaintiffs' customers" . . . and that "such misappropriation" of, among other things, "its good will can only be estimated by conjecture" (R. 6-7, ¶¶ 13-14). This, along with related allegations of the Verified Complaint, provides "a short and plain statement" of the claim against Connie Benson showing Kasco is entitled to relief." Rule 8(a), Utah Rules of Civil Procedure. Moreover, Kasco sought to expand its claims against Connie Benson and to add Robert Benson as a defendant based upon information obtained after Larry Benson was enjoined indicating that Connie and Robert Benson took steps to continue Tri-B-Supply's butcher supply business. (R. 366-368). The district

court erroneously denied Kasco's motion, as shown below. (Page 22, infra).

d. Connie and Robert Benson exploited Larry Benson's Contract Breaches

Without citation to the record or any order, Bensons represent that the district court "found" that Connie Benson's actions were not a "furtherance of Larry's breach of his covenant not to compete." (Red Brief, pp. 22-23). This is untrue; there is no such finding and the district court did not even comment on Connie's or Robert's exploitation of Larry Benson's contract breaches. (R. 971, 972, 973).

Bensons then pick at isolated facts, contending there is insufficient evidence of breach exploitation. (Red Brief, p. 23). The essence of their argument is that because Tri-B-Supply allegedly now has "nothing to do with Larry Benson," an injunction is improper. (Red Brief, pp. 23-25).⁹ As support, Bensons cite to the district court's statements opining that Larry Benson was abiding by injunction terms.¹⁰ Contrary to

⁹Bensons also argue that "Kasco's problem" is its failure to "keep a salesman in the territory." (Red Brief, p. 23). Bensons ignore that Larry Benson remained with Kasco for over a decade in the Utah territory. Moreover, to the extent Bensons' remark relates to current circumstances, it simply highlights damages Kasco has experienced as a result of the high percentage of former customers misappropriated by Bensons. The greatly reduced client base provides a much smaller financial incentive to current territory managers.

¹⁰Whether Larry Benson violated the terms of his injunction has not yet been raised as an issue before the district court and little discovery has been done concerning it.

Bensons' unsupported statements, Larry Benson need not be with Tri-B-Supply now before Connie and Robert Benson may be enjoined. Bensons treated Tri-B-Supply as their joint business and held themselves out to the public that way. (Blue Brief, pp. 29-31). Courts "will treat them in the manner they operated." McCart, 470 N.E.2d at 762. "[I]f this Court were to enjoin [the former employee] only and allow [the spouse] to continue the [competing business] at the same site and with the same customers the court would be ignoring the business realities of the situation, frustrating the proper purpose of . . . the contract, and affording [the employee] indirect competition and benefit in specific violation of the contract terms." Id.

Connie Benson's complicity in Larry Benson's breach and Connie Benson's and Robert Benson's exploitation of that breach is established by overwhelming evidence which Kasco will not recite again here. (Blue Brief, pp. 10-17; 29-31). Bensons sidestep these undisputed facts and claim that "price" was the "important determining factor" in customer decisions to abandon Kasco for Tri-B-Supply. (Red Brief, pp. 23-24). Even if this were true (and it is not) it is beside the point. Connie Benson and Robert Benson as Tri-B-Supply are not entitled to exploit Larry Benson's contract breaches and their association with him regardless of the prices they charge. Moreover, Randal Heath, a

former Kasco customer, explained that any difference between Kasco's and Tri-B-Supply's prices was insignificant:

I looked at the prices, and I had -- I went and got a copy of my last Kasco invoice, I believe . . . and I looked at them, and I knew their's was on a 4-month. On a 3-month [Tri-B-Supply's] prices looked a lot cheaper on paper. But in reality they aren't that much cheaper when you consider you're going to be served four times a year instead of three times a year. So pricewise, they were about the same [W]hen I figured it out with [Tri-B-Supply's] knives and blades and Kasco's price, it seemed like we were, you know, within like ten bucks. You know, that's not much. They were just a little bit cheaper. But price wasn't the -- wasn't why I went.

(Addendum P, pp. 30, 39).

Bensons also argue that Connie Benson (not Larry Benson) discovered in the "telephone book" the names of those to whom the March 10, 1989, Tri-B-Supply letter was sent. (Red Brief, p. 25). While Kasco disputes this, the important (and undisputed) fact is that the letter tied both Larry and Connie Benson with Tri-B-Supply, "our own business" offering "more frequent service" and "less expensive service in the future."

(Addendum F). Connie Benson's and Robert Benson's exploitation of that association (which arose from Larry Benson's breach) requires that they too be enjoined. See Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. 488, 488 N.E.2d 22, 31 (1986)(injunction to prevent third parties "from obtaining benefits from [the covenantors'] 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).

e. Corporations Can Enforce Contract Rights

Bensons refer to Kasco as "an enormous multi-state conglomerate" whose contractual and equitable rights should be ignored because Tri-B-Supply is comparatively smaller. (Red Brief, p. 26). This simply does not wash. Kasco, a corporation, is entitled to enforce its contract rights as a natural person would. Utah Constitution Art. XII, § 4 ("corporations shall have the right to sue, and shall be subject to be sued, in all courts, and like cases as natural persons"). It is wrong for Bensons to misappropriate the proprietary interests of another whether the victim is a corporation or an individual. Moreover, much more is at stake for Kasco than Bensons (the self-styled "small local competitor") admit. (Red Brief, p. 26). Kasco's Utah territory (Larry Benson's former territory) is a significant market area in Kasco's business. Larry Benson reached production levels in the territory that placed him among Kasco's top five employees. (R. 41-42). Bensons have not disputed this, and their efforts to down play

the staggering impact Tri-B-Supply has on Kasco's business are of no avail. (Addendum J).¹¹

7. The Trial Court Abused its Discretion by Denying Kasco's Motion to Amend Complaint

As Kasco has shown, Robert Benson should be enjoined from exploiting Larry Benson's contract breaches and misappropriating Kasco's goodwill. (Blue Brief, pp. 34-35). 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". (Red Brief, pp. 26-28).

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. 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

¹¹Bensons again imply -- without support -- that Tri-B-Supply has only obtained customers through "better service, better quality, and a better price". (Red Brief, p. 26). As shown above, this is beside the point and no evidence was before the trial court (or presented here) comparing item-by-item pricing, quality or service. Moreover, Bensons' claim is inconsistent with the high percentage of customers who left Kasco to join Tri-B-Supply soon after Tri-B-Supply's March 10th letter was received or following Tri-B-Supply's first visit. (Blue Brief, p. 12; Addendum J). With such limited, one-time exposure, these former customers had no basis to compare "service" or "quality."

Kasco's motion was an abuse of discretion. See Cheney v. Rucker, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963).

8. Kasco Has Shown Its Entitlement to Prospective Injunctive Relief

Undisputedly, Larry Benson's Agreement with Kasco is intended to provide a period following Larry Benson's termination during which Kasco could preserve its customer base and the good will Larry Benson generated as Kasco's agent. Bensons, however, have deprived Kasco of this right by misappropriating Kasco's good will and opposing Kasco's enforcement efforts during the pendency of these proceedings. Like the employer in Roanoke Engineering Sales Co., Inc., v. Rosenbaum, 223 Va. 548, 290 S.E.2d 882, 886 (1982), Kasco requested prospective enforcement "as soon as it could address this court after an appeal had been granted" (Kasco's Reply Memorandum in Support of Injunction Pending Disposition of Petition Under Rule 5 and Pending Appeal, pp. 10-11). Thus, the question this Court must answer, as other courts have, is "Who should suffer the consequences of this unfortunate delay . . . ?" Id.

Bensons ask the Court to ignore the fact that they have "participated in the prohibited activities during the course of the litigation." Capelouto v. Orkin Exterminating Co. of Florida, Inc., 183 So. 2d 532, 534-35 (Fla. 1966). The result they urge would reward the breaching party and encourage protracted litigation and dilatory tactics. Id. To adopt their

view "would be to nullify, in major part, the effectiveness of such agreements." Id. See also Kodekey Electronics, Inc. v. Mechanex Corp., 500 F.2d 110, 112 (10th Cir. 1974)(extended the injunction to compensate for the period during which the covenantee evaded its terms, noting that "if the extension were not granted, the [covenantee] would in effect be deprived of the benefit of the non-competition agreement"). As the Capelouto court recognized, "[t]his is particularly true since in most cases of this kind, . . . money damages are not susceptible of proof with the required degree of certainty and therefore cannot be awarded." Id. (emphasis supplied).

Bensons do not question the reasoning of these authorities. Instead, they cite cases which in effect deny prospective injunctive relief -- without analysis -- and argue that such relief here would be "only punitive." (Red Brief, p. 31). As their only support, they again misrepresent the trial court's "findings" and contend that the court "found" that Kasco had "sufficient time to protect its good will." (Red Brief, p. 31). As Kasco has shown, the district court made no such finding. Indeed, neither the district court nor Bensons can contend that Kasco has had sufficient time to protect its good will when Kasco has not had one minute free from Bensons' competition, contrary to the Agreement's terms. (Addendum A ¶ 4.3). Prospective relief here is by no means "punitive;" it would provide the protection to which the parties agreed by

applying the remedy which equity requires. See Systems Concepts, 669 P.2d at 421, 424, 430 (granting prospective injunctive relief). Bensons' conduct should not be rewarded.

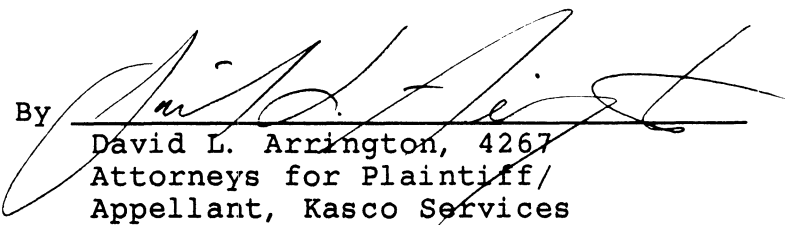
CONCLUSION

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 December, 1990.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By

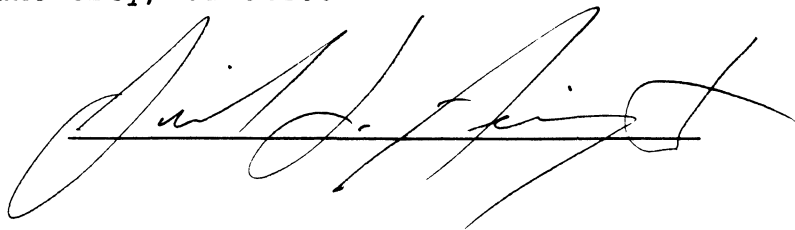


David L. Arrington, 4267
Attorneys for Plaintiff/
Appellant, Kasco Services
Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF SERVICE

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

Reid Tateoka
McKAY, BURTON & THURMAN
1200 Kennecott Building
Salt Lake City, UT 84133

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

ADDENDUM

Tab A

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

* * *

KASCO SERVICES CORPORATION,)	
)	
Plaintiff,	)	Civil No. 89-0901724
	)	Judge David S. Young
vs.)	
	)	Deposition of:
LARRY D. BENSON and CONNIE)	
A. BENSON, dba TRI-B-SUPPLY,	)	<u>LARRY D. BENSON</u>
)	
Defendants.)	
)	
)	

Deposition of LARRY D. BENSON, taken at the instance and request of the Plaintiff, at Vancott, Bagley, Cornwall & McCarthy, 50 South Main, Salt Lake City, Utah, on Wednesday, the 31st day of May, 1989, at the hour of 9:20 a.m., before VICKY MCDANIEL, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, Utah License No. 285.

* * *



Associated Professional Reporters

10 West Broadway/Suite 200/Salt Lake City, Utah 84101/(801)322 3441

1 MR. TATEOKA: Assuming he knew their service
2 schedule?

3 Q (By Mr. Arrington) Yes. Were you pretty aware
4 of the service schedules of your competitors?

5 A No. I don't know the service schedule really
6 mattered.

7 Q Would you like to have known that?

8 A I think the big thing is go in and know their
9 needs. I know for a fact that PBI was working--their man
10 was staying in the same motels I was staying around the
11 territory. On many occasions he was working the very same
12 accounts I was working the very same day I was working them.

13 Q Was that uncommon?

14 A No.

15 Q It was probably more common than not, wasn't it?

16 A There was many times I ran into the Southwest Saw
17 man, he was in there when I walked in.

18 Q Do you think Southwest Saw had a sense for what
19 your schedule was as a--or would inquire after your schedule
20 with your customers, your Keene customers?

21 A I don't think that he cared. Just like me, I
22 don't care. Service schedules don't mean anything to me.
23 If I was going out after a man, I'd go after the business, I
24 wouldn't care who'd just been there. You're not afraid of
25 those kind of things when you're a good salesperson.

1 A Alex Doyle told me that.

2 Q He was there? He's the individual who made that
3 statement?

4 A He was conducting the meeting.

5 Q Did you elect to sign the agreement?

6 A Did I elect to sign--I obviously did sign it, but
7 I didn't elect to sign it, no.

8 Q How can you say that? Couldn't you have left the
9 meeting?

10 A I could have left the meeting or Lord knows what
11 would have happened. That guy was nuts.

12 Q Well, what do you mean by that?

13 A I mean, Alex Doyle was crazy, and KASCO can
14 testify to that, Keene can testify to that.

15 Q Well, you could have left the meeting, though; is
16 that correct?

17 A Correct.

18 Q You could have left the room and not signed the
19 contract; is that correct?

20 A Correct.

21 Q Why didn't you do that?

22 A I was instructed by my sales manager that
23 wouldn't be a good idea if I wanted to continue my
24 employment.

25 Q So you knew as a condition of continued

1 employment that you'd be required to sign the agreement; is
2 that correct?

3 A It certainly appeared that way, yes, at the time.

4 Q In paragraph 7 you say you signed the agreement
5 under duress. What do you mean?

6 A I would say it's duress when you're told to do
7 something you don't want to do and it's put to you in such a
8 way that you feel like you're obligated to do it.

9 Q You signed this agreement but you didn't want to
10 sign it?

11 A You're right, strictly because--forget it.

12 Q You could have not signed the agreement; is that
13 correct?

14 A I could have not signed it.

15 Q Is that correct?

16 A Correct.

17 Q Did anyone threaten you with legal action or
18 physical harm if you didn't sign the agreement?

19 A They had no cause for either.

20 Q I agree.

21 A I'm bigger than they are.

22 Q In paragraph 9 you say that "All of the contacts
23 that I had with grocery stores were made prior to my
24 becoming employed with Keene Corporation." Are you saying
25 that there was not one single store that you hadn't

Tab B