In The

Supreme Court of Virginia

RECORD NO. 121989

ASSURANCE DATA, INC.,

Appellant,

v.

JOHN MALYEVAC,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF FACTS

Plaintiff/Appellant Assurance Data, Inc. ("Assurance") employed Defendant/Appellee John Malyevac ("Malyevac") to "sell the plaintiff's computer products and services to customers" pursuant to an agreement ("Agreement") with Assurance. (J.A. 1-2, 11-27.) Assurance alleged that after Malyevac resigned, on May 25, 2012, he "continued to work, directly or indirectly soliciting, providing, promoting and/or selling, without limitation, computer software and/or hardware products, services, training, managed services and/or related professional services for software and/or hardware products in direct competition with [Assurance's] business." (J.A. 3.) Assurance attempted to state that Malyevac breached the agreement by not adhering to the following restrictions in the Agreement. First, for six months after separation and within a 50-mile radius of Assurance's Virginia offices, Malyevac may not "solicit, provide, promote or sell, directly or indirectly," any "computer, software,

or hardware products" which compete with Assurance's products; "services for customers or prospective customers that are competitive" with Assurance's services; or "related professional services which are provided by" Assurance. (J.A. 13.) Second, for "a period of twelve (12) [*sic*]"[1] after separation, Malyevac may not solicit or do business with Assurance's customers in a way that competes with Assurance. (J.A. 14.) Third, Malyevac cannot disclose "Confidential Information" to anyone. (J.A. 14.) Fourth, after separation, Malyevac must return confidential information and materials to Assurance. (J.A. 16.)

Assurance brought suit to enforce the Agreement, and Mr. Malyevac demurred. (J.A. 33.) The circuit court heard argument on the demurrers from both counsel, then recessed for thirty minutes to do further research before sustaining the demurrer and dismissing the case with prejudice. (J.A. 63-64.) On September 11, 2012,

[1] Assurance's Brief incorrectly states that this clause reads "twelve (12) months" (J.A. 5), which error begs the question of the proper interpretation of the clause itself.

Assurance moved the circuit court to reconsider (J.A. 70); on September 17, 2012, the court denied the motion without a hearing. (J.A. 75.)

ARGUMENT

AOE 1. The Circuit Court Properly Sustained the Demurrer to the Noncompetition and Nonsolicitation Clauses at Issue Because They Were Overly Broad

This Court reviews *de novo* a circuit court's decision to sustain a demurrer. *Glazebrook v. Bd. of Supervisors of Spotsylvania County*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). The same standard applies to the question of whether a noncompetition clause is enforceable. *Home Paramount Pest Control Cos., Inc. v. Shaffer*, 282 Va. 412, 415, 718 S.E.2d 762, 763 (2011) (citing *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005)).

In Virginia, "covenants in restraint of trade are not favored, will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee." *Modern Env'ts, Inc. v. Stinnet*, 263 Va.

491, 493, 561 S.E.2d 694, 695 (2002) (citing *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962)). "Whether a restrictive covenant is enforceable is a question of law to be determined by the court." *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001). To determine whether a restrictive covenant is reasonable, the Court must decide: (1) whether the restraint "is no greater than necessary to protect the employer in some legitimate business interest"; (2) whether the restraint is "unduly harsh and oppressive in curtaining the employee's legitimate effort to earn a living"; and (3) whether the scope and extent of the activity being restricted is reasonable on public policy grounds. *New River Media Grp., Inc. v. Knighton*, 245 Va. 367, 369, 429 S.E.2d 25, 26 (1993) (citing *Roanoke Eng'g Sales v. Rosenbaum*, 223 Va. 548, 552, 290 S.E.2d 882, 884 (1982)). This analysis focuses on three factors: (1) the duration; (2) the geographical scope; and (3) the scope and extent of the activity being restricted. *Simmons*, 261 Va. at 581,

544 S.E.2d at 678. The employer bears the burden of proof. *Richardson*, 203 Va. at 795, 127 S.E.2d at 117. If a covenant is overly broad in scope, then it is unreasonable and unenforceable. *Id*. A party cannot argue "that the scope of the function element could be altered by extrinsic evidence to mean something narrower than its clear language..." *See Shaffer*, 282 Va. at 418, 718 S.E.2d at 765.

A. Assurance Failed to Preserve Its Argument That It Should Be Able to Offer Evidence Because It Made No Proffer to the Trial Court

In *Dade v. Anderson*, the plaintiff had filed a motion for declaratory judgment and amended it following a successful demurrer by the defendant. *Dade v. Anderson*, 247 Va. 3, 4-5, 439 S.E.2d 353, 354 (1994). The circuit court sustained the defendant's second demurrer, and the plaintiff did not re-amend. *Id.* This Court affirmed, in part because "the plaintiff did not tender to the trial court a second amended motion for declaratory judgment or otherwise proffer what she would have alleged had she been allowed to

amend." *Id.* at 8, 439 S.E.2d at 356. This Court could not review the circuit court's decision because the plaintiff had failed to preserve for appeal the facts which she would have alleged. *See id.* Here, Assurance failed to proffer to the circuit court the evidence that it would have offered to support the validity of its noncompetition clause. The evidence certainly did not appear as allegations in the Complaint. Assurance failed to make the proffer even in its Motion for Reconsideration, which expressly raised the issue of amendment. This Court cannot evaluate the circuit court's decision without knowing what the circuit court would have heard, and Assurance failed to preserve that information for this appeal. This Court should therefore affirm the circuit court's decision to strike the noncompetition clause.

B. The Noncompetition Clause Is Overly Broad

A non-competition clause may not forbid "activities in which [the employee was] not engaged." *Richardson*, 203 Va. at 795, 127 S.E.2d at 117. Under Paragraph 5

of the Agreement, Malyevac may not sell *any* competing hardware or software, or provide competing "training, managed services installation, implementation or related professional services" for a period of six months within 50 miles of Assurance's offices, regardless of whether Malyevac worked on those business areas for Assurance. (J.A. 13.) The Complaint merely mentions a single computer software or hardware product – HP Tipping Point – without further elaboration. (J.A. 5.) Nowhere does Assurance define the scope of the restriction. The provision forbids Malyevac from providing services to "prospective customers" but does not define that term. (J.A. 13.) The service area, in Exhibit A to the agreement, is "United States – Authorized DOD and Intel Gov't Accounts." (J.A. 19.) The provision would apparently keep Malyevac from providing competing services to any part of the Department of Defense or other intelligence (assuming that "intel" stands for "intelligence") agencies anywhere in the region. Because the provision

prohibits activities different from those which Malyevac took on Assurance's behalf and fails to define "prospective customers," it is overbroad compared to Assurance's business interest, and the circuit court properly struck the restrictive covenant.[2]

C. The Nonsolicitation Clause Is Overly Broad

The non-solicitation clause is even broader than the non-competition clause and, consequently, it cannot pass muster. First, its specified duration— "a period of twelve (12) [*sic*] after the date of termination" of employment (J.A. 14) —is incurably ambiguous and, as such, construed in Malyevac's favor. *See Modern Env'ts*, 263 Va. at 493, 561 S.E.2d at 695. If Assurance wanted a 12-month term, it should have put that in the Agreement. As it stands, the Agreement could have meant 12 hours, days, or weeks, all of which probably would have been legally reasonable; or months, which

[2] Virginia courts do not "blue pencil," *i.e.*, take a contract that is unenforceable as written and rewrite it to make it enforceable. *Amer. Standard Homes Corp. v. Reinecke*, 245 Va. 113, 122, 425 S.E.2d 515, 519-20 (1993) (quoting *Bank of Southside Va. v. Candelario*, 238 Va. 635, 640, 385 S.E.2d 601, 603 (1989)).

might have been reasonable; or years, which certainly would have been unreasonable. Virginia courts will not add words to the contract to make it say something that it does not.

Second, the restrictive covenant prevents Malyevac from soliciting business from any “past, present or prospective customer of Company or its subsidiaries, with whom [Malyevac] has been in contact or obtained contact/user information in connection with” his services while at Assurance’s office. (J.A. 3-4, 14.) Because the term “prospective” customer is undefined, and because the essence of Malyevac’s daily work life is marketing and sales to everyone he meets, this term would include everyone he deals with, from the business people he deals with directly, to their secretaries or receptionists, to the pizza delivery person. This provision prevents Malyevac from doing business not just with any competitor, but with all government offices, office supply companies, pizza places, and even janitorial services. The circuit court properly

held the nonsolicitation the restrictive covenant unenforceable.

D. The Circuit Court Did Not Need to Hear Evidence on These Issues Because the Provisions Were Overly Broad on Their Faces

Assurance insists that it had the right to put evidence on to support the validity of its noncompetition and nonsolicitation clauses. This is incorrect. For example, in *Modern Environments*, this Court affirmed, based solely on the pleadings and oral argument, a declaratory judgment which invalidated restrictive covenants. *Modern Env'ts*, 263 Va. at 493, 561 S.E.2d at 695. In *Shaffer*, this Court reviewed an appeal from a plea in bar in which the circuit court took evidence. *Shaffer*, 282 Va. at 415, 718 S.E.2d at 763. This Court rejected Home Paramount's argument that testimony regarding Shaffer's training and work experience "would have eliminated" certain "hypothetical job duties from the scope of the court's consideration." *Id.* at 418, 718 S.E.2d at 765. In short, when an employer drafts an extremely broad

restraint of trade, the employer runs the risk that a court will find that no amount of evidence could render the provision reasonable and enforceable. The circuit court properly reached exactly that conclusion here.

AOE 2. The Circuit Court Properly Held That Assurance Had Failed to State a Claim for Violation of the Agreement's Confidentiality Provisions

This Court reviews *de novo* a circuit court's decision to sustain a demurrer. *Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591. Again, Virginia courts do not rewrite a contract that is unenforceable as written to make it enforceable. *Amer. Standard Homes Corp.*, 245 Va. at 122, 425 S.E.2d at 519-20 (quoting *Bank of Southside Va.*, 238 Va. at 640, 385 S.E.2d at 603). Malyevac challenged Assurance's confidentiality claims on the grounds that they failed to state a claim. (J.A. 33, 44-45.) The circuit court sustained the demurrer on those grounds. This was not error: The Complaint failed to state that Malyevac disclosed confidential information. The allegation that Malyevac "is disclosing to others" (J.A. 5) was a conclusory

claim insufficient to survive demurrer. *See Gov't Tech. Servs., Inc. v. Intellisys Tech. Corp.*, 51 Va. Cir. 55 (1999). Likewise, the allegation that Malyevac "redirected to other competitors/resellers, contract deals for the sale of various hardware and software products" (J.A. 6) was insufficient because it failed to plead how a "contract deal" constituted confidential information or how Defendant "redirected" such deals. *See H.E.R.C. v. Turlington*, 62 Va. Cir. 489 (2003). In short, Assurance failed to state a claim for violation of the confidentiality provisions.

AOE 3. The Circuit Court Properly Denied Assurance Leave to Amend its Claim for Violation of the Confidentiality Provision

This Court reviews for abuse of discretion a circuit court's decision to deny leave to amend a complaint. *See Dade*, 247 Va. at 8, 439 S.E.2d at 356.

A. Assurance Failed to Preserve for Appeal the Amendments It Would Have Made to Its Complaint

When a party seeks appellate review of the decision to deny its motion for leave to amend, it must proffer the desired amendments to the circuit court in order to

preserve the issue for appellate review. *Id.* Assurance "did not tender to the trial court" an amended Complaint "or otherwise proffer what [it] would have alleged had [it] been allowed to amend." *See id.* This Court cannot review the circuit court's decision to deny leave to amend because Assurance failed to preserve the issue for appellate review.

B. The Circuit Court Did Not Abuse Its Discretion by Denying Assurance Leave to Amend

The circuit court researched the relevant issues before the hearing. (J.A. 64.) The court took a 30-minute recess during the hearing to research the issues further. (J.A. 63-64.) The court spent nearly a week to issue its denial of Assurance's Motion for Reconsideration, which laid out all of the appellate issues. The court specifically stated in its order that it had already considered everything raised in the Motion for Reconsideration. These events reflect the circuit court's cautious and methodical approach to the questions raised in the demurrer—not a court abusing its discretion. The circuit court heard no argument

from Assurance about how it would supplement the claim for breach of confidentiality. The court did not abuse its discretion in denying Assurance's request to do so.

CONCLUSION

This Court should affirm the circuit court's judgment.

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RULE 5:26 CERTIFICATE

I hereby certify that this brief complies with Rule 5:26(h). Fifteen bound copies, and one electronic copy on CD, of the foregoing Brief of Appellee have been hand-filed with the Clerk of this court on the 25th day of April, 2013.

CERTIFICATE OF SERVICE

I hereby certify that I served three bound copies, and one electronic copy on CD, of the Brief of Appellee on Counsel for the Appellant, via UPS Ground Transportation, at the below listed address this 25th day of April, 2013:

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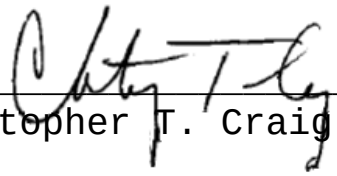

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