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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2019-2020**

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**1190088**

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**Joshua Rogers**

**v.**

**Burch Corporation**

**Appeal from Jefferson Circuit Court  
(CV-19-901430)**

BOLIN, Justice.

Joshua Rogers appeals from a preliminary injunction entered by the Jefferson Circuit Court preventing Rogers from soliciting any employees or clients of Burch Corporation, his

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former employer, as contractually agreed to under restrictive covenants in an employment agreement. We dismiss the appeal.

#### I. Facts and Procedural History

Burch Corporation is an Alabama construction company with a division that designs and builds cold-storage facilities for use in industries such as food processing and food storage. Burch operates its cold-storage facilities in several states. In spring 2016, Burch and Rogers began discussing Rogers's employment as project manager for its cold-storage division in Tampa, Florida. On August 2, 2016, Burch wrote a letter to Rogers outlining the terms of his proposed employment as project manager and stated that the offer was good through August 5, 2016. Rogers accepted the offer by signing and returning the letter to Burch on August 3, 2016. The offer further provided that Rogers's first day of employment would be August 29, 2016.

One of the prerequisites of Rogers's employment with Burch outlined in the letter was entering into an employment agreement. A copy of the employment agreement was included with the letter mailed to Rogers on August 2, 2016. On August 8, 2016, Rogers signed the employment agreement, and on August

29, 2016, Rogers began working with Burch. That same day, Burch's president signed Rogers's employment agreement.

The employment agreement provided, in pertinent part, as follows:<sup>1</sup>

"2. Confidentiality: Trade Secrets: Proprietary Information.

"a. Definition of Proprietary Information. As an employee of [Burch], [Rogers] will have access to [Burch's] 'Proprietary Information' which is defined as property belonging to [Burch] and utilized in its products and services provided to customers and clients which is confidential in nature, and includes, but is not limited to: 'trade secrets,' as defined in Alabama Code [1975,] § 8-27-2, Florida Statute Ann. § 688.002(4) and/or the Georgia Trade Secrets Act, OCGA § 10-1-761(4); pricing information and methodology, compensation; customer lists; customer data and information; mailing lists; prospective customer information; financial and investment information; management and marketing plans, business strategy, technique, and methodology; business models and data; [Burch] provided files, software, code, reports, documents, manuals, and forms used in the business that may not otherwise qualify as a trade secret but which are treated as confidential to [Burch], in whatever medium provided or preserved; relationships or contacts with specific prospective or existing customers, vendors, or clients; customer or client goodwill associated with the ongoing business of [Burch] and each specific marketing or trade area in

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<sup>1</sup>The employment agreement provided that Jefferson County, Alabama, which is where Burch's principal office is located, would be the venue for any disputes relating to the agreement and that Alabama law would apply.

which [Burch] does business; any specialized or unique training provided by [Burch] to [Rogers]; [Burch's] products themselves; [Burch] technology; [Burch] technology support and support services; sales methods and support; labeling; quality standards; suppliers and distributors; intellectual property of any kind and any and all other business or strategic information relating to [Burch's] technological information, products and/or services, all of which [Rogers] acknowledges are owned by [Burch] and which are regularly used in the operation of the business of [Burch].

"b. Confidentiality of Proprietary Information.

[Rogers] shall hold all Proprietary Information in the strictest confidence and shall not disclose any of this Proprietary Information, directly or indirectly, or use it in any way, either during the term of this Agreement or at any later time, except as required in the course of [Rogers's] employment with [Burch] or with the express written authorization from [Burch]. [Rogers] acknowledges and agrees that any disclosure of the Proprietary Information shall result in immediate and irreparable harm to [Burch], and that [Burch] shall be entitled to seek injunctive relief as well as recovery of any direct, indirect, consequential, or punitive damages as provided by Alabama law resulting from any disclosure in violation of this Agreement.

"c. Company Property. All files, plans, pricing and other records, documents, drawings, specifications, equipment, computer data and images, and similar items relating to the business of [Burch], whether prepared by [Rogers], or otherwise coming into [Rogers's] possession, shall remain the exclusive property of [Burch] and shall be returned to [Burch] immediately upon termination of [Rogers's] employment with [Burch].

"3. No Post-Employment Solicitation of Customers for Two (2) years. Upon the termination of [Rogers's] employment with [Burch], for any reason whatsoever, and for two (2) years following said termination, [Rogers] shall not, directly or indirectly, impliedly or expressly, either as an employee, member, manager, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, offer to provide goods and services that are provided by [Burch] to, or otherwise call on, solicit, or take away, or attempt to call on, solicit, or take away, any customer for which [Burch] provided services (or solicited to provide services) during [Rogers's] employment with [Burch].

"4. No Post-Employment Solicitation of Employees for Two (2) Years. Upon the termination of [Rogers's] employment with [Burch], for any reason whatsoever, and for two (2) years following said termination, [Rogers] shall not, directly or indirectly, impliedly or expressly, either as an employee, member, manager, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, offer to employ any person who is employed by [Burch], or who was employed by [Burch] during [Rogers's] employment with [Burch].

"5. Compensation for Breach. In the event of a breach of this Agreement by [Rogers], in addition to the termination of [Rogers's] employment with [Burch], [Burch] may recover from [Rogers], at [Burch's] sole discretion, either (1) any and all damages actually sustained by [Burch]; or, (2) in recognition of the fact that the exact amount of damages sustained by [Burch] will be difficult or impossible to ascertain, as liquidated damages and not as a penalty, the sum of \$10,000, such amount representing the reasonably foreseeable minimum amount of damages that would be sustained by [Burch]

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in the event of a breach of this Agreement by [Rogers]

"6. Equitable and Injunctive Relief Available. In the event of a breach or threatened breach by [Rogers] of the obligations under this Agreement, [Rogers] acknowledges that [Burch] will not have an adequate remedy at law and shall be entitled to such equitable and injunctive relief as may be available to restrain [Rogers] from the continued (or threatened) violation of this Agreement. Nothing in this paragraph shall be construed as prohibiting [Burch] from pursuing any other remedies available for breach or threatened breach of this covenant not to compete, including the recovery of damages from [Rogers]."

On November 21, 2017, Rogers gave notice to Burch that he would be resigning effective December 5, 2017. After receiving that notice, Burch informed Rogers that he did not need to continue working for Burch.

Soon after leaving Burch, Rogers started working for American Thermal Systems, Inc. ("ATS"), as its president. ATS constructs cold-storage facilities. At the time, ATS was owned by Rogers's father.<sup>2</sup>

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<sup>2</sup>In 2019, Rogers purchased his father's interest in ATS. ATS competes with Burch for the sale of cold-storage facilities.

Clyde Walker was employed with Burch as the manager of its cold-storage facilities in Birmingham.<sup>3</sup> As part of his job, Walker handled many aspects of every cold-storage project coming through Burch's Birmingham office. Walker's duties included bid processes, construction management, and client management.

On December 6, 2018, Rogers offered Walker a job with ATS. Walker accepted the offer on December 10, 2018. On December 31, 2018, Walker notified Burch that he was resigning. Walker's final day of employment with Burch was January 11, 2019. After beginning employment with ATS, Walker contacted the Burch customers that he had worked with while he was employed with Burch.

On January 29, 2019, Burch sued Rogers, Walker, and ATS, setting out seven counts in its complaint. In count 1, Burch alleged that Rogers breached the provisions in his employment agreement regarding confidentiality, trade secrets, proprietary information, and solicitation of customers. In count 2, Burch alleged that Rogers and Walker solicited

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<sup>3</sup>In contrast to Walker's job as manager of facilities, Rogers was a project manager, a position that involved "client management," "organization," and "subcontractor selection."

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clients in violation of the employment agreement. In count 3, Burch alleged that Rogers and Walker were negligent and wanton in handling proprietary information belonging to Burch. Count 4 alleged conversion against ATS, Rogers, and Walker regarding proprietary information. Count 5 asserted violations of trade secrets against ATS, Rogers, and Walker. In count 6, Burch sought injunctive relief against ATS, Rogers, and Walker to prevent further allegedly improper use of Burch's proprietary information. Count 7 alleged civil conspiracy against ATS, Rogers, and Walker for soliciting Burch's customers and employees and for using Burch's proprietary information.

Rogers, Walker, and ATS were served with notice and were notified that depositions would be taken. On September 30, 2019, Burch sought a preliminary injunction against Rogers, alleging that the unique and confidential information developed by Burch's management-level employees like Rogers is not available to the public and is part of Burch's proprietary information. Burch further alleged that Rogers's employment agreement prohibited Rogers from soliciting Burch's customers, current employees, and former employees for two years.

Following a hearing, the trial court entered a

preliminary injunction on October 17, 2019, finding, in pertinent part, that there was:

"(1) Substantial evidence that Burch is likely to succeed on the merits of its claims against Rogers. Burch provided evidence of the existence of the Agreement, fully signed by the parties and enforceable only after the initiation of Rogers's employment with Burch. Burch provided evidence that Rogers violated that Agreement in various ways, including (a) the solicitation and hiring of Defendant Walker, whose position with Burch was uniquely essential to Burch's operations; and (b) soliciting current Burch clients and/or vendors through his agents, ATS and Walker.

"(2) A reasonable probability of irreparable injury to Burch due to the further loss of customers and goodwill which qualifies as irreparable injury that can be protected by injunctive relief. See, e.g., Ala. Code [1975,] § 8-1-191(a) ('A protectable interest includes all of the following: ... (3) Commercial relationships or contacts with specific prospective or existing customers, patients, vendors, or clients.''); Ormco Corp. v. Johns, 869 So. 2d 1109, 1119 (Ala. 2003); Bayou Lawn & Landscape Servs. v. Oates, 713 F.3d 1080, 1085 (11th Cir. 2013) ('The court found that the Plaintiffs had demonstrated that the new rules would have an immediate and significant impact on them, resulting in lost revenue, customers, and/or goodwill. We find no clear error in these findings of fact. We have held that these facts support a finding of irreparable injury.''); BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, 425 F.3d 964, 970 (11th Cir. 2005); Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1449 (11th Cir. 1991); DJR Assocs., LLC v. Hammonds, 241 F. Supp. 3d 1208, 1231-32 (N.D. Ala. 2017). The entry of the requested preliminary injunction would keep the status quo during the course of this litigation

and cause little to no harm to Rogers, as the preliminary injunction would merely require Rogers to abide by the terms of his Agreement.

"(3) Because Burch faces irreparable injury, there is also no adequate remedy at law for the potential damage to Burch. Water Works & Sewer Bd. of the City of Birmingham v. Inland Lake Investments, LLC, 31 So. 3d 686, 692 (Ala. 2009) ('[A] conclusion that the injury is irreparable necessarily shows that there is no adequate remedy at law.').

"(4) The hardship imposed upon Rogers by the injunction does not unreasonably outweigh the benefit to Burch. Rogers remains able to work and provide construction services for cold storage facilities. This Order merely enjoins Rogers and his agents from soliciting any further Burch employees or customers, as Rogers contractually agreed in his Agreement. Further, Walker testified that he and ATS are using their best efforts not to target Burch customers, so this Order should not cause any additional harm to Rogers, ATS or Walker.

"Accordingly, it is hereby ORDERED that:

"Rogers, including, without limitation, his officers, agents, servants, employees, attorneys and all persons in active concert with said parties, are hereby restrained and enjoined to:

"(1) refrain from any further solicitation of Burch's current clients or current customers;

"(2) refrain from any further solicitation of Burch's uniquely essential employees or agents.

"The Court makes no determination as to any potential damages to Burch for Rogers's purported breaches of the Agreement and that matter is held over for a final hearing in this matter. This Order

shall remain in force and effect until such earlier time as the Court may issue a final order in this matter or the Order is altered or terminated by the Court. The Court further orders that this preliminary injunction is conditioned upon the posting a bond by Burch with the Clerk of this Court in the amount of ONE THOUSAND 00/100 Dollars (\$1,000) for the payment of any costs or damages which may be incurred by Rogers, such bond having been approved by the Court."

(Capitalization in original.)

Rogers appeals, arguing that the employment agreement and thus the restrictive covenants in that agreement are void because he was not an employee of Burch when he signed the agreement and the restrictions are broader than permitted under § 8-1-190, Ala. Code 1975, and that the preliminary injunction restricts his post-employment activities for a longer period than prescribed in the employment agreement.<sup>4</sup>

## II. Standard of Review

"We have often stated: 'The decision to grant or to deny a preliminary injunction is within the trial court's sound discretion. In reviewing an order granting a preliminary injunction, the Court determines whether the trial court exceeded that discretion.' SouthTrust Bank of Alabama, N.A. v. Webb-Stiles Co., 931 So. 2d 706, 709 (Ala. 2005).

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<sup>4</sup>An appeal may be taken from "any interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction." Rule 4(a)(1)(A), Ala. R. App. P.

"A preliminary injunction should be issued only when the party seeking an injunction demonstrates:

""(1) that without the injunction the [party] would suffer irreparable injury; (2) that the [party] has no adequate remedy at law; (3) that the [party] has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the [party opposing the preliminary injunction] by the injunction would not unreasonably outweigh the benefit accruing to the [party seeking the injunction].""

"Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003) (quoting Perley v. Tapscan, Inc., 646 So. 2d 585, 587 (Ala. 1994))."

Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1175-76 (Ala. 2008).

### III. Discussion

At the outset, we must determine whether Rogers's appeal from the preliminary injunction is moot based on the terms of the employment agreement. A moot case lacks justiciability. Underwood v. Alabama State Bd. of Educ., 39 So. 3d 120 (Ala. 2009). "This Court must sua sponte recognize and address the lack of subject-matter jurisdiction owing to the lack of justiciability." Surles v. City of Ashville, 68 So. 3d 89, 92 (Ala. 2011).

"Events occurring subsequent to the entry or denial of an injunction in the trial court may properly be considered by this Court to determine whether a cause, justiciable at the time the injunction order is entered, has been rendered moot on appeal. '[I]t is the duty of an appellate court to consider lack of subject matter jurisdiction....' Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983). '[J]usticiability is jurisdictional.' Ex parte State ex rel. James, 711 So. 2d 952, 960 n. 2 (Ala. 1998). A justiciable controversy is one that 'is definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a decree.' Copeland v. Jefferson Cnty., 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969). A case lacking ripeness has yet to come into existence; a moot case has died. Between the two lies the realm of justiciability. See 13B Charles Alan Wright et al., Federal Practice and Procedure § 3533 (3d ed. 2008) ('It is not enough that the initial requirements of standing and ripeness have been satisfied; the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition.')."

South Alabama Gas Dist. v. Knight, 138 So. 3d 971, 975-76 (Ala. 2013) (footnotes omitted).

In this case, the trial court entered a preliminary injunction based on the parties' employment agreement.

"The primary purpose of injunctive relief ... is to prevent future injury. See Williams v. Wert, 259 Ala. 557, 559, 67 So. 2d 830, 831 (1953) ('The court cannot enjoin an act which has occurred.');

43A C.J.S. Injunctions 17 (2014) ('Equity will not usually issue an injunction when the act complained

of has been committed and the injury has already occurred.')."'

Irwin v. Jefferson Cty. Pers. Bd., 263 So. 3d 698, 704 (Ala. 2018).

Rogers notified Burch on November 21, 2017, that his last day of employment with Burch would be December 5, 2017. His employment agreement with Burch provided that he could not solicit Burch's employees or customers for two years from the date his employment ended, which would have been, at the latest, December 6, 2019.<sup>5</sup> On October 17, 2019, the trial court entered a preliminary injunction prohibiting Rogers from soliciting Burch's employees or customers. Rogers filed his notice of appeal on October 30, 2019. The two-year period set out in the employment agreement has now expired. Therefore, the issue whether the trial court exceeded its discretion in prohibiting Rogers from soliciting Burch's employees or customers from the date the order was entered on October 17,

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<sup>5</sup>Section 8-1-190 (b) (5), Ala. Code 1975, provides that the presumptively reasonable time limit for a nonsolicitation restrictive covenant is 18 months. "The party seeking enforcement of the covenant has the burden of proof on every element. The party resisting enforcement of the covenant has the burden of proving the existence of undue hardship, if raised as a defense." § 8-1-194, Ala. Code 1975.

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2019, until the two-year period established by the employment agreement expired at the latest on December 6, 2019, is now moot. That is, there is nothing justiciable concerning the preliminary injunction because the nonsolicitation clause in the employment agreement expired, at the latest, on December 6, 2019. Accordingly, "[a] decision by us in this case would accomplish nothing"; therefore, we conclude that the case before us is moot and that the appeal is due to be dismissed. Eagerton v. Corwin, 359 So. 2d 767, 769 (Ala. 1977).

APPEAL DISMISSED.

Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur.