

Trade Secrets Act;

I. The Bankruptcy Court concluded that McCauley did not violate the covenant in the SRA restricting her use of "Proprietary Information," as that term is defined in the SRA;

J. The Bankruptcy Court concluded that Plaintiffs' request for a permanent injunction had been rendered moot;

K. The Bankruptcy Court awarded costs to Defendant.

#### V. Issues in PHS' and McCauley's Cross-Appeal

PHS and McCauley assert that the Bankruptcy Court erred as a matter of law, misapplied the law or was clearly erroneous as follows:

A. The Bankruptcy Court denied PHS' and McCauley's Motion to Amend their Answer to assert a defense of res judicata or lack of standing.

B. The Bankruptcy Court denied PHS' and McCauley's Motion to Amend their Answer to assert a claim for attorney's fees.

#### VI. Issue in Consolidated Appeal

PHS and McCauley assert that the Bankruptcy Court erred as a matter of law, misapplied the law to the facts, was clearly erroneous, or abused its discretion in denying PHS and McCauley's Motion for an Award of Costs and Fees, as to the award of attorney's fees. PHS and McCauley request the Court to reverse the Bankruptcy Court's Order denying their Fee Motion, and remand the matter for a determination of the fees which PHS and McCauley may recover.

## VII. Discussion - The Appeal

### A. Substantial Factor Causation

Maxxim and Medline argue that the Bankruptcy Court made no findings as to McCauley's efforts on behalf of PHS while McCauley was a Maxxim Sales Representative, as a substantial factor in Maxxim's alleged damages, and as a substantial factor in Medline's alleged damages.

Maxxim and Medline argue that McCauley's contract breaches were a substantial factor in Maxxim's losses. Maxxim and Medline argue that the evidence was that PHS used Maxxim's representative in Maine from February, 2003 onward to promote PHS as an immediate alternative to Maxxim, blunting Maxxim's efforts to retain the business. Maxxim and Medline further argue that McCauley and Maxxim's former CPT customers (Maine Medical, Penobscot Bay Medical Center, Central Maine, St. Joseph's - Bangor) all admitted that PHS acquiring a good account executive in New England was an important factor in their success in penetrating that market.

#### 1) Substantial Factor Test

In Tuttle/White Contractors, Inc. v. Montgomery Elevator Co., 385 So.2d 98, 100 (Fla. 5<sup>th</sup> DCA 1980), the Court explains the "substantial factor" test :

According to Corbin on Contracts, the responsibility for contractual damages which are the result of multiple causes appears to be governed by the "substantial factor" test:

In all cases involving problems of causation and responsibility for harm, a good many factors have united in producing the result; the plaintiff's total injury may have been

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the result of many factors in addition to the defendant's tort or breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all the contributing factors causing the injury, and must his loss be segregated proportionately? To these questions the answer is generally No. In order to establish liability the plaintiff must show that the defendant's breach was a "substantial factor" in causing the injury.

The Court notes that Maxxim and Medline entered into a Stipulation providing that Maxxim would be entitled to damages or settlement proceeds relating to the conduct of PHS and McCauley prior to November 10, 2003, and Medline would be entitled to damages or settlement proceeds relating to the conduct of PHS and McCauley on or after November 10, 2003. Karen McCauley was a sales representative for Maxxim from July 1, 2002 until June 27, 2003.

## 2) Maxxim's Damages

The Bankruptcy Court included Findings of Fact which explain in detail the various causes of Maxxim's loss of business in Maine. The Court has included trial testimony of Maine Medical Center, Penobscot Bay Medical Center, Central Maine Healthcare, and St. Joseph's Hospital - Bangor above, to illustrate the substantial evidence supporting the Bankruptcy Court's conclusion that PHS and McCauley did not cause Maxxim's loss of business in Maine.

Maxxim was not awarded a Novation contract in December, 2002. Maxxim bid for the contract, but was excluded in final bid selection. The Novation contract accounted for 75% of Maxxim's CPT business in Maine. (12:242-246). PHS was awarded a Novation contract for 2002-2005. Maine Medical Center, Penobscot Bay

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Medical Center, and Central Maine Healthcare were in the Novation GPO, and intended to seek vendors through the RFP process once Novation identified the vendors who were awarded a Novation contract. Novation's decision not to award Maxxim a contract was a direct cause of Maxxim's loss of Maine CPT business, and was independent of any acts of PHS and McCauley.

In general terms, the RFP process is a search for the best quality provider with a favorable quality-cost ratio. The process may involve an initial group consultation to clearly establish the needs of the entity, and to select participants, then furnishing identical specifications /instructions to all invitees for submission of their proposals, including the criteria upon which the proposals will be evaluated, and then comparing the responses. The RFP process lends itself to meaningful comparison of the proposals of prospective vendors.

Maine Medical Center, Penobscot Bay Medical Center and Central Maine Healthcare also voiced concerns as to quality of Maxxim's CPTs. Maxxim's Chapter 11 filing in February, 2003 triggered further concern as to product supply.

St. Joseph's Hospital - Bangor joined the Yankee Alliance before Karen McCauley became a Maxxim sales representative. St. Joseph's Hospital - Bangor had an individual contract with Maxxim. St. Joseph's Hospital - Bangor was in the Premier GPO, and, upon the expiration of the Maxxim contract and the expiration of the seven-year Premier contracts, intended to seek a Premier vendor. Maxxim was not a Premier vendor.

There is trial testimony that it is important that a vendor have a capable, intelligent, responsive sales representative. Maxxim's Novation customers testified that the normal procedure to select a CPT vendor is through the RFP process, wherein

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Novation vendors compete against each other. Maxxim's Novation customers elected to initiate the RFP process. There is no evidence that establishes a causal link between the decision of Maxxim's Novation customers to initiate the RFP process and the conduct of PHS and McCauley. The evidence shows that Maxxim was excluded from consideration due to a combination of the loss of the Novation contract, poor quality, and the Chapter 11 filing.

According to St. Joseph's Hospital - Bangor, Maxxim knew that when the Premier contracts were up for renewal and the Maxxim contract expired, a new CPT contract would go to a Premier vendor. Maxxim's CPT customers recognized their obligation to purchase the CPTs (a custom product) in the supply pipeline, and did so until the selection of a new vendor.

The Bankruptcy Court identified the factors which caused Maxxim's losses, which were completely independent from any acts of PHS and McCauley. The Bankruptcy Court concluded that the evidence did not establish a causal link between the termination of Maxxim's contracts with its Novation customers, and any act of PHS and McCauley.

As to causation for Maxxim's damages, the Court **affirms** the findings and conclusions of the Bankruptcy Court.

### 3. Medline's Damages

Maxxim and Medline argue that Medline had GPO contracts with Novation and Premier, that Novation contracts did not prevent customers from buying from Medline, that Medline had not filed Chapter 11, and that there is no evidence of service or supply problems as to Medline. Maxxim and Medline argue that the only proof as to damages

was that Medline was unable to penetrate the Maine market because McCauley had delivered Maxxim's customers to PHS. Maxxim and Medline argue that McCauley's speed in directing Maxxim's customers to PHS caused Medline to be deprived of CPT earnings from Maxxim's business.

In January, 2003, Medline was a Novation vendor. After Maxxim was not awarded a Novation contract, Maxxim's Novation customers went through the RFP process to replace Maxxim. The RFP process "levels the playing field" in that each vendor is given an equal opportunity to respond, and each vendor is evaluated by applying the same criteria to the vendor's response.

The Court notes that the combination of Maxxim's loss of the Novation contract, chronic quality issues, and Maxxim's Chapter 11 filing created uncertainty for Maxxim's CPT customers as to a ready supply of CPTs, such that some customers accelerated the RFP process. Gauthier Testimony, supra.

During its RFP process, Maine Medical Center was aware that Medline was a Novation vendor. Maine Medical's clinicians did not approve Medline and Medline was not invited to participate in Maine Medical's RFP. Guare Testimony, supra. There is no evidence that links PHS and McCauley to the decision not to invite Medline to participate.

Penobscot Bay Medical Center invited Medline to participate in its RFP, and Medline did participate. The committee found that Medline did not comply 100 % with the committee's preferences as to the components included in the CPT, and that Medline's costs were the highest of the competing vendors. After comparing cost and performance, Penobscot Bay selected PHS and not Medline. Whitney Testimony, supra. There is no evidence that links any act of McCauley and PHS outside of the

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RFP process to the committee's decision.

Central Maine Healthcare invited three vendors to participate in its RFP, but Medline was not among them. There is testimony that Central Maine's selection of participants was based on quality. Gauthier Testimony, supra. There is no evidence that links PHS and McCauley to the decision not to invite Medline to participate.

St. Joseph's Hospital - Bangor recognized that Medline was a Premier vendor. When Yankee Alliance had its vendor fair in Worcester, Medline had a booth, along with other potential vendors. As a group, Yankee Alliance decided to pursue a contract for CPTs with PHS. There is testimony that PHS provided the lowest cost quality option that the membership agreed to. Maynard Testimony, supra.

In its Findings of Fact and Conclusions of Law, the Bankruptcy Court states that references to "Maxxim" or "Plaintiff" are intended to include Medline unless otherwise indicated by the context. (Footnote 1). The Bankruptcy Court concluded that PHS and McCauley did not cause Maxxim's damages. There is substantial evidence that PHS and McCauley did not cause Medline's alleged damages, including any pre-separation acts and any post-separation acts. As a Novation vendor and a Premier vendor, Medline had the same opportunity to compete for the CPT business in Maine that PHS had.

As to causation for Medline's alleged damages, the Court **affirms** the findings and conclusions of the Bankruptcy Court.

B. Count I - Breach of Contract  
Covenant Restricting Use of Confidential Information

Maxxim and Medline argue that the Bankruptcy Court erred in concluding that McCauley did not breach the covenant restricting McCauley's use of "Proprietary Information" as defined in the SRA.

Maxxim argues that the information that McCauley gave PHS about her customers and their product preferences while still employed by Maxxim constituted "Proprietary Information." Maxxim argues that McCauley provided PHS a list of her Maxxim accounts, and attended a "pack meeting" to permit Maxxim competitors to examine Maxxim CPTs and to supply information to those competitors about the Maxxim packs. Maxxim further argues that McCauley provided PHS with Maxxim's CTMS material, including BOMs, for Maxxim customers Maine Medical, Frisbie Memorial, Penobscot Bay, Maine General, Stephens Memorial and Mid-Coast. Maxxim argues that it is immaterial that the hospitals freely shared the alleged Proprietary Information with others.

In Count I of the Adversary Complaint, Maxxim alleges that:

42. On July 1, 2002, Maxxim and Defendant McCauley entered into the Agreement, a valid and enforceable written contract, which was supported by consideration.

43. Defendant McCauley's covenant regarding confidential information, contained in the Agreement, was reasonable, as it was no more restrictive than necessary to protect the goodwill of Maxxim, and the restrictions did not impose undue hardship on Defendant McCauley.

44. Defendant McCauley's use of confidential and proprietary information of Maxxim, as alleged, constitute breaches of the Agreement.



“Goodwill” refers to the expectation that an established customer will return to do more business. In this case, however, the absence of a GPO contract was a critical factor, in addition to product quality, cost, and reliability. Maxxim’s own acts impaired whatever customer goodwill Maxxim had. Maxxim did not lose its CPT customers because PHS knew the identity of Maxxim’s customers, what was in Maxxim’s CPTs, or the cost to produce Maxxim CPTs.

At trial, McCauley testified that she sent BOMs to PHS at the request of her customers. McCauley’s acts took place long after Maxxim’s customers knew that Novation did not award Maxxim a contract. Once Novation did not award Maxxim a contract, Maxxim’s then-customers continued their CPT business with Maxxim only on an interim basis, and sought a new vendor through the RFP process. The hospitals communicated with the vendors who had been awarded a Novation contract, providing their product preferences to them, and the Novation vendors competed against each other in their RFP process. The Yankee Alliance, a GPO, used a comparable process to select vendors.

The elements of a breach of contract are: 1) the existence of a contract; 2) a breach of the contract, and 3) damages resulting from the breach. The Bankruptcy Court found that Maxxim’s and Medline losses were caused by factors independent of any act of PHS and McCauley. If the Bankruptcy Court erred in concluding that McCauley did not breach the covenant restricting McCauley’s use of Proprietary Information, due to the absence of causation, that error had no impact on the Bankruptcy Court’s ultimate conclusion denying relief to Maxxim and Medline. If there was a breach, there were no resulting damages.

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The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count I.

C. Count II - Breach of Contract

1. Pre-Separation Acts

Maxxim and Medline argue that the Bankruptcy Court did not adjudicate the heart of the dispute between Maxxim and Medline and PHS and McCauley, and that this adversely affected the Bankruptcy Court's conclusions as to the breach of contract, unfair trade practices, breach of fiduciary duty, and tortious interference Counts. Maxxim and Medline argue that the Bankruptcy Court made no findings or conclusions as to McCauley's "commercial espionage and sabotage against Maxxim during a five month period when [McCauley] was still serving as a Maxxim Sales Representative "

Count II is directed to McCauley's alleged violation of the SRA during its term, as well as after the termination of the Agreement.

In Count II, Maxxim alleges that:

49. Defendant McCauley's covenant not to compete, contained in the Agreement, was reasonable, as it was no more restrictive than necessary to protect the business and goodwill of Maxxim, and the restrictions did not impose undue hardship on Defendant McCauley.

50. Defendant McCauley's conduct in competing with Maxxim and in soliciting its customers by engaging in activities for PHS while still in Maxxim's employ, constitute breaches of the Agreement.

The elements of an action for breach of contract are: 1) the existence of a contract; 2) a breach of the contract, and 3) damages resulting from the breach. The Bankruptcy Court found that McCauley knowingly violated her covenant not to compete in going to work for PHS, but Maxxim suffered no damages a result of McCauley's actions. The Bankruptcy Court found that Maxxim's loss of the Maine business was due to the poor quality of Maxxim's services and goods, the loss of a key group purchasing contract and the filing of its Chapter 11, for which PHS and McCauley bore no responsibility. In other words, any actions taken by McCauley during the five-month period immediately preceding June 27, 2003 did not cause Maxxim's customers to end their contracts with Maxxim.

As to the request for injunctive relief, the Court notes that Maxxim did not commence the adversary proceeding until after the conclusion of McCauley's employment with Maxxim. An injunction is directed to preventing future harm, and cannot affect past harm. An injunction is the usual remedy to enforce a covenant not to compete, and could not have been granted for any pre-separation acts. The alternative remedy is the award of damages for those acts, but Maxxim's and Medline's damages were not caused by any act of McCauley.

If the Bankruptcy Court erred in not making additional explicit findings as to Count II, the error did not impact the ultimate conclusion of the Bankruptcy Court denying relief to Maxxim and Medline as to Count II.

## 2. Post-Separation Acts

### Legitimate Business Interest in Enforcing Post-Separation Non-Compete Covenant

Maxxim and Medline argue that the Bankruptcy Court erred to the extent it held or intended to hold that the "legitimate business interest" requirement is applicable to a

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covenant not to compete during the term of the sales representative relationship, citing Insurance Field Services, Inc. v. White & White Inspection & Audit Service, Inc., 384 So.2d 303, 307-308 (Fla. 5<sup>th</sup> DCA 1980)(even without agreement, during ongoing relationship there exists a common law duty not to engage in disloyal acts). Maxxim and Medline argue that the "legitimate business interest" requirement applies to a post-separation non-compete clause, and the Bankruptcy Court committed an error of law and misapplied the law to the facts by its overly narrow construction of "legitimate business interest." Maxxim and Medline argue that the Bankruptcy Court erroneously omitted analysis of Maxxim's established customer relationships at the time the SRA was signed, and the presence of other "Proprietary Information," focusing only on trade secrets and confidential business information.

In the Findings of Fact and conclusions of Law, the Bankruptcy Court states:

The term "legitimate business interest" includes, but is not limited to (1) trade secrets, (2) valuable confidential business or professional information that otherwise does not qualify as trade secrets, (3) substantial relationships with specific prospective or existing customers and (4) customer goodwill. Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable. In addition, a person seeking enforcement of a restrictive covenant also must prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. Maxxim failed to prove any legitimate business interest worthy of protection by a covenant not to compete.

The enforceability of a covenant not to compete is controlled by the law at the time the agreement takes effect. Ch. 542.335 , Florida Statutes (2002) controls the enforceability of the covenant not to compete in the SRA. There was extensive trial testimony on the issue of trade secrets and confidential business information that

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Maxxim and Medline contended that McCauley used in breach of the SRA. The Bankruptcy Court concluded that Maxxim failed to prove that McCauley had access to confidential or proprietary information obtained during her employment with Maxxim.

#### A) Substantial Relationships with Existing Customers

Maxxim argues that Maxxim's numerous CPT relationships existed at the time the SRA was signed, were ongoing during the term of the SRA, and thereafter.

The Bankruptcy Court noted Maxxim's supply problems, service quality problems, the Novation Agreement, the loss of other sales representatives, and Chapter 11 filing, and the impact of those factors on Maxxim's relationships with its existing customers. The Bankruptcy Court states: "Most importantly, as discussed in the section above dealing with causation, McCauley's actions simply did not result in any damages to Maxxim."

Maxxim had substantial relationships with existing customers until December, 2002. However, once Novation did not award Maxxim a contract, those relationships were over. Maxxim's relationship with its CPT customers continued only to the extent that there were additional CPTs in the supply pipeline that the hospitals were obligated to purchase. Maxxim's customers intended to use the RFP process to select another vendor, with "stocking agreements" covering the time gap between the conclusion of Maxxim's contract and the selection of a new vendor. Maxxim's own actions impaired its substantial relationships with Maxxim's existing customers. PHS was a Novation vendor and a Premier vendor. This situation is somewhat like Shields v. Paving Stone Company, 796 So.2d 1267 (Fla. 4<sup>th</sup> DCA 2001).

If the Bankruptcy Court erred in not including any explicit conclusion of law beyond its conclusion that Maxxim did not prove any legitimate business interest justifying the restrictive covenant, given the Bankruptcy Court's conclusion as to causation, that error had no impact on the Bankruptcy Court's ultimate decision to enter judgment in favor of PHS and McCauley.

#### B. Proprietary Information

Maxxim argues that Maxxim provided extensive proprietary information and training on Maxxim's products, customers, pricing and profits to Karen McCauley. The "proprietary information" included "organized, detailed, competitively sensitive and current customer files" from Susan LaVoie and Thomas Pilkington, and a laptop containing Maxxim's "Custom Tray Management System" ("CTMS"). The CTMS included CPT specifications and contents, Bills of Materials containing content specifications, the pack and content pricing and the costing, overhead, profit and commission information for Maxxim CPTs. Maxxim argues that Maxxim restricted access to its CTMS to its Sales Representatives, who were not authorized to give any information on CTMS to any competitor. Maxxim further argues that the files and CTMS contained valuable current and historical information on Maxxim's dealings with its customers, which would be of economic advantage to new competitors, which took many years and considerable effort to accumulate, and which was critical to Maxxim in generating CPT sales and profits and managing the CPT business.

Maxxim further argues that McCauley had access to Maxxim's computer assisted drawings/computer assisted manufacturing printouts. Maxxim contends it reasonably restricted access to CAD/CAM designs to its production personnel and to the Sales Representatives and supervisory personnel for their own CPT customers. The Court notes that Maxxim was unable to identify which sales personnel had accessed

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CAD/CAM designs during the relevant time.

Maxxim also refers to the lengthy collaborative process involved in the design of CPTs, and the long sales cycle of 6 to 9 months required to build a relationship with decision-making personnel.

In its Findings of Fact, the Bankruptcy Court made findings as to CPT design and specifications, Bills of Material, the CTMS, CAD/CAM, and the terms of the Maxxim/Novation Agreement. The Bankruptcy Court noted that Maxxim did not enter into confidentiality agreements with its customers, as to CPT contents and design, or bills of material. The Bankruptcy Court also noted that bills of material are routinely provided to customers in connection with the sale of CPTs, and are used by customers for a variety of purposes, among them to solicit prices for CPTs from competing suppliers. The Bankruptcy Court noted that hospitals often provide a tray sample to a potential supplier.

McCauley had substantial experience in the health care industry when Maxxim hired her, and already knew the decision-makers at some of the medical facilities and important customers in her territory. Maxxim considered McCauley to be a "turn-key" employee. To the extent that Maxxim is arguing that customer goodwill associated with specialized training is a legitimate business interest justifying the SRA's restrictive covenant, the customer goodwill was no longer present, and the Bankruptcy Court's finding as to causation renders this issue moot.

Ronald Evans, a Maxxim representative, testified in his deposition as to the variety of ways to design a CPT, such as by using the lengthy collaborative process Maxxim describes, or "through a bid submitted by an institution with some required specifications, or a GPO will issue an RFP that may have specific specifications."