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IN THE
COURT OF APPEALS OF INDIANA

FAST TEK GROUP, LLC,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 29A02-0602-CV-133
	)	
ON SITE, LLC, et. al,	)	
	)	
Appellees-Defendants)		

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0508-PL-891

December 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Fast Tek Group, LLC, ("Fast Tek LLC") appeals the trial court's order dissolving a preliminary injunction against Kerry Goodwin and Kevin Capps. OnSite, LLC, and Philip Grove appeal the trial court's refusal to dissolve a preliminary injunction against Grove. We dismiss in part, affirm in part, reverse in part, and remand.

Issues

The restated issues before us are:

I. whether Fast Tek LLC's appeal with respect to Goodwin and Capps is now moot; and

II. whether the trial court properly refused to dissolve the injunction against Grove by denying a motion to correct error filed by Grove and OnSite.

Facts

On September 18, 2003, Fast Tek LLC purchased the physical assets of Fast-Tek, Inc., such as computers and office furniture. Grove was president of Fast-Tek, Inc. at the time of the sale and was the company's founder. Fast-Tek, Inc. was deeply in debt at the time of the sale, and coinciding with the sale of the company's physical assets, Fast Tek LLC loaned Fast-Tek, Inc. $250,000 to pay those debts. The loan was secured by all of Fast-Tek, Inc.'s assets, including intangible assets.

Fast-Tek, Inc. was a company that provided inspection, engineering, and related quality control services with respect to companies that supplied parts to General Motors

Corporation ("GM") in its manufacture of automobiles.[1] Fast-Tek, Inc. was one of only eight companies that GM had approved for the provision of these services in the United States and Canada. Fast Tek LLC continued the provision of these services to GM after the September 18, 2003 sale of assets, while Fast-Tek, Inc. ceased operations on the same day.

Also on September 18, 2003, Grove executed an employment agreement with Fast Tek LLC, whereby he became a vice president of sales and strategic planning and owner of a twenty-five percent share of the voting equity units of the company. The agreement included a non-competition provision, which was to last for two years if Grove's employment was terminated by the company, or five years if Grove left of his own accord.

Goodwin and Capps were hired by Fast Tek LLC in 2005 and executed non-competition agreements as part of their employment. These agreements were identical to each other, but different from the one executed by Grove. The stated duration for the post-employment limit on competition with Fast Tek LLC was one year after termination.

In late July 2005, Grove, Goodwin, and Capps left the employ of Fast Tek LLC and went to work for OnSite or related companies.[2] OnSite was a new company, but it was intended to provide the same type of engineering and inspection services offered by Fast Tek LLC and to operate in direct competition with Fast Tek LLC. Grove and

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[1] It appears Fast-Tek, Inc. had other customers as well, but GM clearly was its primary customer.

[2] It is unclear whether Goodwin and Capps actually went to work for OnSite or for another related company or companies owned by OnSite's founder, Edward Nix.

Goodwin communicated with GM representatives and essentially represented that OnSite was the same company as Fast Tek LLC, only with a different name. In response to these representations, GM replaced Fast Tek LLC with OnSite as one of the eight approved parts supplier inspectors in the United States and Canada, although Fast Tek LLC convinced GM to reverse this decision.

On August 1, 2005, Fast Tek LLC filed suit against OnSite, Grove, Goodwin, Capps (collectively "the Defendants") and others, alleging violations of the non-competition agreements. On August 8, 2005, the trial court entered a temporary injunction enjoining the Defendants from making misrepresentations to GM and requiring them to comply with the non-competition agreements. After hearing further evidence, on August 28, 2005, the trial court entered a preliminary injunction that concluded the non-competition agreements were valid and enforceable and required the Defendants to comply with them.

On September 23, 2005, the Defendants filed a motion to correct error challenging the preliminary injunction and requesting that it be dissolved. On December 22, 2005, the trial court entered an order granting the motion and vacating the preliminary injunction in part with respect to Goodwin and Capps. Specifically, it concluded that most of the non-competition agreement affecting them was overly broad and unenforceable. However, the trial court still required Goodwin in particular not to make misrepresentations to potential OnSite customers or to utilize confidential information belonging to Fast Tek LLC. The trial court refused to dissolve the preliminary injunction with respect to Grove, finding his agreement to be entirely valid.

On January 20, 2006, Grove and OnSite filed a notice of appeal, challenging the trial court's denial of the motion to correct error with respect to Grove. On January 23, 2006, Fast Tek LLC filed a notice of appeal, challenging the trial court's lifting of most of the preliminary injunction with respect to Goodwin and Capps. On April 4, 2006, this court ordered these cases to be consolidated on appeal. We now address the merits of these cases.

Analysis

I. Goodwin and Capps's Non-Competition Agreements

We first address the non-competition agreements relating to Goodwin and Capps. Goodwin and Capps argue that Fast Tek LLC's appeal is moot with respect to those agreements, because by their terms they expired at the end of July 2006, or one year after Goodwin and Capps left Fast Tek LLC's employ. "An appeal is moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or when no effective relief can be rendered to the parties." Lake County Sheriff's Corrections Merit Bd. v. Peron, 756 N.E.2d 1025, 1027 (Ind. Ct. App. 2001).

The sole issue that is properly before us on interlocutory appeal is whether the trial court properly dissolved the preliminary injunction against Goodwin and Capps. We can no longer direct any type of relief in favor of Fast Tek LLC on this issue. Even if we were to conclude the non-compete agreement was entirely enforceable, it expired one year after Goodwin and Capps left Fast Tek LLC. That date passed in July of this year. We could not direct the trial court to reinstate the preliminary injunction.

It is true, as Fast Tek LLC suggests, that the validity of the non-competition agreements may be relevant in determining whether Goodwin and Capps are liable in damages to Fast Tek LLC. Because the ruling on the preliminary injunction was not a final order, however, the trial court remains free to reconsider its invalidation of most of the agreement and to reach a different result than when it ruled on the preliminary injunction. See U.S. Land Services, Inc. v. U.S. Surveyor, Inc., 826 N.E.2d 49, 67 (Ind. Ct. App. 2005). Additionally, there may be independent bases for assessing damages against Goodwin and Capps. The trial court specifically (albeit preliminarily) found that, regardless of the validity of his non-competition agreement, Goodwin had engaged in improper conduct when attempting to convince GM that Fast Tek LLC had become OnSite and in utilizing confidential information belonging to Fast Tek LLC. We cannot order the reinstatement of preliminary injunctive relief in Fast Tek's favor at this time, and we decline to enter a pre-emptive ruling on the agreement's validity before the trial court has entered final judgment in this case. Fast Tek LLC's appeal with respect to Goodwin and Capps is moot, and the proper action when faced with a moot appeal is to order its dismissal.[3] See Stansberry v. Howard, 775 N.E.2d 679, 680 (Ind. 2002).

II. Grove's Non-Competition Agreement

With respect to Grove's non-competition agreement, Fast Tek LLC argues that his appeal is untimely and not properly before this court. Specifically, Fast Tek LLC contends that Grove was required to appeal the trial court's original grant of the

[3] Fast Tek LLC makes no argument that its appeal falls under the "public importance" exception to not considering moot appeals. See Lake County, 756 N.E.2d at 1027.

preliminary injunction against him on August 28, 2005, not its December 22, 2005 ruling on the motion to correct error. Therefore, it claims that the notice of appeal Grove filed on January 20, 2006 was untimely because it was well outside the thirty-day limit for initiating an appeal under Indiana Appellate Rule 14, which governs interlocutory appeals.

As Fast Tek LLC notes, this court recently held that where an appellant could have appealed an interlocutory order as of right under Appellate Rule 14(A), a notice of appeal filed forty-five days after the order was entered was untimely and we lacked jurisdiction to consider the appeal. See Young v. Estate of Sweeney, 808 N.E.2d 1217, 1221 (Ind. Ct. App. 2004). Furthermore, we stated that the fact the appellant had filed a motion to correct error challenging the interlocutory order, which was denied, did not extend the time period for filing a notice of appeal from the interlocutory order. See id. at 1221 n.6. We noted that nothing in Indiana Trial Rule 59, governing motions to correct error, "suggested that a motion to correct error is proper following an interlocutory order." Id. Nor did any language in the appellate rules indicate that the time period for initiating an appeal from an interlocutory order, as opposed to a final order, could be extended by the filing of a motion to correct error. See id.

Although Young on its face might seem to control this case and require dismissal of Grove's appeal, upon closer examination we conclude Young is distinguishable from the present case. The interlocutory order at issue in Young was an order for the payment of money, specifically attorney fees. See id. at 1220 n.5. Indiana Appellate Rule

14(A)(1) allows for an interlocutory appeal as of right from any order for the payment of money.

By contrast, the relevant subsection of Appellate Rule 14(A) in this case is (5), which permits an interlocutory appeal as of right from any order "[g]ranting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction." Under this rule, Grove could have immediately appealed the trial court's original grant of the preliminary injunction on August 28, 2005. Instead, he filed a motion to correct error. According to Young, such a motion is not a proper response to an interlocutory order. However, regardless of the label placed on Grove's motion, it clearly was a request to "dissolve" the preliminary injunction issued on August 28, 2005. On December 22, 2005, the trial court issued an order effectively refusing to dissolve the injunction.[4] Appellate Rule 14(A)(5) permits an interlocutory appeal as of right from any order "refusing to dissolve a preliminary injunction" so long as a notice of appeal is filed within thirty days of such order. Grove's notice of appeal filed on January 20, 2006, fell within this time frame. We conclude that Grove's appeal is timely and properly before us. Cf. Oxford Fin. Group, Ltd. v. Evans, 795 N.E.2d 1135, 1141 (Ind. Ct. App. 2003) (holding appeal following motion to correct error, which resulted in partial modification of a preliminary injunction, was an appeal of right under Appellate Rule 14(A)(5)).

Turning to the merits of the appeal, the decision whether to grant or deny a preliminary injunction rests within the discretion of the trial court and the scope of our

[4] There is no argument in this case that the "motion to correct error" was deemed denied on an earlier date.

review is limited to deciding whether the trial court has clearly abused that discretion.[5] Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc., 820 N.E.2d 158, 163 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or if the trial court misinterprets the law. Id. In order to properly grant a preliminary injunction, the trial court measures several factors: (1) whether the movant's remedies at law are inadequate, causing irreparable harm pending resolution of the substantive action; (2) whether the movant has demonstrated at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) whether the threatened injury to the movant outweighs the potential harm the grant of the injunction would occasion upon the non-movant; and (4) whether the public interest will be disserved. Titus v. Rheitone, Inc., 758 N.E.2d 85, 91 (Ind. Ct. App. 2001), trans. denied.

The sole issue with respect to the granting of the preliminary injunction in this case is the reasonableness of Grove's non-competition agreement. With respect to covenants not to compete, we observe that they are not favored in the law. Dicen v. New Sesco, Inc., 839 N.E.2d 684, 687 (Ind. 2005). However, covenants not to compete ancillary to the sale of a business "stand in better stead" than ordinary covenants between an employer and employee. Id. Our supreme court has noted:

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[5] We acknowledge that the present appeal concerns the trial court's refusal to dissolve the preliminary injunction against Grove. However, as a practical matter the standard of review for that refusal appears to be coextensive with the standard that would have applied to the original granting of the injunction. See Xantech Corp. v. Ramco Indus., Inc., 643 N.E.2d 918, 921 (Ind. Ct. App. 1994) (applying standard of review for original grant or denial of preliminary injunction where issue on appeal was whether trial court properly refused to dissolve injunction).

> In the former situation there is more likely to be equal bargaining power between the parties; the proceeds of the sale generally enable the seller to support himself temporarily without the immediate practical need to enter into competition with his former business; and a seller is usually paid a premium for agreeing not to compete with the buyer. Where the sale of the business includes good will . . . a broad noncompetition agreement may be necessary to assure that the buyer receives that which he purchased. . . . On the other hand, an ordinary employee typically has only his own labor or skills to sell and often is not in a position to bargain with his employer.

Id. (quoting Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 28 (Mass. Ct. App. 1986)).

Additionally, the more favorable treatment extended to covenants not to compete ancillary to the sale of a business also extends to employment covenants not to compete executed in the same transaction as the sale of the business, where the seller of the business becomes an employee of the buyer. See id. at 689. This court has observed, also quoting from Alexander:

> It is not at all unusual for the seller of a business to join the new enterprise in an employment capacity. There are obvious advantages to both sides which flow from such an arrangement. It enables the purchaser to carry on the old business with the least possible dislocation and loss of good will. Established customers of the business sold could be expected to patronize the successor business. And such an arrangement provides the seller with the opportunity to be productive in the work with which he is familiar, and to gain income.

Fogle v. Shah, 539 N.E.2d 500, 503 (Ind. Ct. App. 1989) (quoting Alexander, 488 N.E.2d at 28).

Both ordinary employment covenants and sale of a business covenants are reviewed under a reasonableness standard. Dicen, 839 N.E.2d at 687. Policy considerations, however, "dictate that noncompetition covenants arising out of the sale of a business be enforced more liberally than such covenants arising out of an employer-employee relationship." Id. (quoting Alexander, 488 N.E.2d at 28). A three-pronged test is applied in determining whether non-competition agreements ancillary to the sale of a business are overbroad. Fogle, 539 N.E.2d at 503. The elements of the test are: (1) whether the covenant is broader than necessary for the protection of the covenantee in some legitimate interest; (2) the effect of the covenant upon the covenantor; and (3) the effect of the covenant upon the public interest. Id. "Of primary importance is the question of whether the covenant not to compete is reasonable as to the covenantee . . . and whether it is reasonable as to time, space and the activity restricted." Id. "The more liberal enforcement of sale of a business covenants means that they will be deemed reasonable when they are 'limited to the area of business involved . . . .'" Dicen, 839 N.E.2d at 688 (quoting Donahue v. Permacel Tape Corp., 234 Ind. 398, 405-06, 127 N.E.2d 235, 238 (1955)). The ultimate determination of whether a non-competition covenant is reasonable in each and every aspect is a question of law. Sharvelle v. Magnante, 836 N.E.2d 432, 437 (Ind. Ct. App. 2005).

The main focus of Grove's argument essentially is that his covenant not to compete should not be considered ancillary to the sale of a business. Specifically, he contends that there is no evidence that Fast Tek LLC explicitly purchased the goodwill of

Fast-Tek, Inc., and therefore Grove's non-competition agreement is an "ordinary" covenant not to compete that is too broad and violates public policy.

We conclude there is clear evidence that Grove's non-competition agreement with Fast Tek LLC was ancillary to the sale of Fast-Tek, Inc. The situation in this case is directly parallel to the situation we described in Fogle when quoting the Massachusetts Alexander case. The multi-layered and simultaneous transaction between Fast-Tek, Inc., Fast Tek LLC, and Grove permitted the purchaser, Fast Tek LLC, to continue providing precisely the same services to precisely the same customers, most importantly GM, with no disruption. Grove was given the opportunity to continue in precisely the same line of work, while finding investors who were willing to take on his business and finance the payment of significant outstanding debt that Fast-Tek, Inc. had incurred. That there is no explicit mention of Fast Tek LLC having purchased Fast-Tek, Inc.'s "goodwill" is not dispositive of the issue before us. The very names of the seller and buyer in this case were virtually identical, their primary customer was the same, i.e. GM, and one of their most high-profile officers/employees was the same, i.e. Grove. We also note the evidence in the record that Grove enjoyed significant bargaining power in negotiating the sale of Fast-Tek, Inc. and in crafting the non-competition agreement itself, unlike the typical case of an employee who lacks little bargaining power vis-à-vis an employer. In light of all this evidence, we will view Grove's non-competition agreement more favorably than an ordinary employment non-competition agreement. In other words, it appears clear that Grove's non-competition agreement was part and parcel of the

expectations of the investors in Fast Tek LLC when they agreed to take over Fast-Tek, Inc.'s business.

Grove's non-competition agreement states:

> Employee agrees that during the term of his employment and for (a) two years following termination of his employment [by Fast Tek LLC]; and (b) five years following termination of his employment [by Grove], he will not, directly or indirectly call upon, solicit, or service any customer or potential customer of the Company [Fast Tek LLC]. He also agrees that he will not divert or take away, or attempt to divert or take away, employees of the Company, the business or patronage of any customer of the Company or Fast-Tek Inc. during the time frames set forth above. For purposes of this Agreement, "Customer or Customers" shall include any person or entity who was a customer of Company or a customer of Fast-Tek Inc. prior to or during his employment, and "potential customers" shall include any customer to which Company made a proposal to do business with the Company, which proposal was made prior to or during his employment. Employee agrees not to enter into competitive endeavors and not to undertake any commercial activity, which is contrary to the best interest of the Company. For the period listed herein and within 500 miles of Indianapolis, Indiana, the employee will not directly or indirectly, becoming [sic] an employee, consultant, owner, officer, agent or director of, or otherwise participating in the management, operation, control or profits of any firm engaged in the business of inspection, sorting, rework and containment of suspect automotive components that relate to automobile engines and transmissions in the continental United States during the time frames set forth above.

App. p. 93.

Grove fails to advance an argument that any portion of this covenant is unreasonable or to cite any authority that would support such an argument, aside from his general argument that the agreement was not ancillary to the sale of Fast Tek, Inc. This

results in waiver of any contention that the agreement is unreasonable. See Ind. Appellate Rule 46(A)(8)(a); Encore Hotels of Columbus, LLC v. Preferred Fire Protection, 765 N.E.2d 658, 662 (Ind. Ct. App. 2002).

Waiver notwithstanding, we will briefly address the reasonableness of some of the agreement's provisions. We observe that a former employer has a legitimate business interest in restricting its former employees from enticing away the employer's old customers. Smart Corp. v. Grider, 650 N.E.2d 80, 83 (Ind. Ct. App. 1995), trans. denied. It was proper to restrain Grove from attempting to solicit Fast Tek LLC's customers, especially in light of the apparently undisputed evidence that as soon as he left, Grove attempted to garner the business of GM, Fast Tek LLC's most important customer, for OnSite. As for the five-year duration of the agreement, we previously have approved such a length of time as reasonable in a covenant not to compete. See Pickett v. Pelican Serv. Assoc., 481 N.E.2d 1113, 1119 (Ind. Ct. App. 1985), trans. denied.

It also appears to us that the 500-mile geographical limitation is reasonable in this case. The situation here is unlike cases that have addressed non-competition agreements for local-level businesses. See, e.g., Robert's Hair Designers, Inc. v. Pearson, 780 N.E.2d 858 (Ind. Ct. App. 2002) (addressing eight-mile prohibition on competition for hair stylists). Fast Tek LLC is in a business that provides specialized services to large, multi-national corporations such as GM. In fact, Fast Tek LLC has provided services in the United States as far away as Utah and Maine, and has even ventured into Europe and Asia. It is clear that Grove could effectively compete with Fast Tek LLC and provide

services to companies such as GM even if he were several hundred miles away from Fast Tek LLC's Indianapolis headquarters.

We also believe that it is within Fast Tek LLC's legitimate interests to preclude Grove from attempting to persuade other Fast Tek LLC employees to leave the company. "Raiding" a company's employees is an activity that is inherently harmful to the company, presuming the company wanted to retain those employees, regardless of whether those employees go on to directly compete with the company. By losing experienced and valued employees, the company must seek out, hire, and train new employees, which has the potential to adversely affect their ability to compete in the marketplace.

Additionally, we note that the agreement defines "customers" whom Grove may not solicit as "any person or entity who was a customer of Company or a customer of Fast-Tek Inc. prior to or during his employment," and "potential customers" whom he may not solicit as "any customer to which Company made a proposal to do business with the Company, which proposal was made prior to or during his employment." App. p. 93. Generally, this court has closely scrutinized covenants not to compete that prevent an ex-employee from contacting past or future customers of his or her ex-employer.[6] For example, we have invalidated covenant not to compete provisions that precluded an ex-employee from contacting "past" or "prospective" clients of the ex-employer. See Seach

[6] We discussed a similar issue at length in our opinion in Dicen v. New Sesco, Inc., 806 N.E.2d 833, 847-48 (Ind. Ct. App. 2004). Our supreme court granted transfer, vacating our opinion in its entirety, but did not find it necessary to address this particular issue.

v. Richards, Dieterle & Co., 439 N.E.2d 208, 214 (Ind. Ct. App. 1982). We concluded it was impermissibly vague and overbroad to prohibit the employee from contacting persons or clients that the employer had no contact with during the duration of employment. Id. We also stated, "To expect an employee to be acquainted with every past and prospective client of the Firm is unrealistic. In this situation, a former employee could easily violate the terms of the contract without knowing he was doing so." Id.

This case is distinguishable from Seach. First, the agreement at issue in Seach apparently was an employment agreement, not an agreement ancillary to the sale of a business as is the case here. As noted earlier, sale of a business covenants are more liberally enforced than ordinary employment covenants. Dicen, 839 N.E.2d at 688. Second, it is evident that Fast Tek LLC only came into being as a viable entity contemporaneously with the commencement of Grove's employment there and the termination of Grove's company, Fast-Tek, Inc., as a going concern. Thus, to the extent his non-competition agreement restricts him from contacting "past" customers or potential customers of Fast Tek LLC contacted before Grove's employment, there are no such customers here. In other words, the non-competition agreement only will prevent Grove from soliciting entities who either were customers of Fast Tek LLC or who had business contacts with Fast Tek LLC as potential, solicited customers during Grove's tenure of employment at Fast Tek LLC. In that regard, the non-competition agreement's definition of "customers" and "potential customers" is reasonable and enforceable against Grove.

Nonetheless, there appears to us to be one portion of Grove's non-competition agreement that is unreasonable on its face. Specifically, the agreement does not permit Grove to "directly or indirectly call upon, solicit, or service any customer or potential customer of the Company." App. p. 93. The plain import of this provision would be to preclude Grove from providing any type of service or product to companies such as GM, or in fact contacting GM at all, regardless of whether the service or product provided was in competition with Fast Tek LLC. To be reasonable, even within the context of the sale of a business, a covenant not to compete should be "'limited to the area of business involved . . . .'" Dicen, 839 N.E.2d at 688 (quoting Donahue, 234 Ind. at 405-06, 127 N.E.2d at 238). Non-competition agreements that completely forbid a former employee from providing any service or product to a customer of the former employer, regardless of whether that service or product competes with the former employer, generally are overbroad. Burk v. Heritage Food Serv. Equip., 737 N.E.2d 803, 814-15 (Ind. Ct. App. 2000).

Under the process of "blue-penciling," a court may strike unreasonable provisions from a covenant not to compete, but it cannot add terms that were not originally part of the agreement. Sharvelle, 836 N.E.2d at 439. We will apply the "blue pencil doctrine" to modify Grove's non-competition agreement as follows:

> Employee agrees that during the term of his employment and for (a) two years following termination of his employment [by Fast Tek LLC]; and (b) five years following termination of his employment [by Grove], ~~he will not, directly or indirectly call upon, solicit, or service any customer or potential customer of the Company. He also agrees that~~ he will not divert or take away, or attempt to divert or take away,

> employees of the Company, the business or patronage of any customer of the Company or Fast-Tek Inc. during the time frames set forth above. . . .

None of the remainder of Grove's non-competition agreement appears to us to be unreasonable, particularly in the absence of any specific argument by Grove to the contrary and in light of the agreement's status as one that clearly was executed ancillary to the sale of Grove's former business.

Conclusion

The question of the propriety of the trial court's refusal to enter preliminary injunctions against Goodwin and Capps now is moot and we dismiss that portion of the appeal. Grove's appeal is properly before us, but we conclude that most of the non-competition agreement he signed is valid and enforceable, save for one phrase therein that we order stricken. With respect to the failure to dissolve the preliminary injunction against Grove, we affirm in part, reverse in part, and remand with instructions to the trial court to modify the injunction in accordance with this opinion and to conduct further proceedings as necessary.

Dismissed in part, affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and ROBB, J., concur.