NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1817

UNITED STATES ENVIRONMENTAL SERVICES, L.L.C.

VERSUS

GERARD F. NELSON

Judgment Rendered: AUG 25 2011

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2010-000548

The Honorable W. Ray Chutz, Judge Presiding

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Lance J. Arnold **Scott L. Sternberg** **New Orleans, Louisiana**	**Counsel for Plaintiff/Appellant** **United States Environmental** **Services, L.L.C.**
Greg Murphy **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellee** **Gerard F. Nelson**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

An environmental remediation company appeals a judgment dismissing its petition for injunctive relief and damages related to agreements containing non-competition and non-disclosure provisions. For the following reasons, we dismiss the appeal in part as moot, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

United States Environmental Services, L.L.C. (USES) is engaged in the business of environmental emergency response and remediation of oil and other hazardous material releases and contamination, underground storage tank removal, environmental air monitoring, and related activities. On May 21, 2007, USES employed Gerard F. Nelson as an estimator, with the duties of estimating the pricing of projects for potential customers. On the same day, Mr. Nelson executed an employment contract, with no fixed term, entitled "Noncompetition and Confidentiality Agreement" (the 2007 agreement). That contract set forth the terms of his compensation and other perquisites of employment, as well as covenants on his part not to disclose confidential or proprietary information, documents, or trade secrets (the confidentiality covenant); not to solicit USES customers or perform services or organize a business in competition with USES (the non-competition covenant); and not to solicit any USES employee to work for him or any other business in competition with USES (the employee non-solicitation covenant). The non-competition and employee non-solicitation covenants were effective during a restrictive period of two years from the date of termination of Mr. Nelson's employment with USES. The confidentiality covenant had no stated restrictive period or term.

Mr. Nelson's employment with USES ended on May 22, 2009, based upon a reduction in USES's workforce. On the same date, the parties entered into another agreement entitled "Compensation, Release and Confidentiality Agreement" (the 2009 agreement). That agreement documented Mr. Nelson's termination as of that date; the payment of a lump sum of $8,269.22 "in lieu of any amounts, wages, or benefits that [were] otherwise due him;" an agreement by Mr. Nelson to release USES from and indemnify it for all past and present claims relating to his employment; and restrictive covenants of confidentiality and non-disparagement on Mr. Nelson's part, in favor of USES.

In late July 2009, Mr. Nelson began work for ES&H, Inc., a competitor of USES, in the capacity of an estimator for tank cleaning projects. On January 28, 2010, USES, though its attorney, wrote to Mr. Nelson to advise him that he was in violation of the restrictive covenants of the 2007 and 2009 agreements and that USES intended to seek injunctive relief.

On February 4, 2010, USES instituted the present action by filing a verified petition for a temporary restraining order, other injunctive relief, and damages against Mr. Nelson. In its petition, USES alleged that it had learned of Mr. Nelson's employment by one of its direct competitors and that, by providing services to his new employer, he had breached the non-competition covenant of the 2007 agreement. It further alleged that Mr. Nelson was utilizing confidential information gained through his employment with USES, thereby breaching the confidentiality covenants of the 2007 and 2009 agreements.

The trial court signed an order denying USES's request for a temporary restraining order and fixed the hearing on the request for a

preliminary injunction and a permanent injunction for March 1, 2010. On that date, the trial court granted Mr. Nelson's motion to continue and refix the hearing on the request for the preliminary injunction for March 22, 2010, but issued a temporary restraining order prohibiting him from violating the terms of the 2007 and 2009 agreements.

At the hearing of March 22, 2010, the testimony of Mr. Nelson, certain officers and employees of USES, and a representative of a USES customer was presented and documentary evidence was introduced, including an e-mail sent by Mr. Nelson to the USES customer, advising of his employment by "a competitor of USES" that "provide[d] the same services," and requesting the "opportunity to provide [the customer] with pricing as [he] did before." At the conclusion of the hearing, the trial court took the matter under advisement and requested post-trial memoranda from the parties.

On April 27, 2010, the trial court issued its written reasons for judgment. The trial court held that the terms of the 2007 agreement were "not dispositive of the issue before the court." Rather, the court held that the 2009 agreement included language that amounted to "a compromise and release of any claims that could be brought between the parties" arising out of Mr. Nelson's employment with USES. The trial court further held that because the restrictive covenants in the 2009 agreement had an indefinite term, they were in derogation of La. R.S. 23:921(C) and therefore unenforceable. Finally, the court stated its factual finding that Mr. Nelson's "actions" were not "in violation of any enforceable provision of any agreement entered into between the parties."

The trial court's judgment was signed on June 16, 2010, and simply provided that USES's "[p]etition" was "**DENIED**" [*sic*] at its cost.

USES appeals.

ASSIGNMENTS OF ERROR

USES has itemized its contentions of error on the part of the trial court as follows:

1. The [t]rial [c]ourt erred when it found that the May 22, 2009 [a]greement released or modified the restrictive covenants of the May 21, 2007 [a]greement, specifically its non-competition and confidentiality agreements.

2. The [t]rial [c]ourt erred when it found the May 22, 2009 [a]greement acted as a release of future violations of restrictive covenants contained in the May 21, 2007 [a]greement.

3. The [t]rial [c]ourt erred when it found that La. R.S. [23]:921(C) applies to confidentiality and non-disparagement covenants.

4. The [t]rial [c]ourt erred in not analyzing the non-competition agreement contained in the May 22, 2009 [a]greement as to its compliance with Louisiana's statutory provisions regarding non-competition agreements.

DISCUSSION

Context and Scope of the Judgment

A final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. *Ball v. Heritage Manor of Mandeville*, 06-1379, p. 1 (La. App. 1st Cir. 5/4/07), 961 So.2d 414, 415. The judgment appealed provides that "[USES's] Petition for Temporary Restraining Order and Injunctive Relief is hereby **DENIED** at it's [*sic*] cost." As so worded, the judgment denies all relief sought by USES against Mr. Nelson in its petition, thereby effectively dismissing the action in its entirety.

The original order fixing the hearing on USES's request was in the form of a rule to show cause why a "preliminary or permanent injunction"

should not issue. The order continuing and refixing the hearing provided for a temporary restraining order and described the hearing as related to the request for a preliminary injunction. A preliminary injunction is essentially an interlocutory order issued in summary proceedings incidental to the main demand for permanent injunctive relief, and is designed to preserve the *status quo* pending a trial of the issues on the merits of the case. *Farmer's Seafood Co., Inc. v. State ex rel. Dep't of Pub. Safety*, 10-1746, p. 4 (La. App. 1st Cir. 2/14/11), 56 So.3d 1263, 1266. It is likewise clear from the hearing transcript that the hearing related only to the request by USES for a preliminary injunction, and not to the merits of the action, including its claim for damages arising from Mr. Nelson's alleged violation of the agreements.[1]

Given the trial court's written reasons, it is apparent that it raised or noticed the peremptory exception of *res judicata* on its own motion, based upon its interpretation of the compromise or release in the 2009 agreement. *See* La. C.C.P. art. 927(B), La. C.C. art. 3080, and La. R.S. 13:4231. However, the trial court's judgment dismissing the petition in effect addressed the merits of all of USES's claims asserted in its petition, including its existing claims for damages and any potential future claims for damages and injunctive relief not subject to the two-year restrictive period of La. R.S. 23:921(C) and the 2007 agreement. The matter was not set for determination on the merits, and the parties were not otherwise given notice and an opportunity to be heard on the issue of the purported compromise of USES's claims unrelated to its claim for injunctive relief. The judgment was

[1] During the hearing, USES's president was asked on cross-examination whether USES suffered any damages by reason of Mr. Nelson working for ES&H, prompting an objection from USES's counsel, who emphasized that the hearing was "not a damage portion of the trial." The trial court sustained the objection. Later, during the course of closing argument by counsel, the trial court expressly recognized that the parties and the trial court were "not here for damages."

thus overly broad in scope, and should arguably have been limited to determination of the issue of USES's entitlement to injunctive relief under both agreements as of the time of the hearing.[2] Nevertheless, we have determined that it is not appropriate to attempt to resolve the issues of this appeal solely on that procedural basis, but on the following grounds.

Injunctive Relief Under La. R.S. 23:921

Louisiana has long had a strong public policy disfavoring non-competition agreements between employers and employees. *SWAT 24 Shreveport-Bossier, Inc. v. Bond*, 00-1695, p. 4 (La. 6/29/01), 808 So.2d 294, 298. Louisiana Revised Statutes 23:921 embodies that general policy, but sets forth specific exceptions defining the limited circumstances under which such agreements may be valid. The exception applicable to the circumstances of this matter is La. R.S. 23:921(C), which provides, in relevant part:

> Any person, . . . who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.

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[2] While the trial court was technically authorized to notice *res judicata* on its own motion under La. C.C.P. art. 927(B), extinguishment of an obligation by compromise is an affirmative defense that normally must be raised by the party seeking its benefit. *See* La. C.C.P. art. 1005 and *Richardson v. Richardson*, 02-2415, p. 4 (La. App. 1st Cir. 7/9/03), 859 So.2d 81, 85. Mr. Nelson did not plead compromise as a defense to enforcement of the 2007 agreement in his answer or at trial. The purpose of the requirement that some defenses be affirmatively pleaded is to give the plaintiff fair and adequate notice of the nature of the defense and thereby prevent last minute surprise to the plaintiff. *Johnson v. Steele*, 98-1726, p. 5 (La. App. 1st Cir. 9/24/99), 754 So.2d 1006, 1009. In exercising its right to notice *res judicata* on its own motion, especially after a case has been submitted for decision, a court should consider the procedural status and context of the action to determine if that issue is ripe for consideration and appropriate to resolve the issues actually presented for decision. *See, e.g., Parish of Iberville Sales Tax Dep't v. City of St. Gabriel*, 08-1780, p. 11 n.7 (La. App. 1st Cir. 7/22/09), 21 So.3d 955, 961 n.7 (*en banc*).

A non-competition agreement complying with the requirements of La. R.S. 23:921(C) "shall be considered an obligation not to do," and the former employer is entitled to seek recovery of "damages for the loss sustained and the profit of which he has been deprived," as well as injunctive relief enforcing the agreement "without the necessity of proving irreparable injury." La. R.S. 23:921(H). However, an employee's agreement not to solicit employees of his former employer to work for him or another employer after he leaves his employer does not fall within the restrictions of La. R.S. 23:921. *See CDI Corp. v. Hough*, 08-0218, pp. 8-14 (La. App. 1st Cir. 3/27/09), 9 So.3d 282, 288-92, and cases cited therein.[3]

The two-year period applicable to the non-competition covenant and the employee non-solicitation covenant expired by their terms on May 22, 2011. Only those acts of Mr. Nelson that were violative of those covenants and capable of accomplishment within that period could have been enjoined. When an appeal is taken from an order denying injunctive relief, and the act sought to be enjoined is accomplished pending appeal, the appeal will be dismissed as moot. *Silliman Private Sch. Corp. v. Shareholder Group*, 00-0065, p. 5 (La. App. 1st Cir. 2/16/01), 789 So.2d 20, 23, *writ denied*, 01-0594 (La. 3/30/01), 788 So.2d 1194. On the record before us, USES's claim for injunctive relief under La. R.S. 23:921(H) and the employee non-solicitation covenant is therefore moot. *See Menard v. La. High Sch. Athletic Ass'n*, 09-0800, p. 3 (La. App. 1st Cir. 12/23/09), 30 So.3d 790, 793, *writ denied*, 10-0169 (La. 4/5/10), 31 So.3d 370. Accordingly, we must dismiss USES's appeal in part, to the extent that it seeks injunctive

[3] In the *CDI Corporation* case, we held that such an employee non-solicitation agreement, although not by its terms governed by La. R.S. 23:921, is nevertheless subject to a public policy requirement of reasonableness in scope and duration. *Id.*, 08-0218 at pp. 9 n.4 and 13-14, 9 So.3d at 289 n.4 and 292.

relief under La. R.S. 23:921(H) and the employee non-solicitation covenant of the 2007 agreement.

However, although the issue of USES's entitlement to the above-described injunctive relief is moot, we are not precluded from determining the status of this controversy insofar as it relates to USES's claims for preliminary injunctive relief under other provisions of the 2007 agreement and for damages, which would remain viable in the event that the 2009 agreement did not compromise those claims. Similarly, we are not precluded from considering the status of any claims for injunctive relief and damages founded upon those covenants in the 2009 agreement not subject to the limitations of La. R.S. 23:921(C).

The Compromise in the 2009 Agreement

The proper interpretation of a contract is a question of law subject to *de novo* review on appeal. *Solet v. Brooks*, 09-0568, p. 5 (La. App. 1st Cir. 12/16/09), 30 So.3d 96, 99. Accordingly, we need not accord deference to the trial court's legal conclusions as to the scope and meaning of the compromise incorporated in the 2009 agreement, but must independently review its language to determine the parties' mutual intent. *See Toomy v. La. State Employees' Ret. Sys.*, 10-1072, p. 5 (La. App. 1st Cir. 3/25/11), 63 So.3d 198, 201-2.

Interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. This is an objective inquiry; thus, "a party's declaration of will becomes an integral part of his will." La. C.C. art. 2045, Revision Comments – 1984, (b). When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. Each provision in a contract must be interpreted in light of the other

provisions so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050.

A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship. La. C.C. art. 3071. A compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they express. La. C.C. art. 3076.

In holding that the 2009 agreement compromised *all* claims between the parties related to Mr. Nelson's employment by USES, the trial court relied upon the introductory paragraph of that agreement, which provides:

> This Compensation, Release and Confidentiality Agreement ("Agreement") is entered into as of the **22 day of May, 2009** (the "Effective Date") by and between **United States Environmental Services, L.L.C.** ("Company") and **Gerard F. Nelson** ("Employee"), to resolve any and all claims, demands, and causes of action which could arise out of the employment relationship between Employee and Company, and the termination of that relationship, as of the Effective Date.

Following that introductory paragraph, the following preamble to the rest of the agreement appears:

> NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are duly acknowledged by the Parties, Employee and Company *agree as follows*:

(Emphasis added.)

The agreement then sets forth six numbered sections. The fourth section sets forth the restrictive covenants of confidentiality ("Non-Disclosure") and non-disparagement ("Agreement Not to Harm or Disparage"). The third section is entitled "**Release**," and begins with the language: "In consideration of Company's undertakings and agreements hereunder, and other good and valuable consideration, Employee hereby

releases Company, and . . . all others acting on behalf of Company (the "Company Related Parties"), and agrees to hold the Company Related Parties harmless from and against any and all known and unknown claims, liabilities, demands, causes of action, costs or expenses (including attorney's fees) of any kind . . . ." The section goes on to recite specific types of causes of action covered by the release under various federal and state laws, and recites Mr. Nelson's agreement regarding the broad scope of claims released, his agreement not to initiate any action against USES for any such claims, and his acknowledgment that he is not entitled to any further payment for wages or other compensation other than the payment of the sum described in the agreement. There is no language in the third section, or elsewhere in the agreement, purporting to release Mr. Nelson from any obligations owed to USES.

Although the introductory paragraph of the 2009 agreement, read in isolation, injects some ambiguity as to the matters intended to be released, we cannot end our inquiry by a "mere examination" and "[l]iteral reading" of the introductory paragraph. *See Sloane v. Davis*, 619 So.2d 585, 589-90 (La. App. 3rd Cir.), *writ denied*, 629 So.2d 355 (La. 1993). *See also Succession of Ramp*, 252 La. 660, 671, 212 So.2d 419, 423 (La. 1968). Apart from the introductory paragraph, the 2009 agreement's release section unequivocally relates only to claims that might be made by Mr. Nelson against USES arising from his employment.

In *Moak v. American Auto. Ins. Co.*, 242 La. 160, 134 So.2d 911 (La. 1961), the Louisiana Supreme Court held that when a dispute arises as to the scope of a compromise agreement, extrinsic evidence can be considered to determine exactly what differences the parties intended to settle. This rule is a special exception to the general rule of La. C.C. art. 2046, based upon the

supplementary rule of construction in La. C.C. art. 3076, to the effect that compromises do not extend to differences that the parties never intended to include in them. *Brown v. Drillers, Inc.*, 93-1019 (La. 1/14/94), 630 So.2d 741, 748-49. Thus, in the case of a compromise agreement, the intent which its words express in light of the surrounding circumstances at the time of execution of the agreement is controlling. *Brown*, 630 So.2d at 748. Although Mr. Nelson did not assert the affirmative defense of compromise as a bar to USES's claims at trial, testimony relating to the purpose and amount of the payment made to Mr. Nelson as part of the 2009 agreement was offered without objection at trial for other purposes. Under the circumstances, we may appropriately consider such evidence in interpreting the scope of the compromise or release.

As USES points out, it is significant that in the trial court Mr. Nelson never raised the affirmative defense of compromise in opposition to USES's claims under the 2007 agreement. The testimony at the hearing relating to the release in the 2009 agreement and the basis of the payment to Mr. Nelson likewise supports its position that the subject of the release was his claims for any compensation owed him upon his termination and any other potential claims he might have against his former employer, and that the only party giving up rights under that agreement was Mr. Nelson.

In summary, reading the agreement as a whole, we conclude that the compromise at issue did not effect the release or discharge of Mr. Nelson's obligations to USES under the 2007 agreement, and that the trial court erred in holding otherwise. Although injunctive relief is now moot as to the non-competition and employee non-solicitation covenants of the 2007 agreement, USES's claims for damages for Mr. Nelson's alleged violations of those covenants during the two-year restrictive period are still viable and were not

compromised. Accordingly, the trial court's judgment is reversed in part insofar as it dismissed the foregoing claims and any other claims for damages under the 2009 agreement.

Injunctive Relief Under the 2009 Agreement

The only issue to be considered at a hearing on a preliminary injunction is whether the moving party has met a *prima facie* showing that it will suffer irreparable injury, loss, or damage if the injunction is not issued, that it is entitled to the relief sought as a matter of law, and that it will likely prevail on the merits of the case. *Farmer's Seafood Co.*, 10-1746 at p. 6, 56 So.3d at 1267. An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction. La. C.C.P. art. 3612. Appellate review of a trial court's issuance of a preliminary injunction is limited. The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court and will not be disturbed on review unless a clear abuse of discretion has been shown. *Farmer's Seafood Co.*, 10-1746 at p. 6, 56 So.3d at 1267.

A trial court's reasons for judgment, while defining and elucidating a case, form no part of the official judgment it signs and from which appeals are taken. *Peters v. Harmsen*, 03-1296, p. 9 (La. App. 1st Cir. 4/2/04), 879 So.2d 157, 162. Regardless of the trier of fact's reasons, if a judgment is correct, it should be affirmed. *Id.* We have carefully reviewed the testimony of the witnesses and the documentary evidence introduced at the hearing, relating to Mr. Nelson's alleged violation of the confidentiality covenants of both agreements and the non-disparagement covenant of the 2009 agreement, and we conclude that the trial court's implicit factual finding that no violations of such covenants occurred is supported by the evidence. Its finding is not manifestly erroneous, and its decision to deny

the issuance of a preliminary injunction as to those elements of the agreements was not an abuse of discretion. Accordingly, we affirm the judgment in part insofar as it denied preliminary injunctive relief based upon the confidentiality covenants of both agreements and the non-disparagement covenant of the 2009 agreement.

Dismissal of USES's Claims for Damages Under Both Agreements

As explained above, the trial court's judgment relating to the enforceability of the 2007 agreement's provisions was based upon its legally erroneous conclusion that USES's claims under that agreement were compromised by the 2009 agreement. The trial court did not base its decision regarding the validity and enforceability of the 2007 non-competition covenant upon its substantive compliance with La. R.S. 23:921, and made no specific factual findings regarding USES's actual geographic business area and other relevant factors relating to the 2007 agreement. The hearing at issue also did not address the issue of damages, and therefore no evidence of any damages sustained by USES was introduced. Because the substantive merits of USES's entitlement to injunctive relief under the 2007 non-competition and employee non-solicitation covenants were not actually determined by the trial court at the hearing, and the related issues of any resulting damages sustained by USES and its right to permanent injunctive relief were not procedurally before the trial court at that time, we conclude that this matter should be remanded to the trial court for a full evidentiary hearing on the merits of those issues.

USES also contends that the trial court erred in ruling in its written reasons that the 2009 restrictive covenants of confidentiality and non-disparagement were subject to and violative of La. R.S. 23:921(C), as those covenants were subject to an indefinite term. We agree. By its terms, La.

R.S. 23:921(C) does not impose any time, geographic, or other limitations upon voluntary agreements relating to nondisclosure of confidential or proprietary information or trade secrets, or upon agreements by employees not to make or publish disparaging statements that could damage the reputation or business of former employers.[4] While we affirm the trial court's judgment in part, on substantive grounds, as to the denial of preliminary injunctive relief under the confidentiality and non-disparagement covenants, we reverse it in part to the extent that it purports to dismiss any claims by USES for damages on the merits, its request for permanent injunctive relief, and any potential claims arising from alleged future violations of those covenants, and remand it for further proceedings on those issues.

DECREE

The appeal is dismissed in part as moot, to the extent that the appellant, United States Environmental Services, L.L.C. seeks injunctive relief under the non-competition covenant of the 2007 agreement under La. R.S. 23:921(H) and under the employee non-solicitation covenant of the 2007 agreement. The judgment of the trial court is affirmed in part insofar as it denied preliminary injunctive relief based upon the confidentiality covenants of both agreements and the non-disparagement covenant of the 2009 agreement. In all other respects, the judgment of the trial court is reversed in part, and this matter is remanded to the trial court for further

[4] As emphasized by USES, the confidentiality covenant relates to interests that are similar, if not identical, to interests also protected under the Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1401-27, and the Uniform Trade Secrets Act, La. R.S. 51:1431-39, neither of which imposes any time limit on the protection afforded thereunder. As to the non-disparagement covenant, the only conceivable restriction as to its enforcement that suggests itself would be considerations of freedom of speech under the First Amendment.

proceedings consistent with this opinion. The costs of this appeal are assessed to the opposing parties in equal proportions.

APPEAL DISMISSED IN PART, JUDGMENT AFFIRMED IN PART AND REVERSED IN PART, AND CASE REMANDED.