STATE OF MINNESOTA
IN COURT OF APPEALS
A10-362

Schmit Towing, Inc.,
Appellant,

vs.

Chris Frovik, individually, d/b/a FTR Towing and Recovery,
Respondent.

Filed November 9, 2010
Reversed and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-09-6303

Ryan P. Myers, Christopher P. Parrington, Benjamin R. Skjold, Skjold Barthel, P.A., Minneapolis, Minnesota (for appellant)

Wendy G. M. Lahn, Susan Guertin, Law Office of Charles W. LaDue, Coon Rapids, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's grant of summary judgment for respondent, which was based on the district court's conclusion that a noncompete clause

in the parties' independent-contractor agreement was invalid. Because the district court improperly applied a post-employment independent-consideration requirement when determining the validity of the noncompete clause, we reverse and remand.

FACTS

Appellant Schmit Towing, Inc. is a Minnesota corporation engaged in the business of towing vehicles pursuant to private and government contracts. Respondent Chris Frovik, doing business as Frovik Towing and Recovery (FTR), is a Minnesota resident who engages in the business of towing vehicles.

On or about June 9, 2006, Schmit entered into a subcontract agreement (first agreement) with FTR, wherein FTR would provide towing services to Schmit. This contract did not contain a noncompete clause. On July 31, 2007, Schmit and FTR mutually terminated the first agreement. That same day, the parties entered into another agreement (second agreement), which contained a noncompete clause. In March 2009, Schmit filed a complaint alleging, among other claims, that FTR had breached the noncompete clause by providing towing services for Schmit's competitor. Schmit sought injunctive relief, which was denied by the district court.

FTR moved to dismiss for failure to state a claim upon which relief could be granted. Schmit moved for partial summary judgment. Because the district court considered matters outside of the pleadings, it treated FTR's motion as one for summary judgment.[1] The district court granted summary judgment in favor of FTR, based on its

[1] "If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by

conclusion that the parties' noncompete agreement was invalid, and denied Schmit's motion for partial summary judgment. This appeal follows.

D E C I S I O N

On appeal from summary judgment, "[w]e review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The formation of a contract requires an offer, acceptance, and consideration. *Commercial Assocs, Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). "A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). The party asserting a breach-of-contract claim must also demonstrate the damages to which he is entitled. *See Border State Bank of Greenbush v. Bagley Livestock Exchange, Inc.*, 690 N.W.2d 326, 336 (Minn. App. 2004) ("Liability for breach of contract requires proof that damages resulted from or were caused by the breach."), *review denied* (Minn. Feb. 23, 2005). To extend a breach-of-contract analysis any further

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the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ." Minn. R. Civ. P. 12.02.

than these basic principles, the court must invoke some public-policy rationale for subjecting a particular agreement to a higher degree of scrutiny. *See Rossman v. 740 River Drive*, 308 Minn. 134, 136, 241 N.W.2d 91, 92 (1976) ("[P]ublic policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public.").

"Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade." *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 265 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996). Restrictions "broader than necessary to protect the employer's legitimate interest are generally held to be invalid, and the determination of the necessity for the restriction is dependent upon the nature and extent of the business, the nature and extent of the service of the employee, and other pertinent conditions." *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965). "But restrictive covenants are enforced to the extent reasonably necessary to protect legitimate business interests. Legitimate interests that may be protected include the company's goodwill, trade secrets, and confidential information." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 456 (Minn. App. 2001).

Noncompete agreements are "invalid unless bargained for and supported by adequate consideration." *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993). The adequacy of consideration for a noncompete agreement depends on the facts of the particular case. *Overholt Crop Ins. Service Co., Inc. v. Bredeson*, 437 N.W.2d 698,

702 (Minn. App. 1989). But a noncompete agreement entered into subsequent to an initial employment contract requires independent consideration. *Id.* "This requirement reflects the fact that employers and employees have unequal bargaining power. When the employer fails to inform prospective employees of noncompetition agreements until after they have accepted jobs, the employer takes undue advantage of the inequality between the parties." *Sanborn*, 500 N.W.2d at 164 (quotation omitted). The underlying public-policy concern is based on the disparity in bargaining power that exists in an employer-employee relationship or that may exist in the relationship between an employer and an independent contractor. *See, e.g.*, *Bunia v. Knight Ridder*, 544 N.W.2d 60, 63-64 (Minn. App. 1996) (holding exculpatory clause invalid as against public policy due to the disparate bargaining power between that particular employer and an independent contractor). However, where no disparity exists, public policy is not at issue and the parties are free to contract as they wish. *See Rossman*, 308 Minn. at 136, 241 N.W.2d at 92.

In granting summary judgment for FTR, the district court reasoned that the first agreement was a valid contract, for an indefinite term, which could be terminated by either party upon notice. The district court described the parties' relationship as an "independent contractor arrangement," which was "akin to that of an at-will employer/employee relationship, wherein either party may terminate at will." Next, the district court analogized the parties' termination of the first agreement and execution of the second agreement to "terminating an at-will employee, but then telling the employee that [he or she] can be rehired if [he or she signs] a non-compete." Based on this

analogy, the district court determined the validity of the parties' noncompete agreement by applying the independent-consideration requirement applicable to post-employment noncompete agreements, instead of applying the principles that govern noncompete agreements in general. The district court ultimately concluded that because Schmit's claims were predicated on the validity of the noncompete clause in the second agreement, which lacked additional, independent consideration, the claims failed as a matter of law.

There is no dispute that FTR was an independent contractor and not an employee of Schmit. And the requirement of independent consideration to validate a noncompete agreement entered into subsequent to an initial contract has only been applied in the context of employer-employee relationships. *See Sanborn*, 500 N.W.2d at 164 (requiring independent consideration for a noncompete between an employer and employee); *Freeman v. Duluth Clinics, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) (same); *Jostens, Inc. v. National Computer Systems, Inc.*, 318 N.W.2d 691, 703-04 (Minn. 1982) (same); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740-41 (Minn. 1982) (same); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980) (same). FTR fails to cite any case in which this requirement has been applied outside of the employer-employee context. Imposing the requirement in this case would therefore require an extension of existing law. "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). We therefore conclude that the district court improperly applied the post-employment

independent-consideration requirement and, as a result, erroneously granted summary judgment in favor of FTR. Accordingly, we reverse and remand for further proceedings.

In determining the validity of the second agreement on remand, the district court may consider the legal principles that generally govern noncompete agreements, including, as appropriate, antitrust law. *See* Minn. Stat. § 325D.51 (2008) ("A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful."). Schmit argues that we should apply these principles on appeal, determine that the noncompete agreement is valid, and award summary judgment in Schmit's favor, along with damages. But as Schmit recognizes, the district court did not apply these principles when determining the validity of the second agreement. We do not consider issues for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will generally not consider matters not argued to and considered by the district court). Remand is the appropriate remedy. And because we reverse based on an error of law, we do not consider Schmit's argument that the district court erred by failing to view the facts in a light most favorable to Schmit.

Lastly, FTR makes several arguments as to why this court should affirm summary judgment in its favor. FTR alleges that it did not breach the contract because its purpose was frustrated; that the second agreement was signed under duress; and that FTR did not improperly compete with Schmit. We do not consider these arguments because they require fact-finding and were not addressed by the district court. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (holding that the role of the court of appeals is to correct errors, not to find facts); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210

(Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them." (citations omitted)).

Reversed and remanded.

Dated:

Judge Michelle A. Larkin