[Cite as *Acordia of Ohio, L.L.C. v. Fishel*, 2010-Ohio-6235.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ACORDIA OF OHIO, LLC,	:	APPEAL NO. C-100071 TRIAL NO. A-0507349
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
MICHAEL FISHEL,	:	
JANICE FREYTAG,	:	
MARK TABER,	:	
SHEILA DIEFENBACH,	:	
NEACE LUKENS INSURANCE AGENCY, LLC,	:	
NEACE & ASSOCIATES INSURANCE AGENCY OF OHIO, INC.,	:	
and	:	
JOSEPH T. LUKENS,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 17, 2010

James McCarthy, III, and *Katz, Teller, Brant & Hild*, for Plaintiff-Appellant,

Mark E. Lutz, *Michael Majba*, and *Denlinger, Rosenthal & Greenberg*, for Defendants-Appellees.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Plaintiff-appellant, Acordia of Ohio, LLC, an insurance agency, filed this action seeking damages and injunctive relief against four former employees, defendants-appellees Michael Fishel, Janice Freytag, Mark Taber, and Sheila Diefenbach ("the Fishel team"), as well as competitors of Acordia, Neace Lukens Insurance Agency, LLC, Neace & Associates Insurance Agency of Ohio, Inc., and Joseph Lukens ("Neace-Lukens"). Acordia asserted various causes of action, including violation of noncompete agreements and misappropriation of trade secrets.

{¶2} Each member of the Fishel team left Acordia to begin employment with Neace-Lukens. When the members of the Fishel team had initially begun employment with Acordia, each had signed a noncompete agreement. But Acordia is the product of various corporate mergers, and all of the noncompete agreements were signed with Acordia's predecessor companies. The following is a summary of how the members of the Fishel team came to be employed by Acordia.

{¶3} In 1993, Fishel joined Frederick Rauh & Co. and signed a noncompete agreement. In 1994, Frederick Rauh was acquired by Acordia, Inc. Frederick Rauh's name was legally changed to Acordia of Cincinnati, Inc. But Acordia of Cincinnati, Inc., also registered the fictitious name Acordia/Rauh and did business as such. In 1996, both Janice Freytag and Mark Taber joined the company and signed noncompete agreements. The following year, Acordia of Cincinnati, Inc., merged into Acordia of Ohio, Inc. In 1999, Ohio's Secretary of State canceled the fictitious name of Acordia/Rauh because a renewal had not been filed. One year later, Sheila

Diefenbach joined the company and signed a noncompete agreement with Acordia of Ohio, Inc. In May 2001, Wells Fargo purchased the parent company Acordia, Inc., and later that year Acordia of Ohio, Inc., was merged into Acordia of Ohio, LLC.

{¶4} In August 2005, each member of the Fishel team resigned from Acordia and began employment with Neace-Lukens. Acordia immediately filed the present action seeking monetary damages and injunctive relief. Acordia also filed a motion for a preliminary injunction, seeking to prevent the Fishel team from soliciting any individuals or entities whom Acordia had done business with and from using any of Acordia's trade secrets. Following a hearing, the trial court denied Acordia's motion for a preliminary injunction. It determined that the noncompete agreements had not been assignable to successors such as Acordia, and that the information Acordia sought to protect was not properly classified as a trade secret. Acordia appealed to this court, where we determined that the trial court had not abused its discretion in denying injunctive relief.

{¶5} Following this court's decision on injunctive relief, the Fishel team and Neace-Lukens (collectively referred to as "the appellees") filed motions for summary judgment in the trial court. The court granted summary judgment to the appellees on all of Acordia's claims. This appeal ensued. In one assignment of error, Acordia now argues that the trial court's grant of summary judgment was in error.

Standard of Review

{¶6} We review a trial court's ruling on a motion for summary judgment de novo.[1] Summary judgment is appropriately granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the

[1] *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party.[2]

Law of the Case

{¶7} We first consider the appellees' argument that all rulings made in our earlier decision are the law of the case and are binding in this appeal. Appellees assert that, under the law-of-the-case doctrine, this court must conclude that the Fishel team had not violated their noncompete agreements. But Acordia argues that the law-of-the-case doctrine is not applicable, and that we are not bound by conclusions of law made in an earlier appeal concerning injunctive relief.

{¶8} The law-of-the-case doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."[3] The doctrine's purpose is to "ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution."[4]

{¶9} This court's earlier decision involved the review of the trial court's denial of a preliminary injunction. The granting or denial of a preliminary injunction does not involve a ruling on the merits of a case. Rather, an injunction is designed to preserve the status quo of the parties pending a ruling on the merits.[5] Further, the standard applied by an appellate court when reviewing a ruling on a motion for an injunction is that of abuse of discretion.[6] In contrast, this appeal involves a de novo

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[2] *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.
[3] *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.
[4] Id.
[5] *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 267, 747 N.E.2d 268.
[6] Id. at 269.

review of a trial court's grant of summary judgment. The merits of the case will be considered in this appeal. For these reasons, we conclude that this court's earlier decision has no effect on the present appeal because it did not become the law of the case for the issues currently in dispute.

{¶10} The Eighth Appellate District considered a similar argument with respect to the law-of-the-case doctrine when it analyzed whether conclusions reached in an appeal concerning a temporary injunction were binding on the same parties in a later appeal from the granting of a motion to dismiss.[7] Noting that although each appeal contained similar facts and issues, each also involved a differing standard of review, the court declined to apply the law-of-the-case doctrine. The court held that "[f]or the reason that these standards differ, we will not apply the 'law of the case' doctrine in this instance."[8]

{¶11} We agree with the reasoning employed by the Eighth Appellate District, and we hold that this court's decision affirming the trial court's denial of injunctive relief is not the law of the case for purposes of deciding the present appeal. We now proceed to discuss the merits of this appeal.

Noncompete Agreements had Expired

{¶12} Acordia argues that the trial court erred in granting summary judgment to the appellees because the noncompete agreements signed by each member of the Fishel Team had transferred to Acordia of Ohio, LLC.

{¶13} Ohio law provides that noncompete agreements transfer by law in a merger or consolidation. R.C. 1701.82(A)(3) specifically states that "[w]hen a merger

[7] *In Defense of Deer v. Cleveland Metroparks* (2000), 138 Ohio App.3d 153, 740 N.E.2d 714.
[8] Id. at 162.

or consolidation becomes effective * * * [t]he surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers * * * of each constituent entity."

{¶14} Under this provision, Acordia of Ohio, LLC, inherited all assets, rights, and the like that belonged to Acordia of Ohio, Inc. This would have included any valid noncompete agreements. And it necessarily follows that Acordia of Ohio, Inc., inherited all assets, rights, and the like that belonged to Acordia of Cincinnati, Inc. This case has a significant history of mergers and acquisitions, and the same fundamental logic applies to each such transaction.

{¶15} Because a successor entity inherits only the assets and rights belonging to the predecessor entity, we must determine whether Acordia of Ohio, Inc., possessed the right to enforce the noncompete agreements at the time that it was merged into Acordia of Ohio, LLC. To do so, we must examine the language contained in the noncompete agreements signed by each member of the Fishel team.

{¶16} Michael Fishel signed his noncompete agreement with Frederick Rauh & Co. The agreement stated, "In consideration of my employment and its continuation by Frederick Rauh & Company (hereinafter, Company) I hereby covenant as follows: (A) For a period of two years following termination of employment with the company for any reason, I will not directly * * *solicit, write, accept or in any other manner perform services relating to insurance business, insurance policies, or related insurance services for any of the following * * *." The agreement further stated that "[t]he covenant contained above shall remain in full force and effect regardless of the cause of termination of employment."

{¶17} The noncompete agreement specifically identified Fishel's employer as Frederick Rauh & Company, and it prohibited Fishel from competing with Frederick Rauh & Company for two years following his termination of employment with the company for any reason. Fishel's employment with Frederick Rauh & Company terminated at the very latest when Acordia of Cincinnati, Inc., was merged into Acordia of Ohio, Inc., and the company ceased using the fictitious name Acordia/Rauh. Consequently, the two-year period of Fishel's noncompete agreement began to run at that time. And should it have become necessary, those successor entities would have possessed the right to enforce that agreement during the relevant two-year period. Acordia of Ohio, LLC, did not have an enforceable noncompete agreement with Fishel, because the time restriction under the agreement had expired by the time that Fishel left his employment with Acordia of Ohio, LLC.

{¶18} The noncompete agreements signed by the three other members of the Fishel team were nearly identical to that signed by Michael Fishel. Mark Taber and Janice Freytag each signed their noncompete agreements with Acordia of Cincinnati, Inc., and Sheila Diefenbach signed her noncompete agreement with Acordia of Ohio, Inc. Each agreement defined the company as Acordia/Rauh. Taber and Freytag's noncompete agreements began to run in 1997, when Acordia of Cincinnati, Inc., was merged into Acordia of Ohio, Inc. And the restrictions under Diefenbach's noncompete agreement were triggered in 2001, when Acordia of Ohio, Inc., was merged into Acordia of Ohio, LLC.

{¶19} Acordia argues that the restrictions under the noncompete agreements were not triggered by the various mergers and acquisitions because the Fishel team had remained continuously employed at all times. We are not persuaded. Ohio law

is clear that "a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity."[9] The restrictions in the noncompete agreements in this case took effect when employment was terminated for any reason. Because the predecessor companies ceased to exist following the respective mergers, the Fishel team's employment with those companies was necessarily terminated at the time of the applicable merger. By their own terms, the agreements' restrictions were triggered by the relevant mergers and acquisitions.

{¶20} Because the Fishel team's noncompete agreements had already expired, Acordia of Ohio, LLC, did not have the right to enforce those agreements. Accordingly, the trial court did not err in granting summary judgment to the appellees on Acordia's claim alleging violations of the noncompete agreements.

{¶21} Acordia raises several additional arguments in its brief regarding the noncompete agreements. Our conclusion that these agreements had expired prior to the Fishel team's employment with Acordia of Ohio, LLC, is enough to dispose of these arguments, but we address them briefly.

{¶22} Acordia first asserts that enforcement of the noncompete agreements is consistent with public policy, and that the conclusion that the agreements had not survived the corporate mergers violated public policy. Acordia further alleges that this court's prior decision, along with the trial court's decision granting summary judgment, "has perpetuated an aberration of Ohio corporate law." Acordia cites an unreported decision from a trial court in Warren County, *Wells Fargo v. Baseler*,

[9] *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St.2d 26, 31, 272 N.E.2d 105.

which, it asserts, conflicts with this court's earlier decision and compels this court to conclude that the noncompete agreements had been passed along by operation of law in each merger and were therefore enforceable by Acordia. Last, Acordia argues that a change in corporate ownership did not invalidate the noncompete agreements.

{¶23} Acordia's arguments are inapposite, and it appears to have misinterpreted this court's prior decision. We did not conclude that the Fishel team's noncompete agreements had not survived the corporate mergers. In fact, we explicitly stated that "regardless of the assignability of a noncompete agreement, the right to enforce the agreement transfers by law in a merger to the successor entity without specific language." We reach the same conclusion in this decision. The noncompete agreements passed to the successor entity, but their restrictions were triggered by their own terms when a merger occurred, and each had expired prior to the Fishel team terminating their employment with Acordia of Ohio, LLC. Acordia's arguments are without merit.

Trade Secrets

{¶24} Acordia asserts that the trial court erred in determining that there was no genuine issue of material fact regarding the Fishel team's alleged misappropriation of Acordia's trade secrets and confidential and proprietary information.

{¶25} Ohio's Uniform Trade Secrets Act is contained in R.C. 1333.61 through 1333.69. The act defines a trade secret as information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain

economic value from its disclosure or use," and as information that "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[10]

{¶26} Acordia has identified the following as the information and materials misappropriated and exploited by the Fishel team: identities of clients and customers; identity, authority, and responsibilities of the key contacts with each client; service-cost burden with respect to each client; insurance coverages for each client; specific insurance policies purchased for clients; expiration dates, premiums, commissions rates, and other terms and conditions of clients' policies; clients' risk specifications and claims-loss histories; business strategies and techniques to respond to specific clients' needs; and financial information.

{¶27} Following our review of the record, we cannot conclude that the trial court erred in determining that no genuine issue of material fact existed with respect to the Fishel team's alleged misappropriation of trade secrets. The record demonstrates that the Fishel team contacted many former Acordia clients after joining Neace-Lukens. Many of those clients ceased doing business with Acordia to follow the Fishel team to Neace-Lukens. But the record does not indicate that the Fishel team used Acordia's confidential information and trade secrets to maintain business relationships with these clients. The record indicates that the Fishel team was able to obtain the allegedly confidential information and trade secrets through public sources and from the clients themselves.

{¶28} Acordia argues that, under Ohio law, one cannot escape liability for a trade-secrets violation merely because the information at issue is obtainable from other sources. The Ohio Supreme Court has held that the purpose behind Ohio's

[10] R.C. 1333.61(D).

trade-secrets law "would be frustrated were we to except from trade secret status any knowledge or process based simply on the fact that the information at issue was capable of being independently replicated."[11] But the court further suggested that, for summary judgment to be denied on these grounds, the record must actually raise a genuine issue of fact as to how the allegedly confidential information was obtained.[12] Here, no such genuine issue of fact is present.

{¶29} The information identified by Acordia as trade secrets was most certainly valuable to Acordia. But given the absence of evidence in the record that such information was misappropriated by the Fishel team, we conclude that the trial court did not err in granting summary judgment to the appellees on Acordia's claims for trade-secrets violations.

Duty of Loyalty and Tortious Interference

{¶30} Acordia further argues that the trial court erred in granting summary judgment to the appellees on its claims for breach of the duty of loyalty.

{¶31} Acordia specifically argues that the Fishel team breached the duty of loyalty owed to Acordia by plotting a coordinated resignation from the company and soliciting Acordia's clients on behalf of their new employer. The duty of loyalty requires an employee "to act 'in the utmost good faith and loyalty toward his * * * employer.' "[13] Here, the record contains no genuine issue of material fact that the Fishel team had violated its duty of loyalty to Acordia. The four members of the Fishel team resigned from Acordia simultaneously. But they did not solicit Acordia's

[11] *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 183, 1999-Ohio-260, 707 N.E.2d 853.
[12] Id. at 182.
[13] *Orbit Electronics, Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶34, quoting *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440, 116 N.E.2d 701.

clients on behalf of Neace-Lukens until they were employed by Neace-Lukens. And because their noncompete agreements had expired, the Fishel team was entitled to compete with Acordia for the business of clients whom they had worked with while employed by Acordia.

{¶32} Acordia next asserts that the trial court erred in granting summary judgment on its claims for tortious interference with business relationships. Acordia correctly states that "[t]he torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another."[14]

{¶33} Because their noncompete agreements had expired, the appellees were entitled to compete with Acordia for the business of Acordia's clients. Their behavior in so doing was not improper, and they did not tortiously interfere with Acordia's business relationships.

{¶34} The trial court properly granted summary judgment to the appellees on Acordia's claims for breaches of the duty of loyalty and tortious interference with business relationships.

Conclusion

{¶35} The trial court properly granted summary judgment to the members of the Fishel team on Acordia's claims for violation of the noncompete agreements. Although they had survived the applicable corporate mergers, the noncompete agreements had expired and were not enforceable by Acordia by the time the Fishel

[14] *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14, 1995-Ohio-66, 651 N.E.2d 1283.

team left Acordia. And the trial court did not err in granting summary judgment on Acordia's remaining claims for misappropriation of trade secrets, breach of the duty of loyalty, and tortious interference with business relationships. The judgment of the trial court is, accordingly, affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and **DINKELACKER, J.,** concur**.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.