

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01232 COA

KERNEY C. MCNEIL

APPELLANT

v.

NOWELL FUNERAL SERVICES, INC., A MISSISSIPPI CORPORATION, AND H. BERNARD NOWELL, JR., INDIVIDUALLY AND SOUTHERN SECURITY LIFE INSURANCE COMPANY, INC.

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HARVEY T. ROSS

COURT FROM WHICH APPEALED: CHANCERY COURT OF COAHOMA COUNTY

ATTORNEYS FOR APPELLANT:

H. HUNTER TWIFORD, III

CURTIS D. BOSCHERT

A. JANE HEIDELBERG

ATTORNEY FOR APPELLEES:

WILLIAM B. RAIDFORD

NATURE OF THE CASE: CONTRACT- COVENANT NOT TO COMPETE

TRIAL COURT DISPOSITION: GRANTED PERMANENT INJUNCTION AGAINST
APPELLANT

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Kerney C. McNeil sold his funeral home to Nowell Funeral Services and signed a covenant not to compete within a fifty-mile radius for a ten-year period. McNeil worked for Nowell as manager of the funeral home for two years following the sale. McNeil quit and began to engage in the funeral business. Nowell sought enforcement of the covenant via preliminary and permanent injunctions. The chancellor granted the injunctions so as to enforce McNeil's covenant not to compete. McNeil appeals arguing: (1) the chancellor's findings of fact and conclusions of law should not be considered as they were merely those submitted by Nowell; (2) the court's ruling that the covenant was reasonable was error because the covenant was a hybrid of the employee-employer type and the sale-of-a-business type and the covenant violated public policy; (3) the court erred in ordering specific performance and in not allowing McNeil to rescind the covenant because there was no meeting of the minds between the parties, there was mutual mistake of fact as to the tax consequences of the sale, and McNeil suffered failure of his consideration; and (4) the court erred in denying McNeil's claim for monetary and/or equitable relief of rescission or modification of the sales agreement and the covenant not to compete. Finding no error, we affirm.

STATEMENT OF THE FACTS

In January 1991, Nowell Funeral Services, Inc. purchased McNeil Funeral Home, a sole proprietorship owned by Kerney C. McNeil. Nowell obtained a covenant not to compete from McNeil and his wife prohibiting the McNeils from engaging in the funeral business for a ten-year period from the date of the sale and within a fifty-mile radius of Clarksdale, Mississippi. McNeil is a long time resident of Clarksdale and had been in the funeral business for twenty-two years. McNeil also owned a flower shop, one-stop photo store, interest in a monument company, and provided maintenance and/or grave opening and closing services for several cemeteries.

Pursuant to an oral employment contract, McNeil worked for Nowell Funeral Services as the manager of the Clarksdale funeral home until March 1993. In March 1993, McNeil began to make plans to open another funeral home in Clarksdale. McNeil also provided funeral services to the family of a friend who had died in Clarksdale.

Nowell petitioned the chancery court for a preliminary and permanent injunction against McNeil seeking to have the covenant not to compete enforced. The chancellor granted the injunctions so as to enforce the covenant and found that McNeil was not entitled to recover on his counterclaim.

The sale of McNeil Funeral Home was structured as follows: \$210,000 cash paid to McNeil at closing; \$90,000 assumption by Nowell of McNeil's obligation to West Casket Company; and approximately \$200,000 assumption by Nowell of McNeil's pre-need burial contracts. The closing statement reflected the sale price as \$210,000 "plus the assumption of specified seller's contracts."

Nowell Funeral Services's corporate tax return reported the sale as \$500,000, reflected no increase in goodwill for 1991, and reflected that no covenant not to compete was purchased.

H. Bernard Nowell, president of Nowell Funeral Services, testified that his usual practice to

determine a purchase price was to take the average of the last three year's gross receipts of the business and add the value of the real estate and other improvements. Nowell determined that the value of McNeil's business was \$500,000.

Nowell offered McNeil \$500,000. Nowell also offered to hire McNeil as the manager of the Clarksdale funeral home for a salary of \$26,000 per year, the use of a car, payment of country club and rotary club dues, and commissions from burial life insurance sales. McNeil told Nowell that he needed to first discuss the matter with his accountants, and that he would get back with Nowell. This is where the parties' accounts of the negotiations differ.

McNeil testified that after discussing the sale with his accountants and the apparent undesirable tax consequences, McNeil informed Nowell that he could not afford to sell the business. McNeil testified that Nowell then offered to discuss the matter with Nowell's own accountants and attorneys to see if a more desirable deal could be worked out so as to avoid any tax problems. McNeil testified that Nowell proposed a deal which would address McNeil's tax consequences. McNeil admitted that he did not discuss the sale or its structure with his accountant again until after the sale was complete.

Nowell testified that McNeil's employment was not necessary nor a condition to the sale of the funeral home. According to Nowell, McNeil indicated concern over tax consequences, but Nowell did not offer to help McNeil structure a deal to avoid or defer tax liability. Rather, Nowell testified that he offered "to do what he could" to help McNeil with his tax concerns, but Nowell made no promises or representations.

McNeil's accountant testified that he discussed with McNeil the possibility of restructuring the sale in order to defer some of the tax consequences. The accountant also testified that the tax liability is not a result of the sale of the business, but rather the result of McNeil's previous treatment of pre-need sales. He also testified that there was no other way for Nowell to have reported the sale to the IRS.

The testimony also revealed that McNeil had previously been a defendant in a case in which the same court upheld and enforced a covenant not to compete which was virtually identical to the covenant presented in the present cause.

ARGUMENT AND DISCUSSION OF THE LAW

I. THE CHANCELLOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD NOT BE CONSIDERED AS THEY WERE MERELY THOSE SUBMITTED BY NOWELL.

McNeil argues that the chancellor erred in adopting Nowell's submission of proposed findings of fact and conclusions of law. Nowell's brief contains the letter from the chancellor in which both parties were asked to submit proposed findings of fact. Great deference is given to the chancellor's findings of fact, and he will not be overturned unless manifestly wrong. *Brooks v. Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995) (citations omitted). In the present case, the chancellor substantially adopted Nowell's proposed findings of fact with minimum additions or deletions. Therefore, we are required to analyze the chancellor's findings with greater care. *Id.* at 1118. The Mississippi Supreme Court has stated that in such a situation "our duty of 'deference to [the chancellor's] findings is necessarily lessened.'" *Omnibank of Mantee v. United S. Bank*, 607 So. 2d 76, 83 (Miss. 1992) (quoting *Rice*

Researchers, Inc. v. Hiter, 512 So. 2d 1259, 1266 (Miss. 1987)). While there is no manifest error in adopting verbatim the findings submitted by one side, our scrutiny is heightened. *Brooks*, 652 So. 2d at 1125 (Roberts, J., concurring) (with six members of the court joining).

Employing this heightened scrutiny, we have reviewed the record and determine that there is substantial evidence to support the chancellor's findings. We decline to recite each finding of the chancellor's fourteen-page findings of fact and conclusions of law and will suffice it to say that the record contains support for the chancellor's findings. We find no merit in this assignment of error.

II. THE COURT'S RULING THAT THE COVENANT WAS REASONABLE WAS ERROR BECAUSE THE COVENANT WAS A HYBRID OF THE EMPLOYEE-EMPLOYER TYPE AND THE SALE-OF-A-BUSINESS TYPE AND THE COVENANT VIOLATES PUBLIC POLICY.

McNeil argues that the trial court erred in determining that the covenant was reasonable. The Mississippi Supreme Court has addressed the issue of covenants not to compete noting that:

[A] valid and accepted distinction remains between covenants not to compete in an employer-employee setting and those dealing with the sale of a business. . . . 'The essential line of distinction between the two (2) settings is that: . . . the purchaser is entitled to protect himself against competition on the part of the vendor, while the employer is not entitled to protection against mere competition on the part of a servant. In addition thereto, a restrictive covenant ancillary to a contract of employment is likely to affect the employee's means of procuring a livelihood for himself and his family to a greater degree than that of a seller who usually receives ample consideration for the sale of the goodwill of his business. Thus, generally speaking, the territorial extent of a restrictive covenant entered into by the seller or purchaser of a business will be upheld by the courts with much greater readiness than the same provision would as part of a restrictive covenant ancillary to a contract of employment.' . . . As such we must scrutinize to a lesser degree the pertinent facts supporting a finding of reasonableness where the sale of a business's goodwill is involved.

Herring Gas Co. v. Whiddon, 616 So. 2d 892, 897 (Miss. 1993) (citing *Cooper*, 515 So. 2d at 905).

The chancellor determined, as a factual matter, that the covenant not to compete was reasonable in time and geographic scope, and that it was drafted pursuant to the sale of a business. This Court will not "set aside the chancellor's finding of fact as to reasonableness unless such is manifestly wrong." *Cooper*, 515 So. 2d at 905 (Miss. 1987) (citations omitted). The chancellor heard testimony regarding the time and distance restrictions of the covenant. The ten-year time period coincided with the length of the financing period of the purchase. The chancellor determined that it was reasonable that a purchaser of a business would want to protect his investment at least for the length of the time required to recoup the initial investment. We agree. The fifty-mile radius sought to incorporate the market served by the funeral home plus some room for growth. The funeral home draws business from all of the counties surrounding Coahoma county. Testimony was heard that McNeil, a long-time resident of Clarksdale, was a popular person in the funeral business for twenty-two years. Nowell

testified that he would not have bought the funeral home without such a covenant. After a review of the record before us, we cannot say that the finding of reasonableness was manifestly wrong.

The chancellor determined that the covenant was not an employer/employee type, rather the covenant was a result of the sale of a business. Nowell testified that he would have purchased the business regardless of McNeil's employment as manager; however, Nowell would not have purchased the business without the covenant. Nowell's practice was to require a covenant from the former owner of the business, and Nowell never required such a covenant from an employee. We find substantial evidence in the record to support the trial court's findings. Thus, this issue is also without merit.

III. THE COURT ERRED IN ORDERING SPECIFIC PERFORMANCE AND IN NOT ALLOWING MCNEIL TO RESCIND THE COVENANT BECAUSE THERE WAS NO MEETING OF THE MINDS BETWEEN THE PARTIES, THERE WAS MUTUAL MISTAKE OF FACT AS TO THE TAX CONSEQUENCES OF THE SALE, AND MCNEIL SUFFERED FAILURE OF HIS CONSIDERATION.

IV. THE COVENANT NOT TO COMPETE SHOULD NOT HAVE BEEN SPECIFICALLY ENFORCED IN LIGHT OF NOWELL'S STATEMENT TO THE INTERNAL REVENUE SERVICE UNDER PENALTY OF PERJURY THAT THE TRANSACTION FOR THE PURCHASE OF THE ASSETS AND LIABILITIES DID NOT INCLUDE EITHER A COVENANT NOT TO COMPETE OR THE PURCHASE OF VALUABLE GOODWILL; AND THE COURT ERRED IN DENYING MCNEIL'S CLAIM FOR MONETARY AND/OR EQUITABLE RELIEF OF RESCISSION OR MODIFICATION OF THE SALES AGREEMENT AND THE COVENANT NOT TO COMPETE.

McNeil's third and fourth assignments of error encompass essentially the same issue: that the chancellor erred in failing to allow modification or rescission of the sales agreement and covenant not to compete. McNeil bases this claim on two things: first, the tax consequences of the sale of the business and second, the employment agreement. We will consider the two assignments of error together.

Our standard of review in regard to a chancellor's findings is well settled. The Mississippi Supreme Court has held that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). The appellate scope of review is limited since this Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted).

The chancellor determined that McNeil was not entitled to relief as there was no breach of the agreement concerning how the tax aspects of the transaction would be reported to the IRS. McNeil initially consulted his accountant when offered \$500,000 by Nowell. McNeil's accountant testified that he had advised McNeil that sale could be structured to defer, not avoid, tax consequences of McNeil.

McNeil failed to have his accountant or attorney structure the deal in such a manner. McNeil is an

experienced business man who later regretted his decision to sell his business. McNeil had professional accountants and attorneys whom he failed to consult, or at least failed to follow their advice. McNeil seeks now to remedy the situation by arguing that the sales agreement and covenant should be rescinded.

Additionally, after one and one-half years, the tax consequences came to light and Nowell made reasonable efforts to rectify the unexpected tax consequences. There is an argument that McNeil's subsequent acceptance of Nowell's assistance to remedy his tax consequences was a waiver of any former breach; however, we need not reach that question. The chancellor's determination that there was no breach of the sales agreement has substantial support in the record. McNeil alleges that Nowell breached the oral employment contract. The alleged breaches constituted time off and guaranteed additional compensation from insurance overrides. Testimony was heard regarding the negotiations. McNeil testified that there was a minimum commission guaranteed by the insurance company. Nowell testified that no funeral director was employed with such a guarantee. In fact, Nowell's wife testified as an adverse witness (against Nowell) and testified that there was no such guarantee.

The chancellor determined that the proof supports the finding that Nowell performed his part of the oral employment contract. Nowell paid McNeil his \$26,000 annual salary. Nowell provided the perks discussed. Two salary increases to a total salary of \$31,000 occurred during McNeil's employment. Essentially, the chancellor was presented with the situation where the parties failed to commit their employment agreement to writing. The court determined that McNeil was an at-will employee of Nowell and that there was no agreement as to the scope of work or hours to be worked by McNeil. We find substantial evidence in the record to support the chancellor's findings. Thus, McNeil is not entitled to damages or rescission of the sales agreement or covenant not to compete.

THE JUDGMENT OF THE CHANCERY COURT OF COAHOMA COUNTY GRANTING THE PERMANENT INJUNCTION AGAINST KERNEY C. MCNEIL SO AS TO ENFORCE THE COVENANT NOT TO COMPETE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.