Wolfe's Pattern Jury Charge for Texas Non-Compete Cases

Paula Payne Windows v. Dawn Davis

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March 20, 2021

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[Question on implied agreement to provide confidential information]

QUESTION ___

Do the circumstances surrounding the employment of *Dawn Davis* by *Paula Payne Windows* indicate that her employment necessarily involved providing her with confidential information before she could perform the work she was hired to do?[1]

Answer "Yes" or "No."

Answer: _____

[**Comment**: Use this question when the non-compete does not expressly state that the employer agrees to provide confidential information to the employee, but the employer contends there was an implied agreement to provide confidential information.]

[1] *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850-51 (Tex. 2009) (agreement without express promise was enforceable where the circumstances surrounding employment indicated that it necessarily involved providing the employee confidential information before he could perform the work he was hired to do).

[Question on providing confidential information]

If you answered "Yes" to Question ___ [the question on an implied agreement to provide confidential information], then then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

Did *Paula Payne Windows* provide *Dawn Davis* with confidential information?[2]

Answer "Yes" or "No."

Answer: _____

[**Comment**: Use this question when the "otherwise enforceable agreement" is the employer's express or implied agreement to provide the employee with confidential information, and where there is conflicting evidence regarding whether the information provided by the employer was confidential. If the "otherwise enforceable agreement" is an agreement to provide specialized training, revise accordingly.]

[2] *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006) (non-compete becomes enforceable once the employer provides confidential information and specialized training as promised); *Neurodiagnostic Tex, LLC v. Pierce*, 506 S.W.3d 153, 164-65 (Tex. App.—Tyler 2016, no pet.) (agreement to provide specialized training was an "otherwise enforceable agreement" where the employer actually provided the promised training and there was evidence the training was specialized)

[Question on reasonableness of non-compete]

If you answered "Yes" to Question ___ [the question on providing confidential information], then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

Section __ of the _____ Agreement contains limitations as to time, geographical area, and scope of activity to be restrained. Did *Paula Payne Windows* establish that those limitations reasonable?[3]

Limitations are unreasonable if they impose a greater restraint than is necessary to protect the company's goodwill or other business interest, such as the interest in protecting confidential information.[4]

When the company's interest is protecting its confidential information, a time period is unreasonable if the information would become outdated before the time period expires.[5]

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[3] *See* TEX. BUS. & COM. CODE § 15.51(b) ("If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, for a term or at will, the promisee has the burden of establishing that the covenant meets the criteria specified by Section 15.50 of this code. . . . For the purposes of this subsection, the 'burden of establishing' a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.").

[4] *See* TEX. BUS. & COM. CODE § 15.50(a) ("a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee").

[5] *See, e.g. Stone v. Griffin Comm. & Security Sys., Inc.*, 53 S.W.3d 687, 696 (Tex. App.—Tyler 2001, no pet.) (five years was reasonable where there was "ample evidence" that it would take five years for the information received by the employees to become outdated); *CDX Holdings, Inc. v. Heddon*, No. 3:12-CV-126-N, 2012 WL 11019355, at *9 (N.D. Tex. Mar. 2, 2012) (plaintiffs failed to meet burden to show one-year limitation was reasonable, where there was testimony that the information was "continually changing and updated" and had a "short shelf life").

A geographic limitation is unreasonable if it extends beyond the sales territory for which the employee was responsible while working for the company.[6]

A scope of activity is unreasonable if it is an industry-wide exclusion and is not limited to customers the employee (a) interacted with while employed by the company or (b) learned confidential information about while employed by the company.[7]

Answer "Yes" or "No."

Answer: _____

[**Comment**: This question should be submitted when the non-compete is part of an employment agreement and there is conflicting evidence regarding the reasonableness of the non-compete. There are many Texas cases reciting a general rule that the reasonableness of a non-compete is a question of law, but those cases typically do not address the situation where there is conflicting evidence going to

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[6] *See Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 660 (Tex. App.—Dallas 1992, no writ) (reasonable geographic area generally considered to be the territory in which the employee worked for the employer).

[7] *See John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("The Texas Supreme Court has held that an industry-wide exclusion is unreasonable") (citing *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 386-88 (Tex. 1991)); *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 298 (Tex. App.—Beaumont 2004, no pet.) (non-compete that was not limited to customers employee had dealings with while employed by company was unreasonably broad); *EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 660 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (enforceability of non-compete would turn on whether it extended to customers that employee had no dealings with).

But see Republic Servs., Inc. v. Rodriguez, No. 14-12-01054-CV, 2014 WL 2936172, at *8 (Tex. App.—Houston [14th Dist.] June 26, 2014, no pet.) (mem. op.) (distinguishing *Stroman* and reversing summary judgment that non-compete was an industry-wide exclusion, where employer offered evidence of companies in the industry that were not competitors); *M-I LLC v. Stelly*, 733 F.Supp.2d 759, 796-97 (S.D. Tex. 2010) (distinguishing *Stroman* and holding that six-month restriction on engineer providing "well completion services" was not an industry-wide exclusion encompassing the oil and gas business).

the question of reasonableness. Furthermore, section 15.51 of the Business and Commerce Code defines the "burden of establishing" a fact as "the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence."

The instruction on time limitation may need to be adjusted depending on the interest of the employer at issue.

The instruction on a reasonable geographic limitation is appropriate for a typical sales employee but may need to be adjusted depending on the employee's role. *See, e.g., Ameripath, Inc. v. Hebert*, 447 S.W.3d 319, 335 (Tex. App.—Dallas 2014, pet. denied) (broad geographic area was reasonable considering employee was a member of employer's "highest level management team"). In addition, some courts have held that limitations on scope are a reasonable alternative to a geographical limit. *See, e.g., Gallagher Healthcare Ins. Servs. v. Vogelsang*, 312 S.W.3d 640, 654-55 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("A number of courts have held that a non-compete covenant that is limited to the employee's clients is a reasonable alternative to a geographical limit").

The question and instruction on scope of activity may need to be adjusted or omitted depending on whether the court finds that the limitation is a prohibited industry-wide exclusion or not.]

[Question on breach of non-compete]

If you answered "Yes" to Question __ [the question on reasonableness], then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

Did *Dawn Davis* fail to comply with the restrictions in section __ of the _____ Agreement?[8]

Answer "Yes" or "No."

Answer: _____

[**Comment**: In many cases there will be no dispute that the employee violated the terms of the non-compete, in which case submitting the question may be unnecessary. But unless the defendant stipulates that the agreement was breached, or the court enters summary judgment that the agreement was breached, the plaintiff may want to request the question to avoid the possibility of waiving the issue.]

[8] PJC 101.2.

[Question on damages for breach of non-compete]

If you answered "Yes" to Question ___ [the question on failure to comply], then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paula Payne Windows* for its damages, if any, that resulted from such failure to comply?[9]

Consider the following elements of damages, if any, and none other:

> The loss of net profits directly and foreseeably caused by *Dawn Davis's* failure to comply in an amount proven by *Paula Payne Windows* with reasonable certainty.

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost profits sustained in the past.

Answer: _____

2. Lost profits that, in reasonable probability, will be sustained in the future.

Answer: _____

Lost profits must be proven with reasonable certainty,[10] must be based on one complete calculation,[11] and may not be speculative.[12] *Paula Payne Windows* has the burden to prove their alleged lost profits resulted from the conduct of *Dawn Davis*.[13]

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[9] PJC 115.3.
[10] *Szczepanik v. First S. Trust Co.,* 883 S.W.2d 648, 649 (Tex.1994)
[11] *Holt Atherton Ind., Inc. v. Heine*, 835 S.W.2d 80, 85 (Tex. 1992).
[12] *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 860 (Tex. 2017) (citing *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994)).
[13] *Hunter Bldgs. & Mfg., L.P. v. MBI Global, L.L.C.*, 436 S.W.3d 9, 18 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (emphasis added) (citing *Haynes & Boone v.*

Paula Payne Windows must prove a direct causal link between the actions of Dawn Davis, the injury suffered, and the alleged lost profits.[14] The alleged lost profits must be the natural and probable consequence of the failure to comply with the non-compete[15] and must be foreseeable and traceable to the failure to comply with the non-compete.[16]

[**Comment**: Lost profits are a common type of actual damages in a non-compete case. If the plaintiff seeks some other measure of actual damages, the questions should be adjusted accordingly.]

Bowser Bouldin, Ltd., 896 S.W.2d 179, 181 (Tex. 1995), *abrogated on other grounds by, Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45-46 (Tex. 2007)).

[14] *Id*.

[15] *See Horizon*, 520 S.W.3d at 860.

[16] *Mood v. Kronos Prods., Inc.*, 245 S.W.3d 8, 12 (Tex. App.—Dallas 2007, pet. denied) (emphasis added) (citing *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998)).

[Question on tortious interference with non-compete]

QUESTION __

Did *Real Cheap Windows* intentionally interfere with the _____ Agreement?

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.[17]

Answer "Yes" or "No."

Answer: _____

[**Comment**: Submit this question only if the judge has not found as a matter of law that the defendant's alleged interference was legally justified. *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996).]

[17] PJC 106.1.

[Question on justification defense to tortious interference]

If you answered "Yes" to Question ___ [the question on intentional interference], then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

Did *Real Cheap Windows* have a good-faith belief that the _____ Agreement was unenforceable as written?[18]

Answer "Yes" or "No."

Answer: _____

[**Comment**: Submit this question if the judge has found that the defendant had a "colorable," but mistaken, legal right to interfere with the contract. *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996).]

[18] PJC 106.2.

[Question on damages for tortious interference with non-compete]

If you answered "No" to Question ___ [the question on good-faith belief], then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paula Payne Windows* for its damages, if any, that resulted from *Real Cheap Windows'* intentional interference with the _____ Agreement?[19]

Consider the following elements of damages, if any, and none other:

> The loss of net profits directly and foreseeably caused by the interference in an amount proven by *Paula Payne Windows* with reasonable certainty.

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost profits sustained in the past.

Answer: _____

2. Lost profits that, in reasonable probability, will be sustained in the future.

Answer: _____

Lost profits must be proven with reasonable certainty,[20] must be based on one complete calculation,[21] and may not be speculative.[22] *Paula Payne Windows* has the burden to prove their alleged lost profits resulted from the conduct of *Dawn Davis*.[23]

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[19] PJC 115.22.
[20] *Szczepanik v. First S. Trust Co.,* 883 S.W.2d 648, 649 (Tex.1994)
[21] *Holt Atherton Ind., Inc. v. Heine*, 835 S.W.2d 80, 85 (Tex. 1992).
[22] *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 860 (Tex. 2017) (citing *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994)).
[23] *Hunter Bldgs. & Mfg., L.P. v. MBI Global, L.L.C.*, 436 S.W.3d 9, 18 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (emphasis added) (citing *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995), *abrogated on other grounds by, Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45-46 (Tex. 2007)).

Paula Payne Windows must prove a direct causal link between the actions of Dawn Davis, the injury suffered, and the alleged lost profits.[24] The alleged lost profits must be the natural and probable consequence of the failure to comply with the non-compete[25] and must be foreseeable and traceable to the failure to comply with the non-compete.[26]

[**Comment**: Lost profits are a common type of actual damages in a non-compete case. If the plaintiff seeks some other measure of actual damages, the questions should be adjusted accordingly.]

[24] *Id*.
[25] *See Horizon*, 520 S.W.3d at 860.
[26] *Mood v. Kronos Prods., Inc.*, 245 S.W.3d 8, 12 (Tex. App.—Dallas 2007, pet. denied) (emphasis added) (citing *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998)).