Westlaw.

For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Marsh USA Inc. and Marsh and McLennan Companies, Inc.
v.
Rex Cook.
No. 09-0558.

September 16, 2010.

Appearances:

Beverly A. Whitley, Bell Nunnally & Martin LLP, Dallas, TX, for petitioner.
Monica W. Latin, Carrington, Coleman, Sloman & Blumenthal, LLP, Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF BEVERLY A. WHITLEY ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF MONICA W. LATIN ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF BEVERLY A. WHITLEY ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the final matter for the morning and that's 09-0558 Marsh USA Inc and Marsh & McLennan Companies, Inc. v. Rex Cook.

MARSHALL: May it please the Court. Ms. Whitley will present arguments for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF BEVERLY A. WHITLEY ON BEHALF OF THE PETITIONER

ATTORNEY BEVERLY A. WHITLEY: Thank you. Good morning. May it please The Court. This Court should overturn the ruling of the Court of Appeals in this case because Rex Cook signed a non-compete that was part of an otherwise enforceable agreement. That non-compete that Mr. Cook signed was part of his participation in an incentive plan that Marsh set up in 1992 and that plan and that non-compete comply with both the letter and the spirit of the Covenants Not to Compete Act. The Act was actually passed just a few years prior to the time that Marsh implemented its plan and it was passed to overturn this Court's decision in Hill v. Auto Trim, Mobile Auto Trim, and to reopen the door to allowing employers to protect their good will in the form of customer relationships through a non-compete. And to--

JUSTICE PAUL W. GREEN: I have to admit it sounds very compelling so far, but in this particular case, and I

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

guess some of the things the courts are having trouble with, is here you're not. He had a stock option agreement, but you're not really giving any additional, it's the confidential information that the person would otherwise have.

ATTORNEY BEVERLY A. WHITLEY: This is not a confidential information case and prior to the time of light courts had no trouble, except for Hill, finding that a non-compete could be used to protect customer relationships to the extent that they comprise the employer's good will and there were cases prior to Hill that held that and then all of a sudden in Hill, the court said, well you know the employee is nice and goes out and meets the customers and maybe that's his good will and in direct response to that the Legislature said no, no. You're allowed to have a non-compete as long as you have, as long as that non-compete is ancillary to an otherwise enforceable agreement and then it's reasonable and all the other issues that we know are present. In Hill v. Mobile Auto Trim, it's very important understand what happened. The court, this Court said in that case that Mobile Auto Trim couldn't enforce a non-compete to prevent Hill from capitalizing on Mobile Auto Trim's good will for his own benefit, for Hill's own benefit and so since then it's been well-documented that the legislature had Hill in mind whenever it passed the act and that the Legislature wanted to go back to the common law as it existed prior to Hill and the common law as it existed prior to Hill allowed employers to enforce non-compete agreements to prevent their employees from walking out the door with their good will.

JUSTICE PAUL W. GREEN: What if, rather than giving, offering stock options they just said well, in exchange for you continuing to work here and dealing with our clients and customers and adding to the good will, you have to sign this non-compete agreement?

ATTORNEY BEVERLY A. WHITLEY: That would be a different case because in that case there wouldn't be an otherwise enforceable agreement. In this case it wasn't the stock option, the stock option was part of the plan. He was awarded the stock options not for doing anything, but, not for expressly giving a promise at the time he got the stock option. He was awarded the stock option because under the plan certain key employees were allowed to receive stock options under the way it was set up. The otherwise enforceable agreement was the signing of the non-solicitation containing specific promises, handing that over to Marsh and Marsh giving the stock in exchange for that.

JUSTICE DON R. WILLETT: So what do you need to make an employee agree not to compete just because you give them stock options? I mean if anything--

ATTORNEY BEVERLY A. WHITLEY: Because that's part of the plan.

JUSTICE DON R. WILLETT: But the options would seem to already give an employee incentive to sort of look out for the best interest of and protect their employers. It's not like confidential information where if you disclose it, it can harm your employer. Here are options, you would think the person getting options would want to do all they can to kind of boost the value of the company.

ATTORNEY BEVERLY A. WHITLEY: I agree that it's not the same as confidential information, but the options were given as part of a comprehensive incentive plan. That incentive plan had a purpose other than restraining Rex Cook from competing. The purpose of the incentive plan was to link his interest, Rex Cook's interest, with the long-term interest of the shareholders of Marsh and to incentivize him to grow good will. The solicitation, the non-solicitation agreement that he signed was signed in order, as a condition of exercise. At the point that he signed it he got the stock. At that point, ideally under the plan, he would become an owner and he would continue to act in the long-term interest of the shareholders and to try to build good will because after he owned the stock the more that the stock price went up, the more valuable it would be to him.

JUSTICE DAVID M. MEDINA: And what happens if the stock price goes down as is so often happens?

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY BEVERLY A. WHITLEY: If the stock price went down before he exercised, he wouldn't have. If the stock price goes down after he exercises then he's an owner and that would even incentivize him more to try to build a good will.

JUSTICE DAVID M. MEDINA: It would incentivize me to go do something else.

ATTORNEY BEVERLY A. WHITLEY: And it might and the plan or the plan contemplated from the beginning that it wasn't going to be able to force the employee to continue after the exercise, to continue to grow the good will although obviously the ideal situation would be if the employee becomes an owner he would continue to try to grow good will after he had exercised the stock option, but if the employee decided under the plan, which he is allowed to do, to exercise, to sign a non-solicitation agreement and exercise, get the stock, sell the stock that day, take the cash and do whatever and then quit and go to work for a competitor then the Marsh could not force him to continue to work for the best interest of the shareholders, but the non-compete would kick in then and would prevent him from working against the shareholder.

JUSTICE DAVID M. MEDINA: [Inaudible] What if the stock is worthless and it has no value? Then what is [inaudible]--

ATTORNEY BEVERLY A. WHITLEY: Then he would not exercise. There would be no reason.

JUSTICE DAVID M. MEDINA: I understand that, but what does that, how does that affect his obligation?

ATTORNEY BEVERLY A. WHITLEY: Because he didn't have an obligation unless he exercised. The exercise and the transfer of the stock were simultaneous. The option happened a long time ago. The incentive plan comes into being in 1992. He gets the option--

JUSTICE DAVID M. MEDINA: So if the option is never exercised then there's no obligation?

ATTORNEY BEVERLY A. WHITLEY: Absolutely. Absolutely. It was up to Mr. Cook to decide whether or not it was worth it to sign the non-compete and to take the stock and if he didn't want to, he could have left and he could have gone to Lockton unrestrained.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was Cook somehow more valuable to Marsh McLennan after he received this, the stock that he was before?

ATTORNEY BEVERLY A. WHITLEY: That was a point that was raised by the Court of Appeals in its decision. No Your Honor, he was always, in fact from the time that he got the option he was a valuable employee.

CHIEF JUSTICE WALLACE B. JEFFERSON: So this seemed like it was just a naked restraint of trade. It's not like there's confidential information given that sort of increases the consideration for his remaining of the employment so I don't, how is this not just a restraint of trade that the Commerce Code prohibits?

ATTORNEY BEVERLY A. WHITLEY: The idea of a naked restraint is discussed at length in the restatement and the restatement says that when two people who have no other relationship agree that one of them is going to pay the other one money for the agreement not to compete, that's a naked restraint. When you're in the employment context, the restraint is not naked because there is already an underlying relationship that gives the parties the reason to want to have a non-compete. In this case, Marsh sought to link Cook's interest with Marsh's shareholder's interest long-term and to grow good will. The non-compete was not naked because it stopped Cook from the day he exercised walking out the door with the good will, the very good will that he was just paid are incentivized to create.

CHIEF JUSTICE WALLACE B. JEFFERSON: What would this-- so would a covenant like this also be satis-

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

fied with increases in pay? I mean you know we're going to incentivize you to stay by paying you more money per month and that, would that be the sort of agreement that makes a covenant not to compete enforceable?

ATTORNEY BEVERLY A. WHITLEY: It would be a little bit different because this is a comprehensive plan that has a specific purpose other than to restrain competition and what you're talking about raises, we've got to look at is there an otherwise enforceable agreement is that, the giving of a raise an otherwise enforceable agreement? If it is and even if it is money then it would still be, or then it would fit the statute and then the question would be whether or not it would be reasonable under the circumstances, which is not an issue in this case.

JUSTICE PAUL W. GREEN: I don't know whether the record shows this or not, but what happened to the stock? Did he sell it? Did he cash out?

ATTORNEY BEVERLY A. WHITLEY: He cashed out the same day and the plan contemplated that. That's why, I mean the ideal situation was to make him an owner, continue to acting like an owner, but the plan knew if he didn't do that that it had to do something to protect what had been incentivized prior and so--

JUSTICE PAUL W. GREEN: So he cashed out the same day he exercised the option?

ATTORNEY BEVERLY A. WHITLEY: He did and he took the $50,000 difference and did whatever he wanted to.

JUSTICE PAUL W. GREEN: Okay. Would that create a claim back against him for failure of consideration of the deal? In other words--

ATTORNEY BEVERLY A. WHITLEY: Because he's not fulfilling his promises?

JUSTICE PAUL W. GREEN: When he left, violating the policy, does that create a claim back against him for the value of that stock?

ATTORNEY BEVERLY A. WHITLEY: I guess that is a possibility and I hadn't really thought about that because Mr. Cook made promises to Marsh that would fulfill the purpose that Marsh had when they presented or implemented the plan in 1992 and Marsh wants those promises fulfilled. It doesn't want the stock back. It wanted to give the stock to Mr. Cook as a reward for building that good will, but it didn't want him to take that good will, the idea is that Mr. Cook could be incentivized by Marsh through the stock to build his portfolio and could walk out the door with his portfolio.

JUSTICE PAUL W. GREEN: Just thinking in terms, if it's not enforceable, he did act upon the agreement and yet he failed to comply with the agreement so that [inaudible]--

ATTORNEY BEVERLY A. WHITLEY: He certainly did.

JUSTICE PAUL W. GREEN: So that fails. Does that give rise to yet another claim back having nothing to do with the enforceability of the agreement? [Inaudible]

ATTORNEY BEVERLY A. WHITLEY: I guess it would Your Honor, but the fact that there might be another remedy doesn't mean that the Legislature didn't mean for Marsh to have this remedy when it overturned Hill by passing the covenants not to compete [inaudible].

JUSTICE DON R. WILLETT: Did anything else about Mr. Cook's employment change; hours, conditions, wages, anything else when he received the options?

ATTORNEY BEVERLY A. WHITLEY: The options?

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

JUSTICE DON R. WILLETT: When he received the options, did anything else about his employment status or anything change?

ATTORNEY BEVERLY A. WHITLEY: No, Your Honor. He was a key employee before and the options, the idea is he's paid every day to come in and maintain customer relationships, to call those customers constantly to make sure that their needs are being met, but if he has an incentive then he'll go out and find a new relationship that Marsh didn't already have and a new customer and bring that new customer into the fold and the law has always been in Texas that that customer relationship, even if he found it on his own, that customer relationship belongs to the person whose paying him to develop it. I mean and that's how the law has always been except for in Hill, that was different or the court said it was different and then the Legislature reacted to that. It's vital in this case to understand two things. One is that customer relationships are Marsh's good will. Marsh is an insurance broker. It places insurance with a variety of independent insurance companies for its clients. Rex Cook works for Lockton. Lockton is a direct competitor of Marsh. Lockton places the insurance for its clients with a variety of independent insurance companies. The insurance companies that they sell the or they get that insurance place for, they're all the same. The policies are all the same. The difference, what makes a customer loyal to Marsh is not price; it's not the product that they're selling because those things are very similar with every other broker. The difference is the customer's relationship with the key primary point of contact at Marsh and that, for all the customers that Mr. Cook took with him; he was the primary point of contact. We've got to have some way to protect that and the Legislature passed the Act with that in mind because Hill was right there and we know, plus it's been documented by everyone, this Court, lower court and the Legislative history, that they said no. We're going to allow what has always been the common law in Texas that if your relationship is the key to your good will we're going to allow you to protect that.

JUSTICE PAUL W. GREEN: Now let me ask you about the good will. Going back to the stock option thing, is that a continuing option? Were additional stocks added to that as time went by or was it a one-time deal?

ATTORNEY BEVERLY A. WHITLEY: It could have been continuing, but it wasn't the option that was the consideration for the otherwise enforceable agreement. It was the stock, but the option was [inaudible]--

JUSTICE PAUL W. GREEN: So in 1996, he could have exercised a stock option, right? [Inaudible]

ATTORNEY BEVERLY A. WHITLEY: He could of, but he wouldn't because the day he got it, it wouldn't have been worth more than the adoption price, but he could of yes Your Honor.

JUSTICE PAUL W. GREEN: But he could. At some point he could have done that, cashed out, where was the good will at that point? What was his incentive to continue in terms of the stock ownership because he had already cashed it out?

ATTORNEY BEVERLY A. WHITLEY: If he cashed out on the day that he received the option then he wouldn't have sold it for the difference because there wouldn't have been a difference so he would have become an owner and then he would have acted like an owner and that's what Marsh wanted. Marsh wanted him to act like an owner--

JUSTICE PAUL W. GREEN: While he was there he had the good will at heart for the company, but after he cashed out that went away? Because he was no longer an owner.

ATTORNEY BEVERLY A. WHITLEY: I'm trying to understand what your question is exactly?

JUSTICE PAUL W. GREEN: Well I guess I'm saying is you want to enforce this agreement because there's some good will that's involved in this because he's an owner.

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY BEVERLY A. WHITLEY: Yes, Your Honor.

JUSTICE PAUL W. GREEN: But when he cashes out he's no longer an owner.

ATTORNEY BEVERLY A. WHITLEY: That's right and so he wants to take the good will and use it for somebody else and treat it like it's his own or bring it over to Lockton with him. It belongs to Marsh. Marsh is entitled to keep him from walking out the door with it and that's the purpose of this, that's the purpose of the non-compete. The purpose of the agreement is not to restrain Cook from competing, but to grow Marsh's good will through linking the interest of the employee with the employer long-term and through incentivizing him to not just maintain the status quo, but to get the [inaudible] and I see my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you Ms. Whitley. The Court is now ready to hear argument from the respondent.

MARSHALL: May it please The Court, Ms. Latin will present argument for the respondent.

ORAL ARGUMENT OF MONICA W. LATIN ON BEHALF OF THE RESPONDENT

ATTORNEY MONICA W. LATIN: May it please The Court. This case presents the threshold question of what type of consideration justifies a company extracting a covenant not to compete from the promissor. This is not an employment agreement. This is a stock option agreement that the actual consideration for the covenant not to compete was not the award of the options. The actual consideration for the covenant not to compete was the sale to Mr. Cook of publicly traded Marsh stock, not restricted stock, publicly traded stock that anyone in this courtroom can go buy on the open market and not be subject to a covenant not to compete.

JUSTICE PAUL W. GREEN: But at a different price?

ATTORNEY MONICA W. LATIN: Correct and the affect of the transfer to Mr. Cook was the difference between if he chose to exercise it, if any, between the publicly traded stock price and the [inaudible] price, the option price at which Mr. Cook received the stock. So--

JUSTICE PAUL W. GREEN: Did he have to give the money back?

ATTORNEY MONICA W. LATIN: Actually that question hasn't been raised here, but I think the answer is no. The answer is no because this Court has not allowed a forfeiture provision. Texas law has not allowed a forfeiture provision to be a sort of a back door punishment for a violation of an unenforceable non-compete keeping in mind that Mr. Cook had other obligations under the stock exercise agreement including the obligation not to disclose confidential information, there's been no allegation in this case that Mr. Cook has violated that duty, has misappropriated confidential information or has done anything improper with respect to confidential agreement or trade secrets.

JUSTICE DALE WAINWRIGHT: The briefing says that for Mr. Cook to participate in the stock option plan that that arrangement was expressly conditioned on him signing a non-solicitation agreement. Do you agree with the expressly conditioned language?

ATTORNEY MONICA W. LATIN: I agree that it was expressly conditioned on execution of the document called the non-solicitation agreement for exercise of stock options, which includes a nondisclosure provision, as well as the covenant not to compete. This Court has been ...

JUSTICE NATHAN L. HECHT: He read it of course.

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY MONICA W. LATIN: Pardon?

JUSTICE NATHAN L. HECHT: He read it I guess and can see what it said? Why didn't he say no I'm not going to sign this and I'm not entitled to the stock option?

ATTORNEY MONICA W. LATIN: I think he is presumed to have read it. I wouldn't have any reason to disagree with that. The question is not whether a person should be bound to a covenant not to compete just because they read it. If--

JUSTICE NATHAN L. HECHT: Well, but I mean he should have taken, he could have said well if this is what you want, you know I'm not entitled to the stock.

ATTORNEY MONICA W. LATIN: Perhaps he could have done that, but what that does is it permits the party that is extracting the covenant not to compete, to dangle a financial incentive in front of an employee, which is what this was.

JUSTICE NATHAN L. HECHT: And surely an employer can do that. Surely an employer can say, I mean I want to give financial incentives, but I don't, only to people who are going to be here and who I think are going to be loyal so I want you to read this and then I'll give you this enhanced incentive.

ATTORNEY MONICA W. LATIN: This Court has been quite clear that offering money is the most simple example, in exchange for a covenant not to compete, does not give rise to interest or restraining competition and that's--

JUSTICE NATHAN L. HECHT: So to be clear about that, because I was a little unsure about your brief, but if an employer wants to give stock options, but he doesn't want to do it unless he can get a non-competition agreement of some sort he just, he can't do that. He just can't give the stock option.

ATTORNEY MONICA W. LATIN: I would say that you cannot extract a covenant not to compete in return for a stock option agreement and may I mention, employee incentives such as stock option agreements are done to maximize the work that their employees do like raises--

JUSTICE NATHAN L. HECHT: Let me just be sure I understand. The employer comes to the lawyer and says I want to give stock options, but only if I can get a non-compete. Otherwise, I'm not going to give the options. The answer is don't give the option.

ATTORNEY MONICA W. LATIN: That would not be a good reason to award stock options. I agree with that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, but isn't there a bigger sort of philosophical premise here and that is that there, you know this is a state where there's got to be some kind of or at least Texas has recognized some interest in mobility of workers and the restraint of trade based on, I don't know, increases in pay, cost of living assessments, etc. are not enough to make a covenant enforceable that restrains an employee's ability to make a living.

ATTORNEY MONICA W. LATIN: Absolutely that's correct. That was the law in Light, but it was also the law before Light. The Texas law has always assessed the nature of the transaction, the nature of the consideration that justifies the extraction of a covenant not to compete in return. Before the Legislature passed the statute that we're here on today, Texas law was broader. It followed the restatement test that allowed the extraction of a covenant not to compete either in support of a valid transaction or relationship such as an employment relationship. The legislature narrowed that test when it passed the statute that became effective in 1989. And in 1993 the original proposal for the amendment was to expand it back out to provide that a non-compete would be enforceable if it was ancillary to a valid transaction or relationship. That bill did not pass. The bill that was passed

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

maintained the language of otherwise enforceable agreement.

JUSTICE DAVID M. MEDINA: It seems to me that Mr. Cook extracted $50,000 and just thumbed its nose at Marsh. I mean how can that be right?

ATTORNEY MONICA W. LATIN: I would look at it differently Your Honor. I would say that the summary judgment evidence in the form of Ms. Dillenback's affidavit said that Mr. Cook was awarded options because of his many years of excellent service to the company. That's why employers give incentives to their employees. This--

JUSTICE DAVID M. MEDINA: This is as he was walking out the door?

ATTORNEY MONICA W. LATIN: No sir. The stock option award was made in 1996, a slight clarification, the options vested over a four-year period, 25% per year, and were fully exercisable four years later. He did not exercise them until 2005. That was his option. It's an interesting question about why, if this interest was so compelling, it was optional. Why it was that Cook's decision that after 9-11 and before the Eliot Spitzer investigation and whatever else was happening with Marsh stock, why was it that his decision in 2005 to go ahead and exercise those stock options, what was it about that that generated an interest in restraining competition? There's a fundamental flaw in the position that the petitioners take and that is they focus on why they gave Mr. Cook the options. Why has never been the issue. What has always been the issue. If why were the issue money would justify a covenant not to compete. You can say I'm giving this employee a double salary and hope that he'll stay here for the rest of his career or deferred compensation. Why? So that I can protect my customer relationships.

JUSTICE DALE WAINWRIGHT: But if, if when it's--

ATTORNEY MONICA W. LATIN: Well, that's always what companies want to do with the covenant not to compete.

JUSTICE DALE WAINWRIGHT: If, hypothetically, an employee left, an employee had no non-solicitation or non-compete agreement and no restraining contract at all and the employee took the company's trade secrets and used them that employee could be sued under the common law for breech of fiduciary duty with no money paid, with no ancillary agreement, with no otherwise enforceable contract.

ATTORNEY MONICA W. LATIN: That's absolutely correct that the law views confidential information as the kind of thing that deserves particular protection. It's very difficult to determine when confidential information has been used in violation of a previous employer's rights, which is the reason it's the hallmark of the kind of thing that justifies a covenant not to compete. If a customer decides to move when an employee with no non-compete moves to a new company, well why did that client move? Did they move just because they liked the new company? Did they move because of a trade secret? The covenant not to compete allows a cooling off period, some certainty for the prior employer to reestablish that relationship for some period of time to pass before competition begins.

JUSTICE DALE WAINWRIGHT: So given the common law claim for breech of fiduciary duty and the hypothetical case that I'm mentioned why, if I'm the employer, would I even use the non-compete statute? It raises hurdles. It requires more than the breech of fiduciary duty claim requires to be proven in some respects and a brief to fiduciary duty claim. If I'm the employer I could get damages. I could probably get an injunction to stop the violation. I might be able to get an order to get my confidential information and trade secrets back. Why would I even use this statute if it erects the hurdles you're talking about?

ATTORNEY MONICA W. LATIN: I would say that a covenant not to compete makes it easier for an employer to protect their information because if the customer moves their business to the new company or with a new employer there are simple questions. Did the employee under this agreement solicit or service that business?

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

Was the customer covered by the non-compete and did they solicit, not did they use confidential information that was necessarily in their head in soliciting that customer so you do have a much brighter line with a covenant not to compete, which makes it a powerful tool for employers to use to protect their information.

JUSTICE PAUL W. GREEN: Let's assume that the covenant not to compete here was enforceable. Do you have any complaint about the reasonableness of the restrictions imposed by the agreement?

ATTORNEY MONICA W. LATIN: There are at least several problems with the reasonableness prong.

JUSTICE PAUL W. GREEN: They challenged below?

ATTORNEY MONICA W. LATIN: For purposes of our motion at the time, the motion assumed for purposes of the motion that all of the other elements of the pleading were true and it attacked only the threshold question of whether the nature of the consideration gives rise. There are at least two or three problems with the scope that are not before the Court today.

JUSTICE PAUL W. GREEN: As you know with Sheshunoff and Mann Frankfort we were trying to get away from the technical disputes.

ATTORNEY MONICA W. LATIN: Yes and I'd like ...

JUSTICE PAUL W. GREEN: So reasonableness is not a problem here as far as, so the question is whether this is a technical dispute that is enforceable or not.

ATTORNEY MONICA W. LATIN: I appreciate that question very much. There are two parts to that answer. First of all, the types of technical disputes that the Court resolved in Sheshunoff and Mann were issues of contract formation. There was this problem of forming an otherwise enforceable agreement under the auspices of, at the time the agreement was made. Sheshunoff resolved the issue of when performance had to occur such that the otherwise enforceable agreement was created. Did it have to be created instantaneously or could it happen later upon actual performance? In Mann, also applied black letter contract law to say an implied contract is an otherwise enforceable agreement so both of those cases apply black letter contract law to the otherwise enforceable agreement component, but assessing the nature of the consideration is not at all a technical dispute. This Court has always asked two questions; whether a covenant not to compete is justified and if so, how much? And this is the question of whether a covenant not to compete is justified. We haven't gotten to the if so how much and the reason the very dangerous proposition presented by the petitioner's argument is that the petitioner says acknowledged. Well if you pay money you have an otherwise enforceable agreement so you just look at reasonableness. That is incorrect under the statute. Under the statute there are two halves; ancillary to an otherwise enforceable agreement is enforceable to the extent that its restraints are no greater than necessary to protect the legitimate interest of the promisee, but if the second half of that test is failed, section 15.51 requires reformation and enforcement. So if you get to the second half of the test, which is reasonable and no greater restraint than necessary you cannot invalidate a covenant not to compete. The only opportunity under the statute to assess whether there's a prima facie situation that justifies some restraint, we'll figure out how much later, but some restraint, the only place you make that assessment is in the first half of the test, ancillary to an otherwise enforceable agreement, which is exactly consistent with the common law that predates the statute as Justice Hecht observed in the DeSantis opinion in 1990, as Chief Justice Jefferson acknowledged in his concurrence in Sheshunoff, ancillary to an otherwise enforceable agreement, the consative ancillary has always connoted that it gives rise to this interest and even the restatement does that. Section 187 of the restatement talks about first you have to have an ancillary restraint that gives rise to an interest in restraining competition, interest worthy of protection. If, and only if, you do that, if not it's per se unreasonable. If and only if you do that do you get to the continuum.

JUSTICE NATHAN L. HECHT: But before you get to Light, ancillary just means something other than an ab-

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

straction. I mean at least when DeSantis and the law that proceeded it in the restatement was under consideration, it was, you just can't walk down a street, catch somebody and say I want you to agree never to compete with me just in case we ever do.

ATTORNEY MONICA W. LATIN: That's what's interesting. The law actually used the very phrase, gives rise to an interest in restraining competition as I know you're well-aware. That was the test and that's what the restatement does. This section is called not ancillary and it says you have to have something that gives rise to an interest in restraining competition.

JUSTICE NATHAN L. HECHT: But wouldn't an employment relationship be enough under the restatement?

ATTORNEY MONICA W. LATIN: Under the restatement, yes and the statute specifically declined to include relationship as a basis for an otherwise enforceable agreement. The nice thing about it is by requiring an otherwise enforceable agreement you know what you have. You look at the agreement and you can tell, what is it about this agreement that justifies the imposition of a covenant not to compete. Covenants are very important in some circumstances.

JUSTICE DALE WAINWRIGHT: But Counsel, this statute doesn't use the terminology give rise either.

ATTORNEY MONICA W. LATIN: Correct. The statute uses the term ancillary.

JUSTICE DALE WAINWRIGHT: And it's in some of our case law, but it's nowhere in the statute.

ATTORNEY MONICA W. LATIN: That's correct. Now the Legislature is presumed to have used those words in conjunction with the way that they have been used in the law leading to that time. That is the principle, one of the principles of statutory interpretation is that when the Legislature uses a term like ancillary, in fact if you look at DeSantis, other than the narrowing to just an otherwise enforceable agreement, the statute actually fairly well tracks what the common law had provided and this Court had used the term ancillary, have used the term ancillary since. It always connotes something more than just being on the same page. Indeed, if the test were just on the same page, section 1505 wouldn't really have much meaning, which says every contract and restraint of trade is unlawful.

JUSTICE NATHAN L. HECHT: The otherwise enforceable agreement here is the what in your view?

ATTORNEY MONICA W. LATIN: The otherwise enforce, there's no dispute that the otherwise enforceable agreement is the transfer of stock at the agreed upon price to Mr. Cook, which Mr. Cook paid for--

JUSTICE NATHAN L. HECHT: But the acceptance of the option agreement basically--

ATTORNEY MONICA W. LATIN: It is the award of options was in 1996 to actually exercise, to actually be to become a stockholder. Now this idea that option, that exercise of stock somehow creates some interest that's new is actually not in the record before the Court. All of the evidence about the purpose of this plan is about the plan, right? It's a deferred compensation plan that you want the employee to stick around long enough for the options to be in the money because that's compensation [inaudible].

JUSTICE PAUL W. GREEN: Right. But he can't exercise it unless he signs the agreement.

ATTORNEY MONICA W. LATIN: Right. That is the ...

JUSTICE PAUL W. GREEN: So what do we do with that? I mean because it strikes me this is an inequity here that we have not addressed. We haven't talked about, we were talking about windfalls in the previous case. Why isn't this a windfall? Why would we want to allow this situation to occur?

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY MONICA W. LATIN: It's a tack-on if you ask me. It's, these kinds of incentives to employees are given by employers in reward for their current service. Mr. Cook ...

JUSTICE NATHAN L. HECHT: But that's not what the employer said it was for. I mean he at least gets to say.

ATTORNEY MONICA W. LATIN: Well for example, the options are awarded in 1996. You can't even exercise them for a year. So hopefully, Mr. Cook continues to stay with the company, does a good job--

JUSTICE EVA M. GUZMAN: And hopefully the company does better so that they do become valuable and ...

ATTORNEY MONICA W. LATIN: Right. Right. Isn't that great? It's great for everyone. What is it about that circumstance that justifies, that makes the company need a covenant not to compete more than any other company? Every company wants to protect their customer relationships from solicitation. Every company thinks that would be great. It's like talking on the cell phone in your car. Everyone wants to be able to do it, but they don't want anyone else to be able to do it.

JUSTICE PAUL W. GREEN: Well right, but Mr. Cook knew that he didn't get the stock unless he agreed to this restriction.

ATTORNEY MONICA W. LATIN: That was a component of the [inaudible]--

CHIEF JUSTICE WALLACE B. JEFFERSON: Well what if an employer said any pay raise is contingent on you, on this covenant not to compete, any additional cost of living increase or any bonus and that's the original employment relationship. It just seems to me there's at least some tension between recognizing that as valid and the Legislature's decision to put some restrictions on restraints of trade.

ATTORNEY MONICA W. LATIN: The component of the agreement that is a non-solicitation or non-competition agreement is just void. The law has not allowed, they say here's $10,000, $100,000 and thank you for your loyal service. We really appreciate everything you've done and the employee sticks around for ten years or 20 years and then violates, allegedly, again we're assuming that there was a violation here, which we don't agree, violates the covenant not to compete, the employer got the benefit of that incentive. They incentivized, in their theory incentivized the employee to do a good job.

JUSTICE EVA M. GUZMAN: Does it make a difference that you're talking about a key employee whose work product, if you will, would have a significant impact on the future of the company or the good will of a company? I mean it's one thing if you made the non-compete, I guess, applicable to everybody who were to get some sort of financial benefit, but does the fact that he's a key employee or do you dispute that?

ATTORNEY MONICA W. LATIN: Well, I think that that's who companies tend to request covenants not to compete from. They don't tend to request them from the people that can't compete. You want a covenant from the person who can compete against you because otherwise, gosh that would be terrible. That's what their brief says at 31. We need a covenant not to compete because otherwise he could compete so yes that tends to be the kind of person who gets a covenant not to compete.

JUSTICE EVA M. GUZMAN: I guess the argument about conditioning, cost of living raises that really, I'm not sure how that would impact the key employees if you will.

ATTORNEY MONICA W. LATIN: Yeah.

JUSTICE EVA M. GUZMAN: As a policy reason.

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY MONICA W. LATIN: I think as a matter of public policy the restraint is just void and that's the way that it's always been viewed. This test, it's important to note, has been in place for at least 16 years and has not engendered confusion with the courts of appeals that people understand this test, they know what it takes to draft an enforcement covenant not to compete. It's not hard. This is an unusual agreement perhaps in that it fails to do so, but Light was correct when decided and makes sense. It's consistent with the common law and it provides bright line tests that are important for employers both in the hiring and in retaining their employees and so if there are no further questions I thank you very much for you time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Latin.

REBUTTAL ARGUMENT OF BEVERLY A. WHITLEY ON BEHALF OF PETITIONER

JUSTICE DALE WAINWRIGHT: Ms. Whitley, did I misunderstand you? I thought you said the otherwise enforceable agreement is the non-solicitation agreement?

ATTORNEY BEVERLY A. WHITLEY: It is. It's the--

JUSTICE DALE WAINWRIGHT: And non-compete was separate from that?

ATTORNEY BEVERLY A. WHITLEY: No, it was part of it.

JUSTICE DALE WAINWRIGHT: Separate provisions in the same agreement.

ATTORNEY BEVERLY A. WHITLEY: There were four promises in the non-solicitation agreement; the promise not to use confidential information, the promise not to disclose confidential information, the promise not to solicit Marsh employees to go to a competitor and the covenant not to compete.

JUSTICE DALE WAINWRIGHT: So the stock option, your view is the stock option was not the ancillary agreement, the otherwise enforceable agreement?

ATTORNEY BEVERLY A. WHITLEY: Right. You have to look at the whole plan from the beginning because the plan contemplated all these documents be signed. The plan said for key employees there could be an option. The option came later in 1996. The plan also contemplated if you want to exercise, you've got to sign the non-solicitation agreement, this agreement. That was what was signed. If you did that then the plan also contemplated that the stock would be transferred. I want to make sure I address a couple of questions. Justice Guzman, you asked about whether or not he had to be a key employee. There are a lot of cases, especially pre-Hill that talk about what kind of employee could be subject to a non-compete. It has to be an employee who has the ability to utilize his relationship to move that client and there were several cases, I think that Weatherford Oil is one of them, DeSantis v. Wackenhut has a discussion of it because in DeSantis they found that the employee hadn't used his relationship to move the customers. Justice Jefferson, you said that there was a, or you indicated that there was a policy reason that we might not want employers to be able to just give raises in exchange for non-competes and because it might prevent the employee from working, but nothing about the non-solicitation agreement that Mr. Cook signed stops him from working. It is specifically limited to the employee, I mean the clients of Marsh that he worked with while he was at Marsh within a certain period of time and in all of the good will cases it should be limited only to the clients that the employee has built up over the years, while he's being paid on Marsh's dime, he's going out and meeting with the client. He's doing that for Marsh, not to make his own portfolio bigger so in every one of these good will cases it ought to be limited and it is so limited in this case.

JUSTICE DALE WAINWRIGHT: Are you then suggesting that a person could leave with a non-compete and solicit everybody else's book of business, but not his own and that would be okay?

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY BEVERLY A. WHITLEY: Under the cases it would be because the idea is that he would have the relationship that, that his relationship with those customers that he had lunch with once a week, that that would enable him to appropriate Marsh's relationship for the benefit of Lockton. If it was somebody else's book of business then he wouldn't have that relationship and under the law he wouldn't be able to appropriate the relationship.

JUSTICE DALE WAINWRIGHT: But if, I'm tempted to use a term from a former colleague, that can't be right, can it? Doesn't that incentivize an employee to take everybody else's customer list on his way out the door but his?

ATTORNEY BEVERLY A. WHITLEY: It wasn't the list that he took. It was his relationship.

JUSTICE DALE WAINWRIGHT: The trade secrets and confidential information, the information and the business assets that are protected in this area of the law.

ATTORNEY BEVERLY A. WHITLEY: Confidential--I'm sure that Mr. Cook got confidential information while he was at Marsh, but that's not the issue in this case and it wasn't the issue in Hill because in Hill they said that there was confidential information and the Court found that there was just no proof of it. We're talking about the relationship. If he's not the employee with the relationship then that's not a relationship that can be protected as a result of trying to protect a worthy interest that is the good will interest of Marsh so am I answering your question or do you--

JUSTICE DALE WAINWRIGHT: It was about a related question. Go on with your points and rebuttal.

ATTORNEY BEVERLY A. WHITLEY: You had said, Justice Wainwright, that it, or maybe you didn't so maybe there was a question that you had about the ability or why you couldn't just sue for fiduciary duty if the person steals the relationship and I think that the answer was in confidential information situations it's hard to tell whether or not the employee did wrongly capitalize on the confidential information. Well, if you look at the cases you'll see it's just as difficult for the employer to prove that the employee capitalized on the good will because in DeSantis v. Wackenhut, that's exactly what happened. The employee goes out and forms his own business and then sends a solicitation letter to the list of clients of Wackenhut and then whenever the lawsuit comes along he says well those customers didn't leave because they had a relationship with me. They left because they wanted to leave. I understand that I'm out of time Your Honors, I just wanted to say that if we don't, if the Court doesn't overturn this then we're back at Hill and Marsh is without a remedy to enforce a non-compete to prevent its good will from walking out the door with a person that it gave very valuable stock options to in which that person took $50,000 worth of stock and now wants to reneg on the agreements that they gave Marsh and that Mr. Cook knew he was going to have to agree to.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you counsel. That cause is submitted and that concludes the arguments for this morning. The Marshall will now adjourn the Court.

MARSHALL: All rise.

2010 WL 3713706 (Tex.)

END OF DOCUMENT

© 2010 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE