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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DAWN OSBORNE,	)	
	)	
Plaintiff/Appellant,	)	**Supreme Court No. 2017-0254**
	)	
vs.	)	**District Court No. 09-2017-CV-00660**
	)	
BROWN & SAENGER, INC.,	)	
	)	
Defendants/Appellees.	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the Order for Judgment and Judgment entered on June 29, 2017, by the Cass County District Court, East Central Judicial District, State of North Dakota, the Honorable Tom Olson, presiding.

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ARGUMENT

I. STANDARD OF REVIEW.

[¶ 1] The parties agree de novo review applies. (Brown Br. ¶13; Dawn Br. ¶26).

II. THE DISTRICT COURT ERRONEOUSLY GRANTED BROWN'S MOTION TO DISMISS.

A. North Dakota Law Governs.

[¶ 2] Brown suggests this Court must follow M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). This Court is not required to do so. Shelter Mut. Ins. Co. v. Rimkus Consulting Grp., 148 So.3d 871, 874 (La. 2014) (holding state courts not bound by Bremen outside admiralty context). North Dakota is a code state and as such must follow its code. N.D.C.C. § 1-01-06.

[¶ 3] Under N.D.C.C. § 28-04.1-03:

> If the parties have agreed in writing that an action on a controversy may be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, **as appropriate, unless**:
> ...
> 5. It would **for some other reason be unfair or unreasonable** to enforce the agreement.

This has been the law in North Dakota since 1971 notwithstanding the 1972 decision in Bremen. 1971 N.D. Sess. Laws 308. Section 28-04.1-03 is derived from the Model Choice of Forum Act ("MCFA"). (Supp. App. 6). Under the MCFA, this Court must consider the specified exceptions to

enforcement of a forum selection clause. Strafford Tech., Inc. v. Camcar, 784 A.2d 1198, 1201 (N.H. 2001) (remanding for consideration of MCFA's "equitable grounds").

[¶ 4] Even under Bremen, forum selection clauses "should be held unenforceable if enforcement would contravene **a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision**." 407 U.S. at 15; Restatement (Second) of Conflict of Laws § 80 (forum selection clause not to be given effect if "unfair or unreasonable.") North Dakota, through N.D.C.C. § 9-08-06 and judicial decisions, has a strong public policy against employee non-compete agreements and as such Brown's motion must fail. (Dawn Br. ¶¶27, 30-39).

[¶ 5] Brown cites unpublished federal decisions suggesting this Court should ignore the law and public policy of the forum, i.e. North Dakota. Given Section 28-04.1-03 and the above language in Bremen, there is no basis for doing so. Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 789 S.E.2d 310, 314 (Ga. Ct. App. 2016).

B. All "Other Reasons" Must Be Considered in Determining Reasonableness.

[¶ 6] Brown repeatedly and incorrectly asserts to the effect that Dawn has "improperly" failed to focus upon the "forum-selection" clause. (Br. ¶¶19, 20, 26). As set forth above, Section 28-04.1-03 requires consideration of

"other reasons" that would make it "unfair or unreasonable" to enforce a forum selection agreement. As reflected in the on-point **state court** cases cited in Dawn's initial brief, which use a reasonableness analysis echoing Section 28-04.1-03, a forum selection clause should not be ignored, but is the starting point, not the ending point. (Br. ¶¶45-51 (discussing Hall v. Superior Ct., 150 Cal. App. 3d 411 (Cal. Ct. App. 1983); Beilfuss v. Huffy Corp., 685 N.W.2d 373 (Wis. Ct. App. 2004); LaPolla Indus., Inc. v. Hess, 750 S.E.2d 467 (Ga. Ct. App. 2013)).

[¶ 7] In Hall, just as Brown is requesting this Court do, the Court addressed "whether a **choice of forum provision** in a private California securities agreement **is enforceable**." 150 Cal. App. 3d at 413. Just as Brown has done in this case, it was argued "the choice of law issue is severable and premature." Id. at 415. The Court disagreed: "Because the choice of law provision in the same agreement violates the Corporations Code and the public policy of this state, we hold **enforcement of the choice of forum provision is unreasonable**." Id.

[¶ 8] The Court in Beilfuss faced a similar issue: "Section 12 embodies both a choice of law clause and a choice of forum clause and presents us with the classic conundrum: "Which came first, the chicken or the egg?" 685 N.W.2d at 376. The Court explained forum selection clauses will not be enforced if

not reasonable and "**the validity of the choice of law provision is a precondition to determining the enforceability of the forum selection provision.**" Id. at 377-78 § 80 and Bremen). The Court determined it was "**unreasonable** to enforce **the forum selection clause** because it violates Wisconsin's **strong public policy** governing covenants not to compete ...." Id.

[¶ 9] In LaPolla, as in this case, a motion to dismiss was made based on a forum selection provision. 750 S.E.2d at 475. The Court explained forum selection clauses will not be enforced if unreasonable and public policy may provide such a reason if "proceedings in the selected forum are likely to produce a result that offends a settled policy of Georgia." Id. The Court determined Texas law would be contrary to Georgia's public policy in relation to non-compete agreements and affirmed the trial court's denial of the motion to dismiss. Id. at 476. Bunker Hill Int'l v. Nationsbuilder Ins. Servs., Inc., 710 S.E.2d 662 (Ga. Ct. App. 2011).

[¶ 10] Brown urges this Court not to follow Hall, LaPolla, and Beilfuss. Given Section 28-04.1-03's broad directive to consider "other reasons" it would be "unfair or unreasonable" to enforce a forum selection provision, such cases reflect the correct analytical framework for this Court to follow. As detailed above, this Court is under no obligation to follow or rely upon the unpublished

cases Brown advances. Cf. Cardoni v. Prosperity Bank, Case No. 14-cv-0319, at *17, n.13 (N.D. Okla. July 9, 2014) (noting LaPolla and Beilfuss were "based on state law, not federal law.") Indeed, this Court has specifically rejected prior efforts by federal courts to circumvent N.D.C.C. § 9-08-06 as interpreted by this Court. Warner & Co. v. Solberg, 2001 ND 156, ¶¶17-18, 634 N.W.2d 65 (declining to follow Kovarik v. American Fam. Ins. Group, 108 F.3d 965 (8th Cir. 1997)).

[¶ 11] Brown also argues, based upon unpublished federal decisions, this Court should not look at the underlying agreement in which a forum selection clause appears. (Br. ¶17). Such, however, is inconsistent with North Dakota law. Section 28-04.1-03 specifically provides for this Court to determine whether there are "other reasons" it would be "unfair or unreasonable to enforce the agreement."

[¶ 12] This Court has also held "Parties to a contract cannot waive rights which are protected by statutes that promote public policies." Spectrum Emer. Care, Inc. v. St. Joseph's Hosp. & Care Ctr., 479 N.W.2d 848, 853 (N.D. 1992). In addition, N.D.C.C. § 9-08-01 provides: "**Any provision of a contract** is unlawful if it is: 1. Contrary to an express provision of the law; **2. Contrary to the public policy of express law, though not expressly prohibited ....**" There is thus no legal basis for this Court to focus solely on

the forum selection clause while ignoring the rest of the Brown's agreement and North Dakota's public policy.

C. Dawn Cannot Obtain Effective Relief in South Dakota.

[¶ 13] Brown asserts: "In the South Dakota forum, Dawn is permitted to argue which state law should apply to the Employment Agreement and, consequently, whether the covenant-not-to-compete is enforceable under that state's laws." (Br. ¶29). While that may be technically true, this Court clearly has jurisdiction to address the issue before it. Seher v. Woodlawn School Dist., 59 N.W.2d 805, 810 (N.D. 1953) ("Ousting the jurisdiction of the courts' is expressly forbidden" under N.D.C.C. § 9-08-05); Restatement (Second) Conflict of Laws § 80 ("The parties' ... cannot oust a state of judicial jurisdiction.")

[¶ 14] Equally importantly, Brown's argument is disingenuous. The record is clear that if this Court doesn't act, this matter will proceed in Minnehaha County, South Dakota; Brown will argue for the application of South Dakota law, (Doc. 24, ¶7); and, the Circuit Court in Minnehaha County has previously upheld non-competes for Brown against North Dakota citizens in disregard of Section 9-08-06. (Doc. 26).

[¶ 15] Brown's briefing to the Minnehaha Circuit Court emphasized: "In Brown & Saenger Inc. v. Baker, the Honorable Stuart L. Tiede issued a

preliminary injunction in a case that is factually analogous to this action, and materially identical in terms of contract language." (Doc. No. 26, Brief in Support of Application for Preliminary Injunction, 3). In the referred to decision, Judge Tiede noted: "The Court is mindful of arguments by Baker that the non-compete may not be enforceable if the case were brought under North Dakota law. However, the employment agreement in question specifies **that South Dakota law is to govern** the terms of employment." (Doc. No. 27, Order Granting Preliminary Injunction, at 6, Conclusion of Law 13).

[¶ 16] Under Section 28-04.1-03(4), this Court must refuse enforcement of a forum selection clause, if "plaintiff cannot secure effective relief in the other state." Dawn has made a sufficient showing she cannot secure effective relief in South Dakota and equally importantly that its courts will not protect North Dakota's public policy. LaPolla, 750 S.E.2d at 476 ("Premium and Hess made the necessary showing that a Texas Court would likely apply Texas law to enforce the covenants in a manner contrary to applicable George public policy."); Restatement (Second) Conflict of Laws § 80, cmt. c (Supp. 1988) (explaining party may avoid choice of forum provision where courts of the chosen state "would not handle it effectively or fairly.")

D. The Business Corporation Act Prohibits Brown's Actions.

[¶ 17] Brown argues its actions do not violate N.D.C.C. § 10-19.1-132(2), because "no provision of state law prohibits a domestic corporation from contracting with an employee regarding the forum to resolve the parties disputes ...." (Br. ¶31). Under Brown's analysis any North Dakota employer could circumvent 9-08-06, simply by requiring an employee to agree to some other state's law that allows non-competes. Such an interpretation must be rejected as it would leave 9-08-06, and other provisions of North Dakota law, but an empty, meaningless shell, to be avoided at will, and would open a Pandora's box. N.D.C.C. § 34-01-04 (prohibiting persons from preventing persons from accepting or continuing work with another); 34-01-20 (prohibiting employer actions); State v. American West Community Promotions, 2002 ND 98, ¶18, 645 N.W.2d 196 (discussing principals of statutory construction, including against rendering provisions mere surplusage and Court will not presume Legislature intended an idle act); N.D.C.C. § 1-02-07 (particular controls general); N.D.C.C. § 28-04.1-03 (prohibiting forum selection clauses obtained by "abuse of economic power.")

E. The Time Has Come For This Court to Issue a Clear Rule.

[¶ 18] As illustrated by the affidavits submitted to the district court, the actions of Brown and other out of state companies with employees in North Dakota are unfair and anti-competitive. (Docs. 28, 29). This Court must send a clear signal to all employers and Courts outside North Dakota that Section 9-08-06 means what it says. Absent such a decision, North Dakota residents working in North Dakota will be subject to differing interpretations from 49 other states and 194 other countries. A clear decision will ensure all employers, both North Dakota and non-North Dakota based, will not require employees working in North Dakota to sign employment agreements in violation of Section 9-08-06. Such will also provide clear guidance to courts outside of North Dakota that any ruling contrary this Court's decision would be an idle act as it will not be enforced within the boundaries of North Dakota.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED IT LACKED JURISDICTION.

[¶ 19] Because the District Court erroneously granted Brown's Motion to Dismiss it erred in failing to rule on and grant Dawn's Motion for a Preliminary Injunction.

CONCLUSION

[¶ 20] Dawn respectfully requests the district court's judgment be reversed, Dawn be granted an immediate declaratory judgment that the Restrictive Covenants are void, and the action be remanded for further proceedings on the other claims set forth in Dawn's Complaint.

[¶ 21] September 25, 2017.

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CERTIFICATE OF COMPLIANCE

[¶ 22] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 14-point font, proportional typeface and that the total number of words does not exceed 2000 from the portion of the brief entitled "Argument" through the signature block. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

[¶ 23] Dated, September 25, 2017.

/s/ Joel M. Fremstad
Joel M. Fremstad (ND # 05541)

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	)	
	)	
Defendants/Appellees.	)	
	)	

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Maggie Burlingame, being first duly sworn, deposes and says that she is of legal age and that on September 25, 2017, she served the following:

- **APPELLANT'S REPLY BRIEF**
- **APPELANT'S SUPPLEMENTAL APPENDIX**

were served electronically with the Clerk of the Supreme Court. A true and correct copy of the documents were electronically served on the following:

(Name)	(E-mail address)
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Vanessa Lystad	vlystad@vogellaw.com

M. Burlingame
Maggie A. Burlingame

Subscribed and sworn to me this 25th day of September, 2017.

Katy Tellinghuisen
Notary Public

KATY TELLINGHUISEN
Notary Public
State of North Dakota
My Commission Expires Feb. 6, 2020