No. 316A14

NORTH CAROLINA SUPREME COURT

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Beverage Systems of the Carolinas, LLC, Plaintiff-Appellee vs. Associated Beverage Repair, LLC, Ludine Dotoli and Cheryl Dotoli, Defendants-Appellants	)	FROM IREDELL COUNTY 12 CvS 1519 COA 14-188

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DEFENDANTS'-APPELLANTS' NEW BRIEF

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Authorities:

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ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by reversing Summary Judgment for Defendants that found the Covenant Not to Compete so broad in its territorial application as to be unenforceable?

2. Did the Court of Appeals err in remanding the case to the Trial Court with instructions to re-define the territorial limits of the Covenant Not to Compete so as to make its territorial reach enforceable?

3. Did the Court of Appeals err in finding that Plaintiff in purchasing the assets of an entity acquired implied contracts which could be the subject of tortious interference by the Defendants?

4. Did the Court of Appeals err in concluding that the Complaint stated a claim for Tortious Interference With a Perspective Economic Advantage when the Plaintiff never alleged the name of a person or entity who would have entered into an economic transaction with Plaintiff except for interference by Defendants?

5. Did the Court of Appeals err in concluding that sufficient facts were alleged in the Complaint which, if true, would support a claim for damages under Chapter 75 of the General Statutes?

PROCEDURAL HISTORY OF CASE

Plaintiff filed this action on 14 June 2012, alleging that Defendant Lou Dotoli had violated a Covenant Not to Compete entered into with Plaintiff on 30 September 2009. The Complaint further alleged claims against all of the Defendants for (1) tortious interference with Plaintiff's contracts, (2) tortious interference with prospective economic advantage, (3) unfair and deceptive trade practices, (4) punitive damages and (5) injunctive relief to prevent Lou Dotoli from competing with Plaintiff. The Covenant Not to Compete arose out of Plaintiff's purchase of the assets of Elegant Beverage Products, LLC (in which Dotoli had an interest) and Imperial Unlimited Services, Inc. (which was owned by Lou Dotoli's parents) which closed on 30 September 2009.

Following discovery, Defendants moved for and the Trial Court allowed Summary Judgment under Rule 56, N.C. Rules Civ. Proc., dismissing all of Plaintiff's claims. Plaintiff appealed the Trial Court's ruling (filed 3 October 2013) to the North Carolina Court of Appeals. That Court in a 2-1 decision filed 5 August 2014, reversed the ruling of the Trial Court and remanded the case for trial. Judge Elmore in a dissenting opinion, would have affirmed the Trial Court ruling in all respects.

The mandate of the Court of Appeals to the Trial Court occurred on 26 August 2014. Defendants on 2 September 2014, sent their Notice of Appeal to the Supreme Court of North Carolina, together with the docketing fee, and provided a copy of the Notice to the Court of Appeals for North Carolina.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Appeal lies as a matter of law from the Court of Appeals to the Supreme Court in this case under the provisions of N.C. Gen. Stat. §7A-30(2).

STATEMENT OF THE FACTS

On or about 20 July 2009, Plaintiff-Appellee, Beverage Systems of the Carolinas, LLC (hereinafter "Beverage Systems"), executed an Asset Purchase

Agreement (the "Asset Purchase Agreement") with Imperial Unlimited Services, Inc. (hereinafter "Imperial"), Elegant Beverage Products, LLC (hereinafter "Elegant"), Ludine Dotoli (hereinafter "Lou Dotoli" or "Lou"), Thomas Dotoli and Kathleen Dotoli, pursuant to which Beverage Systems bought the businesses and assets of Elegant and Imperial (hereinafter collectively referred to as the "Businesses") (R p 189). The Agreement provided for the sale of all assets, trade names, customer lists, accounts receivable, current customers and customer contracts and all equipment of the Businesses. (R p 7).

At the time of the execution of the Asset Purchase Agreement, Lou Dotoli, the son of Thomas and Kathleen Dotoli, owned a certain percentage of Elegant and was heavily involved in the day-to-day operations of Imperial. (R p 189). As such, Lou Dotoli developed a close and intimate relationship with all of the customers of the Businesses. (R p 189).

In order to protect the legitimate business interests acquired from the Businesses, specifically customer relationships and goodwill, Beverage Systems required that, as a material term of the Asset Purchase Agreement, Lou Dotoli, Thomas Dotoli and Kathleen Dotoli execute a Covenant Not to Compete (the "Non-Compete"). (R p 190). Without the Non-Compete, the interests and assets acquired by Beverage Systems, in the opinion of its President, would be substantially less

valuable if the Dotolis were allowed to re-enter the same markets and compete against Beverage Systems. (R p 190).

Beverage Systems also bought a tract of land and building from Tom Dotoli and Kathy Dotoli from which Elegant and Imperial operated, but that purchase is not involved in this appeal. (R p 7, Par. 17). Allocation of the gross sum of $350,000 paid by Beverage Systems for the assets of Elegant and Imperial was as follows (R p. 141):[1]

A.	Elegant	$ 10,000	Equipment
		$ 35,000	Inventory
B.	Imperial	$150,000	Equipment
		$135,000	Inventory
		$ 10,000	Goodwill
		$ 10,000	Covenant Not to Compete

Imperial was owned and operated by Tom Dotoli. It engaged in the business of servicing beverage dispensing equipment such as soft drink dispensers in establishments like McDonalds, Burger King and other fast food stores. Tom Dotoli and Lou Dotoli were the principal technicians for Imperial, which had operated since 1989. (R pp 211-212).

Elegant, on the other hand, was a Limited Liability Company created by Lou Dotoli and his mother, Kathleen Dotoli, in 2008. Elegant was in the business of

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1 Note that the full $10,000 for the Covenant Not to Compete was paid to Imperial, in which Loudine Dotoli had no interest.

selling high-end coffee and tea products to hotels, commercial restaurants and other institutions which sold high quality coffee and tea to their clientele. (R p 212).

Throughout their history, the deepest penetration by either Elegant or Imperial for the conduct of their business into South Carolina was Rock Hill, just to the south of Charlotte, North Carolina, and to Spartanburg, which lies to the southwest of Charlotte, North Carolina. Neither of the companies provided any sales or service in South Carolina east of Rock Hill, or to the south or southwest of Spartanburg. In North Carolina, Imperial's activities did not extend to the east of Stanly County; Elegant's eastern-most account was in Wake County. Neither company had any business within the large Piedmont, Sandhills or eastern portions of South Carolina or in the Sandhills or eastern part of North Carolina. Their western-most penetration was Morganton in North Carolina and Gaffney in South Carolina. Neither Company was involved in the vast western-most sections of either state. (R p 74).

The Record at page 7 recites that Beverage Systems is a company which supplies, installs, and services beverage products and beverage dispensing equipment in North Carolina (emphasis ours). There is nothing in the Complaint alleging that Beverage Systems at any time operated in South Carolina; there is nothing in the verified Complaint (R pp 6-13) identifying where in North Carolina

or anywhere else Beverage Systems served customers in the course of its work. Specifically, while the verified Complaint alleges that Beverage Systems "supplies, installs, and services beverage products and beverage dispensing equipment in North Carolina" (R p 7), there is nothing in the Record to identify where in North Carolina these services were provided.

The Non-Competition Agreement which Appellant Lou Dotoli is alleged to have violated in this cause provides in pertinent part that Lou Dotoli would not, in the States of North Carolina or South Carolina, during the period ending 1 October 2014,

> ". . . without the prior written consent of Purchaser, directly or indirectly, for himself or on behalf of or in conjunction with any person, partnership, corporation or other entity, compete, own, operate, control, or participate or engage in the ownership, management, operation or control of, or be connected with as an officer, employee, partner, director, shareholder, representative, consultant, independent contractor, guarantor, advisor or in any other manner or otherwise directly or indirectly, have a financial interest in, a proprietorship, partnership, joint venture, association, firm, corporation or other business organization or enterprise that is engaged in the business of the Purchaser or any of its respective affiliates or subsidiaries on behalf of clients (the "Business) . . ." (R pp 15-16).

The same Agreement provides in paragraph 6, R p 18, as follows:

> "6. If, at the time of enforcement of any provisions of Sections 1, 3 or 4 hereof, a court holds that the restrictions stated therein are unreasonable under circumstances then existing, the parties hereto agree that the maximum period, scope or geographical area that are reasonable under such circumstances shall be substituted for the

> stated period, scope or area, and that the court shall be allowed to revise the restrictions contained in Sections 1, 3 and 4 hereof to cover the maximum period, scope and area permitted by law."

There is no reference in the Asset Purchase Agreement (R pp 77-97) nor in the Non-Competition Agreement (R pp 15-23), to any customer of either Elegant or Imperial that Appellant was acquiring in connection with the purchase of the assets of Elegant and Imperial. There in fact were no written contracts which obligated any customer or supplier of either Imperial or Elegant to continue a business relationship with those firms. (R p 76).

On 7 April 2011, there was created by Cheryl Dotoli, the wife of Lou Dotoli, an entity known as Associated Beverage Repair, LLC. (R p 6). There is nothing in the Record to connect Tom Dotoli or Kathleen Dotoli with any activities of Associated Beverage, and they are not parties to this action. However, Lou Dotoli admits in his Affidavit at R pp 71-76 that, after the creation of Associated Beverage, "I began providing . . . repair services on beverage dispensing equipment in the same geographic area as had been previously serviced by Imperial." He further says, however, that

> ". . . Neither I nor my wife ever once requested of or suggested to a prior customer of Imperial or Elegant that they use the services of Associated or me for any purpose. To the contrary, Associated or I would be periodically contacted by a prior customer of Imperial complaining of their dissatisfaction with the services of Beverage after it acquired Imperial's assets, and inquiring whether I or Associated

knew of a person or entity who could provide repair services for the caller. These calls and the word in the market-place led to the steady expansion of business for Associated, using me as the technician to serve the caller's needs. I have never, since beginning performance of services as an employee of Associated, worked outside of the geographic area in North or South Carolina where Imperial or Elegant ever provided services prior to the purchase of their assets by Beverage.

"I do not know the name of any customer now being served by Beverage. I have never contacted, discussed with or otherwise communicated to any entity a request or suggestion that such entity not enter into any contract with or provide any services or commodity to Beverage. I have never assisted Associated or attempted on my own behalf to induce any customer or account of Beverage to terminate all or any part of its relationship with Beverage.

"I have personal knowledge of the manner in which Imperial and Elegant conducted their businesses at all times after 1999. I know that no customer of either entity and no provider of equipment or goods to either entity, had any written contract with either Imperial or Elegant for the rendering of services by those entities to its clients. Simply stated, the arrangement was that so long as Imperial provided competent services at reasonable rates, its customers kept calling back for additional services. So long as Elegant called on its accounts and successfully promoted and sold the coffee and tea products provided to it by its vendors, Elegant continued representing its suppliers. There were no written contracts which obligated any customer or supplier of either Imperial or Elegant to continue a business relationship with those firms. There is no reference in the Asset Purchase Agreement to the purchase by Beverage of any contract rights which either Imperial or Elegant is alleged to have had with its suppliers or customers." (R pp 74-76).

In this action, Beverage Systems alleges that Lou Dotoli has violated the Non-Competition Agreement signed on 30 September 2009. The Plaintiff also contends

that all of the Defendants have tortiously interfered with the contracts of Plaintiff, that they have tortiously interfered with perspective economic advantages of the Plaintiff, that they have violated Chapter 75 of the North Carolina General Statutes, and that Plaintiff is entitled to injunctive relief against Lou Dotoli. Defendants denied all of the allegations, their beginning premise being that the Non-Competition Agreement is unenforceable under North Carolina law. On appeal from a Trial Court ruling agreeing with Defendants' defenses, the North Carolina Court of Appeals in a split decision reversed the Trial Court and remanded to the Trial Court with instructions to re-draw the territory defined in the Non-Compete Agreement to make it enforceable under North Carolina law. The Trial Court was further reversed on all other issues. Judge Elmore, in his dissent, agreed with Defendants on all the issues. The five specific bases of Judge Elmore's dissent present the issues that are the subject of this appeal. Rule 14(b)(1), N.C. Rules App. Proc.

STANDARD OF REVIEW

The scope of review by the Supreme Court of the decision in the Court of Appeals is to determine whether there is error of law in the decision of the Court of Appeals. In making that determination, review by the Supreme Court is limited to a

consideration of those issues that are specifically set out in the dissenting opinion as the basis for the dissent, as stated in the Notice of Appeal and presented in the new Briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Rule 16, N.C. Rules App. Proc.

ARGUMENT

Defendants present this argument in the sequence of the analysis in the dissenting opinion and under the respective captions which Judge Elmore used in concluding that he would affirm the Trial Court's Order Granting Summary Judgment on all issues for Plaintiff.

a. Breach of the Covenant Not to Compete

The pleadings establish that Plaintiff was not organized until 27 May 2009. (R p 7). There is no pleading or proof that it operated anywhere in North Carolina or South Carolina prior to concluding purchase of the assets of Imperial and Elegant on 30 September 2009. At that time, the business of Imperial and Elegant was confined to an area generally within a 50 – 75 mile radius of Statesville. Neither company had ever operated in the remaining vast areas of the Piedmont, the Sandhills, the Coastal Plain or the Mountains of either state. (R pp 71-76).

In Hejl v. Hood Hargett & Associates, 196 N.C. App. 299, 674 S.E. 2d 425 (2009), the Plaintiff had executed a Non-Compete Agreement with Defendant which prohibited Plaintiff from dealing in insurance products in competition with the Defendant anywhere in North Carolina or South Carolina where Defendant was engaged in rendering its services for two years after Plaintiff terminated his employment with Defendant. The Defendant conducted its operations out of Charlotte. Noting that the Non-Compete Agreement "reaches not only clients, but potential clients, and extends to areas where Plaintiff had no connection or personal knowledge of clients", the Court said:

> ". . . we hold the Agreement is invalid and unenforceable because the territory and customers encompassed by the Agreement are overly broad and not reasonably restricted to protect Defendant's legitimate business interests." 674 S.E. 2d 425, 430.

The Court commented in Hejl that

> "A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining its customers." (Emphasis Ours) . . . "To prove that a geographic restriction in a covenant not to compete is reasonable an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. (Citing cases). The territory embraced [by the covenant] shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer. (Citing cases)." 674 S.E. 2d 425, 430.

Just prior to Hejl, our Court had stated in another non-compete case that (1) the reasonableness of a Non-Competition agreement is a matter of law for the Court to decide, and that (2) the party who seeks enforcement of the Covenant has the burden of proving the reasonableness of the agreement. Medical Staffing Network, Inc. v. Ridgeway, 194 N.C. App. 649, 670 S.E. 2d 321 (2009).

In a much earlier case, Noe, et al v. McDevitt, et al, 228 N.C. 242, 45 S.E. 2d 121 (1947), the Plaintiff was involved in the sale and distribution of equipment and supplies used in the business of beauty salons in eastern North Carolina. The Defendant McDevitt went to work for Plaintiff as a salesman, pursuant to an Employment Agreement and Non-Competition Agreement that prevented Defendant, upon terminating his employment, from competing against Plaintiff anywhere in the States of North Carolina and South Carolina. The evidence showed that Defendant's services for Plaintiff during the employment were confined to "eastern" North Carolina.

On appeal from the Trial Court holding that the Non-Competition Agreement was invalid because of its scope, our Supreme Court affirmed, saying:

> ". . . We concur in this conclusion. Giving the Plaintiff the benefit of very generous inferences, while he may have shown the conduct of business to some extent in eastern North Carolina, he has not definitely shown any clientele throughout the much broader territory here involved such as would correlate the protection sought with any need of his business . . ." 45 S.E. 2d 121, 123.

These cases and others are consistent in their holding that the person who seeks to enforce a non-competition agreement must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. Hejl v. Hood, supra; Kinesis Advertising, Inc. v. Hill, 187 N.C. App 1, 652 S.E. 2d 284 (2007); Okuma America Comp. v. Bowers, 181 N.C. App. 85, 638 S.E. 2d 617 (2007); Farr Associates v. Baskin, 138 N.C. App. 276, 530 S.E. 2d 878 (2000); Hartman v. W. H. Odell and Associates, Inc., 117 N.C. App. 307, 450 S.E. 2d 912 (1994). Plaintiff has presented no forecast of evidence to show the location of the customers within its geographic scope of business. It has therefore failed to show that the geographic scope covered by the covenant is necessary to maintain any customer relations. Indeed, Plaintiff has not even alleged that its business activities extend into South Carolina.

Even when the Covenant Not to Compete is given in connection with the sale of a business, our Supreme Court has adhered to the rule that limitations on time and territory must both be considered in determining the reasonableness of each of the limitations. See, e.g., Jewel Box Stores Corporation v. Morrow, 272 N.C. 659, 158 S.E. 2d 840 (1968). There, the Court enforced against the seller of a jewelry business in Morganton a covenant that prohibited the Defendant from owning or operating a competing store for a period of ten (10) years within ten (10) miles of

the City or Morganton. Jewel Box cites a series of cases involving Covenants Not to Compete given in connection with the sale of a business.

One of the cited cases is Thompson v. Turner, 245 N.C. 478, 96 S.E. 2d 263 (1957). In that case, the Defendant (much like Elegant here) sold to the Plaintiff a wholesale coffee and specialty business located in Lenoir. The seller gave the buyer a Covenant Not to Compete either within the City of Lenoir "nor the territory now covered" by the seller in his business. The Defendant contended that the Covenant Not to Compete was invalid because it did not define "the territory" in which Defendant was prevented from competing. However, the evidence at trial established that the "territory" was comprised of the counties of Alexander, Ashe, Avery, Burke, Caldwell, McDowell, Mitchell, Watauga, Wilkes and Yancey. The Trial Court and the Supreme Court held that parole evidence was admissible to establish those counties as "the territory", thus rendering the contract valid.

Apropos this case, the following language in Thompson supports Defendants' argument that the Non-Competition Agreement involved here is unenforceable because of its application to the entirety of two states as to which Plaintiff has no evidence that it ever conducted business:

> "Contracts for the sale of a business containing as an incident to the sale a covenant not to engage in business in competition with the vendee in the area served by the business (emphasis ours) are recognized as valid when reasonable. The test of a covenant is its

> reasonableness in protecting the purchaser from competition from his vendor without detriment to the public." 96 S.E. 2d 263, 266.

There is nothing in the record here, except for the Affidavit of Lou Dotoli, to establish the specific areas in North and South Carolina where Imperial and Elegant conducted their operations. This is but a small portion of the much larger areas of all of North Carolina and all of South Carolina. Plaintiff has not adduced and cannot adduce any evidence that it had (or acquired from Imperial or Elegant) any business interest in any of that much broader area of the two Carolinas which Plaintiff seeks to protect. The Non-Competition Agreement is therefore invalid as being too broad in its scope, and should be stricken as the basis for any claim in this case.

Plaintiff argues, citing Welcome Wagon International v. Pender, 255 N.C. 244, 120 S.E. 2d 739 (1961), that this Court has the right to redraw the agreement so as to render the territory covered by the agreement reasonable and therefore enforceable against the Defendants. Plaintiffs overlook the fact that the parties in Welcome Wagon had, by their contract, defined four separate territories to which the covenant could apply. The Court agreed that one of the four territories (Fayetteville, NC) was reasonable, and therefore enforced the contract as to that territory only. Suffice it to say that under North Carolina's "blue pencil" rule, as applied prior to the majority opinion in this case, the Trial Court could not amend an

invalid Non-Competition Agreement for the purpose of making it enforceable under North Carolina law. Noe, et al v. McDevitt, et al, 228 N.C. 242, 45 S.E. 2d 121 (1947); Hartman vs. W.H. Odell and Associates, Inc., 117 N.C. App. 307, 450 S.E. 2d 912 (1994); American Hot Rod Assoc., Inc. v. Carrier, 500 F. 2d 1269 (1974).

Here, the majority relies on paragraph 6 of the Covenant Not to Compete which provides that if the "restrictions stated herein are unreasonable under circumstances then existing . . . the Court shall be allowed to revise the restrictions . . . to cover the maximum period, scope and area permitted by law". (R p 18). The majority holds that this language takes this case out of the prohibitions of the "blue pencil" doctrine, and in fact directs the Trial Court to re-draw the territorial restriction of the parties' contract to make it enforceable. Defendants find no other case in North Carolina jurisprudence where Trial Courts are given the authority to re-draw contracts between the parties to achieve a result which the Trial Court believes is fair and reasonable.

Applying the majority's logic, a Trial Court could be ordered to amend the purchase price that is paid for a Covenant Not to Compete, where one of the parties contends after-the-fact that the agreed purchase price was too great or too small; similarly, a Trial Court could be ordered to amend the term of the Covenant Not to Compete, where one of the parties after-the-fact contends that the agreed-upon term

is too short or too long. The Court below would thereby reverse the holding of this Court in Welcome Wagon, supra, that

> "The Court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions. However, where, as here, the parties have made divisions of the territory, a Court of equity will take notice of the divisions the parties themselves have made (emphasis ours) and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." 255 N.C. 244, 248, 120 S.E. 2d 739,742.

It is obvious from the Record here that the parties did not, as in Welcome Wagon, provide for any subdivisions of the two-state area which a Court of equity could recognize as having been agreed to between the parties. Thus, Welcome Wagon itself prohibits what the Court of Appeals in this case has required.

b. Tortious Interference With a Contract

The law in North Carolina has for many years been that

> "To establish a claim for tortious interference with contract, a Plaintiff must show: (1) a valid contract between the Plaintiff and a third person which confers upon the Plaintiff a contractual right against a third person; (2) the Defendant knows of the contract; (3) the Defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in damage to Plaintiff." Williams v. American Eagle Airlines, Inc., 208 N.C. App. 250, 702 S.E. 2d 541 (2010); Combs v. City Elec. Supply Co., 203 N.C. App. 75, 690 S.E. 2d 719 (2010); Sellers v. Morton, 191 N.C. App. 75, 661 S.E. 2d 915 (2008); Combs & Associates, Inc. vs. Kennedy, 147 N.C. App. 362, 555 S.E. 2d 634 (2001).

In this case, Lou Dotoli says in his Affidavit that neither Imperial nor Elegant had any contract with any of their customers or suppliers, either for the performance by Imperial of services or for the sale by Elegant of commodities. Therefore, when Plaintiff purchased the assets of Imperial and Elegant, there were no contracts which either of those entities could sell to Plaintiff. Indeed, the schedule of assets purchased by Plaintiff that Plaintiff attached as an exhibit to the Asset Purchase Agreement makes no reference to any such contracts. Plaintiff has not identified in the Complaint any contracts it had or has with third parties with which Defendants allegedly interfered.

Plaintiff's responses to Defendants' Request for Production of Documents are instructive on this issue. Beginning at Record page 110, the Requests and the Plaintiff's Responses establish that "there were no written agreements that were specifically transferred, but Plaintiff did purchase all of the accounts and customers of Elegant Beverage Products, LLC, as part of the Asset Purchase Agreement dated July 20, 2009". (Rule 34 Request No. 1, Response No. 1, R p 111).

As to Imperial, Plaintiff says that "To Plaintiff's knowledge, there were no written agreements that were specifically transferred, but Plaintiff did purchase all of the accounts and customers of Elegant Beverage Products, LLC (sic) as part of

the Asset Purchase Agreement dated July 20, 2009". (Rule 34 Request No. 2, Response No. 2, R p 111).

When asked (Rule 34 Request No. 4, Response No. 4, R p 112) to produce any document containing a representation by either Elegant or Imperial that any customer being served by either of said entities would remain a customer of Plaintiff after closing, Plaintiff refers to pages "BSC 6 through BSC 42" attached to its response. There is nothing in those pages constituting a representation that any customer of Imperial or Elegant would remain a customer of Plaintiff after the closing.

Plaintiff further says that after 30 September 2009 (the day of closing) it never entered into a written contract for the provision of services by Plaintiff to any customer (Plaintiff's Response to Request No. 5, R p 112) and that Plaintiff never gave notice to Defendants of the existence of any contract entered into between Plaintiff and a customer after 30 September 2009. (Plaintiff's Response to Request No. 6, R p 112).

Lou Dotoli says in his Affidavit that Defendants had no knowledge of any contracts between Plaintiff and any third party. He says he doesn't even know who the customers of Plaintiff are. Finally, he says that he never induced any customer of Plaintiff not to perform its contract with Plaintiff (R p 75). Plaintiff's response to

Defendants' discovery presents no facts that are in conflict with Lou Dotoli's Affidavit on the tortious interference issue, and Plaintiff can produce no other contradicting evidence.

It is well established that the unenforceable Non-Competition Agreement addressed earlier in this Brief cannot be used as a basis to support Plaintiff's tortious interference with contract claim. Whittaker General Medical Corp. v. Daniel, 87 N.C. App. 659, 362 S.E. 2d 302 (1987).

As to the tortious interference claim, Plaintiff has failed to identify any contract between Plaintiff and a third party which confers a contractual right upon Plaintiff; he has failed to allege or offer any proof that Defendants had any knowledge of any such contract; he has failed to allege or offer proof that Defendants intentionally induced any third party not to perform its contract with Plaintiff; and he has failed to allege any damage resulting to Plaintiff because of such interference.

On these facts, Plaintiff has failed to allege and can offer no evidence sufficient to raise a genuine issue of fact to support the claim for tortious interference. This claim was therefore properly dismissed.

c. Tortious Interference With Prospective Economic Advantage

The elements to support a claim for tortious interference with future economic advantage are that (1) the Defendants induced a third party to refrain from entering into a contract with Plaintiff without justification, and (2) the contract would have ensued but for Defendants' interference. S.N.R. Management Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 659 S.E. 2d 442 (2008); Walker v. Sloan, 137 N.C. App. 387, 529 S.E. 2d 236 (2000).

It is clear from Walker v. Sloan, supra, that to make out a case for tortious interference with prospective economic advantage "the Plaintiffs must allege facts (emphasis ours) to show that the Defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference". See for the same pleadings requirement Guypton v. Son-Lan Development Co., Inc., 205 N.C. App. 133, 695 S.E. 2d 763 (2010). It also is a requirement that Plaintiffs "assert some measurable damages resulting from Defendant's allegedly tortious activities, i.e., what 'economic advantage' was lost to Plaintiff as a consequence of Defendant's conduct". Walker v. Sloan, supra.

Here, there is not a single allegation of fact to identify what third party the Defendants induced to refrain from entering into a contract with the Plaintiff, or

what the contract was about. (R pp 56-57). There is not a single allegation that, except for such inducement, the contract would have ensued. And except for alleging a monetary claim "in the minimal amount of $10,000" (R p 57), there is not a word alleged about what economic advantage the Plaintiff suffered because of Defendants' alleged inducement. (Compare this allegation with the allegation in Walker v. Sloan that "Defendant's actions resulted in actual damages to the Plaintiff", which the Court said was an insufficient allegation of damages justifying the dismissal of Plaintiff's action). Citing Thacker v. Ward, 263 N.C. 594, 599, 140 S.E. 2d 23, 28 (1965), the Sloan Court said:

> "Our Supreme Court has stated that "{'a'} Defendant is entitled to know from the Complaint the character of the injury for which he must answer."

The Affidavit of Lou Dotoli makes clear why Plaintiff has not identified in its Complaint the name or names of any third parties whom any of the Defendants induced to refrain from entering into a contract with Plaintiff. The reason, as Lou Dotoli says, is that none of the Defendants ever did what they are alleged to have done, i.e., they never induced or sought to induce any third party to refrain from entering into a contract with Plaintiff. (R pp 71-76). This claim was therefore properly dismissed by the Trial Court.

d. Unfair and/or Deceptive Trade Practices

Plaintiff's Chapter 75 claim (identified as Plaintiff's Fourth Cause of Action (R p 55) relies upon Plaintiff's claims alleged in paragraphs 52-55 of the Complaint (R p 54) which involve (1) Lou Dotoli's alleged violation of a Non-Competition agreement (R pp 53-54), and (2) tortious interference by all of the Defendants with the contracts of Beverage Systems (R pp 54-55).

Any Chapter 75 claim against Lou Dotoli based on breach of a Non-Competition agreement should be dismissed because there is no evidence of a valid Non-Competition Agreement which he could have violated. Any claims against all the Defendants for tortious interference with contract should be dismissed because Plaintiff has projected no evidence of contracts with which Defendants interfered. Without the existence of any such unfair or deceptive trade practice to generate the underlying violation of Chapter 75, the Chapter 75 claim should be dismissed.

Plaintiff's next effort to find a support for its Chapter 75 claim is the allegation of a claim denominated "Tortious Interference With Prospective Economic Advantage". (See pars. 76-85, R pp 56-57). However, since Plaintiff does not meet even the pleadings requirements for such a claim (see Walker v. Sloan, supra), Plaintiff has field to allege a claim of this nature which would

constitute a claim under Chapter 75. There exists, therefore, no basis in the Complaint to support a claim for unfair and deceptive trade practices, and this claim should be dismissed.

e. Injunctive Relief

Defendant Lou Dotoli has established in the first portion of this Brief that the Non-Competition Agreement upon which Plaintiff relies is too broad in its geographic scope to be determined a valid Agreement under North Carolina law. Therefore, the Agreement is void and cannot be the basis for a breach by Lou Dotoli of the Non-Competition Agreement.

Because there is no valid Non-Competition agreement, there exists no basis for the granting of injunctive relief against Lou Dotoli or for the recovery of damages by Plaintiff against him based on a breach of the Non-Competition agreement. This claim should therefore be dismissed.

CONCLUSION

The Court of Appeals for all of the reasons relied on by Judge Elmore in his dissent erred in reversing Summary Judgment for the Defendant on all of the issues in this case. This Court should reverse the majority in the Court of Appeals by adopting as its decision the minority opinion of Judge Elmore or by drafting its own comprehensive opinion confirming that "blue penciling" by the Trial Courts is not

an accepted practice in this State, and otherwise reinstating Summary Judgment for Defendants on all of the other issues presented in this case.

This 16th day of October, 2014.

EISELE ASHBURN GREENE & CHAPMAN, PA

By: _____

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CERTIFICATE OF SERVICE

The attached Defendants-Appellants' Brief was served upon Plaintiff-Appellee by mailing a copy thereof to its attorneys of record as follows:

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This 16th day of October, 2014.

EISELE ASHBURN GREENE & CHAPMAN, PA

By: _____

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