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POINTS RELIED ON

POINT I

**THE TRIAL COURT DID NOT ERR AS ASSERTED IN THE
RESPONDENT’S CROSS APPEAL, POINT V OF ITS BRIEF, IN ITS DECISION
TO NOT AWARD DAMAGES TO OXFORD AGAINST COPELAND AND
HELMS ON THE CLAIMS OF OXFORD FOR THE ASSERTED BREACH OF
THE NON-COMPETE AGREEMENTS BECAUSE THE EVIDENCE BEFORE
THE TRIAL COURT SUBSTANTIATED THAT EVEN IF THE COVENANTS
NOT TO COMPETE WERE ENFORCEABLE, THE DAMAGE CLAIMS WERE
BASED ON SPECULATION AND CONJECTURE, AND EVIDENCE WAS
PRESENTED SUBSTANTIATING THAT IN FACT THERE WAS NO DAMAGE
SUSTAINED BY OXFORD ATTRIBUTABLE TO ANY ASSERTED BREACH OF**

THE COVENANTS NOT TO COMPETE.

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POINT II

In Reply To Amicus Curiae Brief Of Missouri Hospital Association

THE RELIEF SOUGHT BY COUNT II OF COUNTERCLAIMS OF COPELAND AND HELMS SEEKING DECLATORY JUDGMENT THAT OXFORD, AS A NOT-FOR-PROFIT CORPORATION, SHOULD BE PRECLUDED FROM ENFORCING NON-COMPETITION COVENANTS OBTAINED FROM EMPLOYEES AS A MATTER OF PUBLIC POLICY IS IN FACT SUPPORTED IN THE LAW AND APPROPRIATE IN RECOGNITION OF THE DISTINCT POWERS, PRIVILEGES AND OBLIGATIONS OF NOT-FOR-PROFIT CORPORATIONS, AS OPPOSED TO FOR PROFIT CORPORATIONS AS WELL AS BEING SUPPORTED BY SOUND PUBLIC POLICY.

Section 355.025 RSMo.

Callmann on Unfair Comp., Trademarks & Monopolies, 4th E.d. Vol.1, § 1.02

1 Fletcher Cyc. Corp. § 68.05 (Perm. Ed. 1999)

STANDARD OF REVIEW

The appeal from a judgment entered after trial before a court is controlled by the often quoted standards by the appellate courts in Missouri which have evolved into the following statement as set forth in [*Lewis v. Gibbons*, 80 S.W.3d 461 \(Mo. 2002\)](#) "The judgment of the trial court must be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." In addition, appellant review of findings made by a trial court imposes upon the appellate court the obligation to disregard all contrary evidence that is not supportive of the fact determinations made by the trial court. In [*Wright v. Rankin*, 109 S.W.3d 696 \(Mo.App. S.D. 2003\)](#) the court reiterated the long standing rule that an appellate court must accept the evidence and inferences favorable to a trial courts ruling and disregard all contrary evidence. The requirement for disregarding any evidence contrary to a fact determination made by the trial court has been consistently upheld by the Missouri Supreme Court. [*Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596 \(Mo. 2001\)](#).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR AS ASSERTED IN THE RESPONDENT'S CROSS APPEAL, POINT V OF ITS BRIEF, IN ITS DECISION TO NOT AWARD DAMAGES TO OXFORD AGAINST COPELAND AND HELMS ON THE CLAIMS OF OXFORD FOR THE ASSERTED BREACH OF THE NON-COMPETE AGREEMENTS BECAUSE THE EVIDENCE BEFORE THE TRIAL COURT SUBSTANTIATED THAT EVEN IF THE COVENANTS NOT TO COMPETE WERE ENFORCEABLE, THE DAMAGE CLAIMS WERE BASED ON SPECULATION AND CONJECTURE, AND EVIDENCE WAS PRESENTED SUBSTANTIATING THAT IN FACT THERE WAS NO DAMAGE SUSTAINED BY OXFORD ATTRIBUTABLE TO ANY ASSERTED BREACH OF THE COVENANTS NOT TO COMPETE.

Oxford seeks to have the court overturn the trial courts finding that it sustained no damage. Oxford asks the Missouri Supreme Court to do that which the appellate courts in Missouri have consistently held they are bound not to do, that is, take into account contrary evidence, which did not support the trial courts decision. The damage claims asserted by Oxford were refuted by the testimony provided by Richard McGee, Oxfords sole witness at trial, and which substantiated that the damage claims, as shown by the exhibits presented, were: (1) not based upon any personal knowledge on the part of McGee (Tr. 55-58); (2) that Oxford and its witness was not familiar with how many patients of Oxford were lost because of the departure of employees other than Copeland and Helms (Tr. 64-65, 67); (3) patients lost by Oxford and which form the basis of a

portion of its damage claims were not known to have been lost due to any activity on the part of Copeland and Helms (Tr. 55-58). The testimony clearly reflected that Oxford's sole witness was not able to identify how many patients, if any, or how many former employees of Oxford, if any, may have been lost due to any activity or undertaking on the part of Copeland and Helms (Tr. 64-65, 67).

In asking the Missouri Supreme Court to overlook the aforementioned evidence and testimony, which in fact supports the trial court's conclusion that there was no damage, is in fact, asking the Court to embrace the opposite of the appropriate standard of review and disregard evidence which supports the trial court's determination, and embrace the evidence presented which did not support the trial court's determination.

It is fundamental that a claim for damages, no matter how documented, blown up, exemplified, embossed or gold plated cannot be sustained if it is based upon speculation and conjecture.

POINT II

In Reply To Amicus Curiae Brief Of Missouri Hospital Association

**THE RELIEF SOUGHT BY COUNT II OF COUNTERCLAIMS OF
COPELAND AND HELMS SEEKING DECLATORY JUDGMENT THAT
OXFORD, AS A NOT-FOR-PROFIT CORPORATION, SHOULD BE
PRECLUDED FROM ENFORCING NON-COMPETITION COVENANTS
OBTAINED FROM EMPLOYEES AS A MATTER OF PUBLIC POLICY IS IN
FACT SUPPORTED IN THE LAW AND APPROPRIATE IN RECOGNITION OF**

THE DISTINCT POWERS, PRIVILEGES AND OBLIGATIONS OF NOT-FOR-PROFIT CORPORATIONS, AS OPPOSED TO FOR PROFIT CORPORATIONS AS WELL AS BEING SUPPORTED BY SOUND PUBLIC POLICY.

The Missouri Hospital Association (“MHA”) has urged in its Amicus Curiae Brief that the public policy argument urged by Copeland and Helms and which they sought to have declared in Count II of their counterclaim before the trial court is unsupported in the law and, if adopted, would represent bad public policy.

MHA has, as did Oxford, suggested that not-for-profit corporations have the same powers as for profit corporations. This is not so. The Missouri legislature has declared by our § 355.025 RSMo. that a group, association or organization created for or engaged in business or activity for profit can not be organized or operate as a corporation under the statutes authorizing the existence of not-for-profit corporations. Persons or corporate entities that seek to restrain commerce by obtaining covenants not to compete from employees seek to protect market share and customers, which translates into revenue. Protecting and insuring potential streams of future revenue is the desired result sought by non-competition covenants from employees. Revenue has a direct bearing upon profit which is the ultimate lifeblood of any competitive business endeavor.

Beyond the realm of our state statutes, which offer the distinctions in powers and purposes of for profit and not-for-profit corporations, the tax status must also be considered at both the federal and state levels. Oxford, like most, if not all not-for-profit

corporations qualified for tax exempt status under Title 26 U.S.C. § 501(c)(3), thereby exempting it from the obligation to pay tax on ordinary income which exceeds operational expenses. Not-for-profit companies owe no tax on charitable contributions which they may receive. Ordinary for profit entities or individuals do not enjoy such a privilege or “power”. These are significant distinctions which were clearly ignored by MHA.

Corporate power is nothing more than a collection of rights, duties and privileges. Any argument to the effect that for profit corporations and not-for-profit corporations have the same powers, just because they may engage in similar types of activities, ignores the basic reasons for the distinction why the not-for-profit status is so often sought, i.e., the exemption from ordinary tax liabilities that most citizens and entities must confront.

MHA has not cited a single case or statute that squarely addresses the issue and substantiates its argument.

MHA has quoted U.S. Supreme Court decision in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S.Ct. 1590, 520 U.S. 564, 137 L.Ed 2d 852 (1997), particularly that part which indicates that non-profit entities may engage in interstate commerce. However, as previously indicated, the fact that a not-for-profit corporation in Missouri may engage in the same or similar business activities as those undertaken by for profit corporations does not make them the same. They do not have the same duties, the same obligations, and the same power.

MHA has also directed to the court 1 Fletcher Cyc. Corp. § 68.05 (Perm. Ed. 1999), which also provides in its discussion of the distinction between for profit and not-

for-profit corporations, the following, at page 32:

“The basic question to be asked in determining whether a corporation is ‘non-profit’ is whether the corporation is being exploited for direct monetary gain.”

As previously indicated, Missouri statutory law, § 355.025 RSMo. prohibits a not-for-profit corporation from being exploited solely for direct monetary gain. Exacting covenants not to compete from doctors, nurses, administrators or personnel working for not-for-profit healthcare corporations can be designed for no other purpose than to protect direct monetary gain.

Missouri courts have consistently held that covenants not to compete exacted from employees should be regarded with significant disfavor as such activities constitute a restraint in trade and promote monopoly which have and should continue to be regarded with rigorous disdain. As stated in Callmann on Unfair Comp., Trademarks & Monopolies, 4th E.d. Vol.1, § 1.02 “...there can be no monopoly in charitable activities. No one should be deprived of the luxury of doing good. . . . However, a charitable organization is unworthy of its purpose if it adopts an attitude of business competition and is activated by ‘a spirit of a rivalry instead of a spirit of generous cooperation and charitable endeavor’”.

MHA has also asserted at page 8 of its brief that Copeland and Helms “. . . advocate unequal treatment for not-for-profit corporations, albeit at a disadvantage, rather than a preference”. Because not-for-profit corporations are exempt from ordinary tax

obligations, there is already existent an unequal treatment. Our Missouri statutes recognize the same as evidenced by § 355.025 RSMo. It defies logic that a not-for-profit that is treated unequally is disadvantaged by virtue of being exempt from ordinary tax obligations. It is a small matter then for it to be required to fulfill its purpose of doing good in the community. The fact that it is also required to compete in the community at some level is a worthy goal which should be implemented. It is respectfully submitted that if not-for-profit corporations engaged in the healthcare industry in this state engaged in the same effort in seeking charitable contributions (for which they would pay no tax) as they seemingly do in endeavoring to restrain competition and protect market share, they would have no problem and indeed, would be offering encouragement to all of those who may wish to enter the worthy field of endeavor regarding the delivery of much needed healthcare services.

The conclusionary statement of MHA at page 11 of its brief that “. . . there can be no question that the public policy of Missouri as expressed by its legislature, permits the use of restrictive covenants by not-for-profit corporations.” is wholly unsupported in the statutes or case law in the State of Missouri.

MHA has asserted that § 431.202 RSMo. constitutes a legislative policy statement regarding enforceability of such covenants. MHA failed to direct the attention of the Court to that part of the statute, § 431.202.3, which provides in substance that nothing within the subdivisions (3) or (4) of subsection 1 (dealing with employer-employee covenants not to compete “. . . is intended to create, or to affect the validity or

enforceability of employer-employee covenants not to compete.” In short, a full reading of the statute leaves employer-employee covenants not to compete exactly where they have been, i.e., disfavored in the law. Further, there is no reference to, exemption, or special attention required by our courts in dealing with employer-employee covenants not to compete exacted by not-for-profit corporations as provided in the plain language of § 355.025 RSMo.

In addressing policy considerations MHA, commencing on page 12 of its brief offers two examples of what types of dire harm would be visited upon not-for-profit corporations should the Missouri Supreme Court determine that not-for-profit corporations may not exact non compete agreements from its employees. The examples beg response. In the first example set forth in pages 12 to 13 of MHA’s brief, a doctor, while learning his trade, and the business nature of it, while employed for a not-for-profit entity, if not otherwise restrained by a non competition agreement, could seek to employ his knowledge and acquired expertise elsewhere while exacting non competes from his employees thereafter. In the first instance, no such facts are before the Court. Secondly, it is doubtful that any healthcare provider should be able to exact a non compete from an employee giving the overriding interest of the state in delivery of healthcare services on as competitive basis as may be possible. In addition, any physician, having left the employ of a benevolent not-for-profit healthcare entity, could arguably take some extra revenue he might derive and devote it to fundraising efforts to ensure charitable contributions for the not-for-profit entity so that it might continue to be able to make

available quality healthcare services in the community.

Under the second dire scenario proposed by MHA, any not-for-profit research entity would of course be entitled to protect its developed concepts and products through federal patent and copyright laws, thereby affording an opportunity to recoup its expenses incurred in the research and development process, through licensing of its products to other manufactures, or otherwise. Non-competition agreements exacted from employees offer no such protection.

In summary, not-for-profit corporations engaged in the delivery of much needed healthcare services should not be penalized because they are required to engage in some competition. Nor should they be inordinately exalted beyond their statutory purpose by being allowed to restrain trade, in any way, in the delivery of much needed good work.

CONCLUSION

Appellants Copeland and Helms submit that the ruling of the trial court, denying the damage claim of Oxford must be affirmed. Further, its is respectfully submitted that the Court should reverse the ruling of the trial court as to Count II of Copeland and Helms counterclaim and thereby declare that a not-for-profit public benefit corporation is not entitled to restrain trade and enforce covenants not to compete with employees under any circumstances, thereby insuring the distinction, mandated by statute and applicable tax laws that there is a difference between for profit and not-for-profit corporations, particularly those engaged in the delivery of healthcare services.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in [Missouri Supreme Court Rule 84.06\(b\)](#) and, according to the word count function of Microsoft Word, by which it was prepared, contains 2,457 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block.

The undersigned further certifies that the diskette filed herewith containing this Appellant's brief in electronic form complies with [Missouri Supreme Court Rule 84.06\(g\)](#) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of December, 2005, one original and ten true and correct copies of the foregoing brief and a copy of the diskette containing the brief which were sent to the court as required by Rule 84.06(f) and two copies of the brief and diskette were forwarded to Mr. Rick E. Temple, 1358 E. Kingsley St., Suite D, Springfield, Missouri 65804 and to Jean Paul Bradshaw and R. Kent Sellers, II, 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108, via

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