

Case No. SC87083

IN THE MISSOURI SUPREME COURT

**HEALTHCARE SERVICES OF THE OZARKS, INC.,
d/b/a OXFORD HEALTHCARE**

Respondent/Cross-Appellant

v.

PEARL WALKER COPELAND and LUANN HELMS

Appellants/Respondents

**APPEAL FROM THE
CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
40TH JUDICIAL CIRCUIT
The Honorable Gregory Stremel**

**SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT
(ORAL ARGUMENT REQUESTED)**

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I.

JURISDICTIONAL STATEMENT

This action involves the enforceability of non-compete agreements, and damages for the breach thereof. This Court granted Application for Transfer from the Missouri Court of Appeals, Southern District, on November 1, 2005. Accordingly, jurisdiction is proper in this Court pursuant to Rule 83.04, *Missouri Rules of Civil Procedure*.

II.

STATEMENT OF FACTS¹

The parties jointly stipulated and admitted into evidence at the trial in this matter a Joint Stipulation of Facts, marked as Joint Exhibit 1, which reads as follows (deleting references to Exhibits) (L.F. 108-30):

1. Plaintiff is a corporation, with a place of business located at 1701 W. 26th Street, Suite A, Joplin, Missouri 64803, and its principal place of business located at 3660 S. National, Springfield, Missouri 65804. Plaintiff is incorporated with the Missouri Secretary of State as a "general not-for-profit corporation," designated as a "public benefit" corporation, and is (and has been since June 1, 1993) qualified for tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

2. Defendant Copeland ("Copeland") is an individual, whose residence is 11507 Allison Lane, Joplin, Newton County, Missouri 64804.

¹ Citations to testimony given at the Hearing held on January 8, 2004, and contained in the official Transcript thereof, will be made by the designation "Tr.," followed by the appropriate page number(s). Citations to the Legal File will be made by the designation "L.F.," followed by the appropriate page number(s). References to the Exhibits introduced into evidence at the Hearing will be preceded by the designation "Ex."

3. Defendant Helms (“Helms”) is an individual, whose residence is 21248 Highway 43, Seneca, Newton County, Missouri 64865.

4. Prior to becoming employed with Plaintiff, Defendant Copeland had no work experience in the home health services industry. Defendant Helms had previously worked as a nurse, but also had no experience in the home health services industry.

5. Defendant Copeland began employment with Plaintiff in 1979.

6. Defendant Helms began employment with Plaintiff in 1996.

7. While employed by Plaintiff, Defendants Copeland and Helms had extensive contact with caseworkers, clients, and employees of Plaintiff.

8. On or about June 1, 1993, Plaintiff and Defendant Copeland, who was at that time an employee of Oxford HealthCare, employed as a Supervisor at Plaintiff’s Joplin, Missouri office, entered into a "Non-Solicitation and Non-Competition Agreement," . . . ("the Copeland Non-Compete Agreement").

9. On or about September 2, 1997, Plaintiff and Defendant Helms, who was at that time an employee of Plaintiff, employed as a Nurse Supervisor at Plaintiff’s Joplin, Missouri office, entered into a “Non-Disclosure and Non-Competition Agreement,” . . . ("the Helms Non-Compete Agreement”).

10. Both Defendants Copeland and Helms were required to sign the Non-Compete Agreements to continue employment with Plaintiff.

11. On January 21, 2000, Defendant Copeland (then Regional Director of Plaintiff's Joplin, Missouri office) submitted to Plaintiff a notice of her resignation, with her last day of work to be February 21, 2000. At the time of her resignation, Defendant Copeland's salary with Plaintiff was \$40,974.00 per year, plus bonus if applicable. Defendant Copeland's total wages paid her by Plaintiff for calendar year 1999 were \$44,139.03.

12. Defendant Copeland, when asked by Plaintiff's employees at the time of her resignation what she was going to do following her resignation, stated she might go to work for her husband.

13. On January 21, 2000, Defendant Helms (then In-Home Services Nursing Supervisor of Plaintiff's Joplin, Missouri office) submitted to Plaintiff a notice of her resignation, with her last day of work to be February 21, 2000. At the time of her resignation, Defendant Helms' salary with Plaintiff was \$35,500.00 per year.

14. Defendants Copeland and Helms' last day to perform any work for Plaintiff was February 4, 2000.

15. After her resignation on January 21, 2000, Defendant Copeland began attending meetings and working with others, including the Missouri Division of Aging (now the Missouri Division of Senior Services), on behalf of a new business in Joplin, Missouri, with a registered

fictitious name of Integrity Home Care ("Integrity"). In late-January 2000, Defendant Copeland agreed with Greg Horton (owner and President of Integrity) to allow Integrity to utilize her Certificate of Provider Certification Training to apply to contract with the Missouri Division of Aging to provide in-home health care services in competition with Plaintiff.

16. After January 21, 2000, Defendant Helms began attending meetings and working with others in regard to Integrity.

17. The corporate identity of Integrity is ASA Healthcare, Inc., d/b/a Integrity Home Care, with a primary office located in Springfield, Missouri. ASA is a for-profit corporation, whose designated owner was initially Greg A. Horton.

18. On January 31, 2000, Integrity requested from the Missouri Division of Aging a Social Services Block Grant contract to provide the same type of services as Plaintiff (in-home services), in the same counties as Plaintiff, and in competition with Plaintiff.

19. Integrity's January 31, 2000 request included Defendant Copeland's Certificate of Provider Certification Training (received on 6/28/99 while employed with Plaintiff) to satisfy the regulatory requirement that Integrity must have at least one certified manager to be awarded a Social Services Block Grant contract.

20. On February 4, 2000, the Missouri Division of Aging awarded Integrity a Social Services Block Grant contract as requested.

21. Defendants Copeland and Helms attended meetings at Greg Horton's house in Springfield, Missouri in late-January and February 2000.

22. Defendant Copeland set up an office in her home in February 2000 for the purpose of conducting Integrity business.

23. Plaintiff Copeland allowed meetings called by others to be held in her home on February 10 and 13, 2000, with current and former employees of Plaintiff, to solicit employees on behalf of Integrity.

24. Beginning in February 2000, Defendant Helms worked several hours each workday in the home of Defendant Copeland, working on behalf of Integrity.

25. The Team Roster submitted by Integrity to the Missouri Division of Aging as of February 24, 2000, listed Defendants Copeland and Helms as two (2) of the four (4) individuals actively working on behalf of Integrity in its Joplin office.

26. All of the conduct described above occurred within a radius of 100 miles of Joplin, Missouri.

27. Beginning in February 2000, some employees of Plaintiff resigned to accept employment with Integrity, some of the clients served by those resigning employees requested the Division of Aging to transfer their services to Integrity, and such services were transferred from Plaintiff to Integrity.

28. Plaintiff filed this action against Defendant Copeland on February 16, 2000. On February 24, 2000, the Court, following its review of the pleadings and hearing argument of counsel, issued a Temporary Restraining Order against Copeland enforcing the Copeland Non-Compete Agreement.

29. Plaintiff filed this action against Defendant Helms on March 10, 2000. On March 23, 2000, the Court, following its review of the pleadings and hearing argument of counsel, issued a Temporary Restraining Order against Helms enforcing the Helms Non-Compete Agreement.

30. On March 23, 2000, the Court consolidated these two actions, and informally stayed the case at the request of Defendants, to allow them to pursue a Federal Court action (against the Commissioner of the Internal Revenue Service and Plaintiff) to request revocation of Plaintiff's tax-exempt status, damages, and a declaration that the Non-Compete Agreements are void. In the interim, the Temporary Restraining Orders against Copeland and Helms were extended by the Court every 15 days.

31. Defendant Copeland's Certificate of Provider Certification Training was replaced by Integrity with the Missouri Division of Aging by letter dated July 3, 2000, and received by the Division of Aging on July 7, 2000.

32. Copeland and Helms' Federal Court action was unsuccessful, and was dismissed by the Federal Court on January 11, 2001.

33. The extended Temporary Restraining Orders expired on April 2, 2001, and were not extended or renewed by this Court.

34. The two-year period covered by the Copeland and Helms Non-Compete Agreement ended on February 4, 2002.

35. Defendants Copeland and Helms are currently employed with Integrity in Joplin, Missouri.

In addition, the Trial Court found the following additional Findings of Fact, which were not objected to on appeal by Copeland and Helms (L.F. 136-37):

1. When Defendants Copeland and Helms voluntarily resigned their employment with Plaintiff on January 21, 2000, each were aware of their non-compete agreements with Plaintiff. Defendant Copeland's equivocal testimony at trial that she was not sure she had such an agreement with Plaintiff was impeached by her own deposition testimony, and was not credible.
2. Notwithstanding their knowledge of their non-compete agreements with Plaintiff, both Defendants Copeland and Helms made a conscious decision to take actions to help start Integrity which were in direct violation of their non-compete agreements, agreeing at the time to suffer the consequences later.

3. Both Defendants Copeland and Helms actively worked to help start Integrity following their resignations from employment with Plaintiff on January 21, 2000 until they were enjoined by this Court.
4. The fictitious name of “Integrity Home Care” was filed and registered with the Missouri Secretary of State on January 26, 2000.

Finally, Copeland and Helms, in the Statement of Facts section of their Substitute Brief, describe and characterize the testimony of the witnesses at Trial, including relating to the issue of their lost income (Appellant’s Substitute Brief, pp. 5-14). However, what was not included in their Statement of Facts were the following additional facts:

- Both Copeland and Helms were volunteering for Integrity Home Care at the time of issuance of the Temporary Restraining Orders against them. (Tr. 114-15, 142-43).
- There had been no agreement between Integrity and Copeland and Helms as to the exact amount of their future salaries with Integrity. (Tr. 85, 113-14, 129-30, 139-40).
- The reason the Temporary Restraining Orders were in effect beyond the initial 15-day period was because of Copeland and Helms’ own request for stay of the proceedings while they pursued their Federal Court Action. (L.F. 31-33).
- The Temporary Restraining Orders were not kept in effect for the full two (2) years, but, rather, were only in effect from their dates of issuance in March, 2000 through April 2, 2001. (L.F. 48).

III.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENFORCING THE NON-COMPETE AGREEMENTS ENTERED INTO BY COPELAND AND HELMS WITH OXFORD, BECAUSE OXFORD HAD RECOGNIZABLE PROTECTABLE INTERESTS AS OUTLINED IN MISSOURI CASE LAW, IN THAT:

- COPELAND AND HELMS DEVELOPED RELATIONSHIPS WITH OXFORD CLIENTS, MISSOURI DIVISION OF AGING CASE MANAGERS AND SUPERVISORS, AND OXFORD CAREGIVERS WHILE EMPLOYED WITH OXFORD;**
- OXFORD HAD AN EXPECTATION THAT THE CLIENTS SERVED BY IT AND PAID FOR BY MEDICAID FUNDS THROUGH THE MISSOURI DIVISION OF AGING WOULD REMAIN ITS CLIENTS ABSENT THE CLIENT NO LONGER QUALIFYING FOR SERVICES, OR DEATH;**
- COPELAND AND HELMS LEARNED OXFORD'S SYSTEM OF OPERATION WHILE EMPLOYED WITH OXFORD;**
- COPELAND AND HELMS HAD ACCESS TO CONFIDENTIAL AND PROPRIETARY BUSINESS INFORMATION OF OXFORD, INCLUDING SALARIES OF EMPLOYEES, FORMS USED,**

POLICIES, MARKETING METHODS, ETC., WHILE EMPLOYED WITH OXFORD; AND

- **THE NON-COMPETE AGREEMENTS SIGNED BY COPELAND AND HELMS OUTLINED/ADMITTED THE CONFIDENTIAL AND PROPRIETARY NATURE OF OXFORD'S BUSINESS INFORMATION.**

Cape Mobile Home Mart, Inc. v. Mobley, 780 S.W.2d 116 (Mo. App. 1989)

Steamatic of Kansas City, Inc. v. Rhea, 763 S.W.2d 190 (Mo. App. 1988)

Willman v. Beheler, 499 S.W.2d 770 (Mo. 1973), abrogated on other grounds,

State ex rel. Leonardi v. Sherry, 137 S.W.3d 462 (Mo. 2004)

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE DOCTRINE OF *RES JUDICATA* FROM THE FEDERAL COURT'S RULING OF COPELAND AND HELMS' FEDERAL COURT SUIT, BECAUSE THE DOCTRINE OF *RES JUDICATA* WAS APPLICABLE, IN THAT:

- COPELAND AND HELMS' FEDERAL COURT SUIT RAISED THE SAME ISSUE AS ASSERTED IN THE COUNTERCLAIMS IN THIS CASE (*I.E.*, THE APPROPRIATENESS OF A NOT-FOR-PROFIT ENTITY ENTERING INTO AND ENFORCING NON-COMPETE AGREEMENTS); AND**
- THE FEDERAL COURT'S RULING DID ADDRESS THE MERITS OF THE ISSUE RAISED.**

Andes v. Paden, Welch, Martin & Albano, P.C., 897 S.W.2d 19 (Mo. App. 1995)

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

Creative Walking, Inc. v. American States Insurance Company, 25 S.W.3d 682
(Mo. App. 2000)

Doherty v. McMillen, 805 S.W.2d 361 (Mo. App. 1991)

III. THE TRIAL COURT DID NOT ERR IN ENFORCING THE NON-COMPETE AGREEMENTS ENTERED INTO BY COPELAND AND HELMS WITH OXFORD, BECAUSE MISSOURI NOT-FOR-PROFIT CORPORATIONS CAN ENFORCE NON-COMPETE AGREEMENTS, IN THAT SUCH CORPORATIONS HAVE UNDER MISSOURI STATUTES THE SAME RIGHTS AND POWERS AS FOR-PROFIT CORPORATIONS.

Mo. Rev. Stat. § 355.131

Director of Revenue v. St. John's Regional Health Center, 779 S.W.2d 588

(Mo. banc 1989)

City of St. Louis v. Institute of Medical Education and Research, 786 S.W.2d 885

(Mo. App. 1990)

Washington County Memorial Hospital v. Sidebottom, 7 S.W.3d 542

(Mo. App. 1999)

IV. THE TRIAL COURT DID NOT ERR IN DISMISSING COPELAND AND HELMS' COUNTERCLAIMS, BECAUSE A TORTIOUS INTERFERENCE ACTION IS NOT APPROPRIATE NOR APPLICABLE IN THE CIRCUMSTANCES IN THIS CASE, IN THAT:

- **OXFORD WAS JUSTIFIED IN SEEKING TO ENFORCE ITS NON-COMPETE AGREEMENTS BASED ON ITS GOOD-FAITH BELIEF IN THE VALIDITY OF THE AGREEMENTS; AND**
- **ANY CLAIM FOR DAMAGES RESULTING FROM THE TEMPORARY INJUNCTIVE RELIEF ENTERED AGAINST COPELAND AND HELMS BY THE COURT REQUIRED A FINDING BY THE TRIAL COURT THAT THE INJUNCTIVE RELIEF WAS IMPROVIDENTIALLY GRANTED, AND WAS LIMITED TO THE AMOUNT OF THE BONDS POSTED BY OXFORD.**

Rule 92.02, Missouri Rules of Civil Procedure

Burney v. McLaughlin, 63 S.W.3d 223 (Mo. App. 2001)

Collins & Hermann, Inc. – Welsbach & Associates Division v. St. Louis County,

684 S.W.2d 324 (Mo. banc 1985)

Luketich v. Goedecke, Wood & Co., Inc., 835 S.W.2d 504 (Mo. App. 1992)

V. THE TRIAL COURT ERRED IN NOT AWARDING DAMAGES TO OXFORD AGAINST COPELAND FOR HER BREACH OF THE NON-COMPETE AGREEMENT, BECAUSE COPELAND WAS RESPONSIBLE FOR THE DAMAGES TO OXFORD BY COMPETITION FROM INTEGRITY FROM ITS INCEPTION THROUGH JULY 3, 2000, IN THAT INTEGRITY COULD NOT HAVE BEEN LICENSED AND PROVIDING SERVICES IN COMPETITION TO OXFORD DURING SUCH PERIOD OF TIME EXCEPT FOR COPELAND ALLOWING INTEGRITY TO USE HER CERTIFICATE OF PROVIDER CERTIFICATION TRAINING FROM THE STATE OF MISSOURI WHICH WAS RECEIVED BY COPELAND WHILE SHE WORKED FOR OXFORD.

Joint Stipulation of Facts

Exhibit P3

Exhibit P6

IV.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENFORCING THE NON-COMPETE AGREEMENTS ENTERED INTO BY COPELAND AND HELMS WITH OXFORD, BECAUSE OXFORD HAD RECOGNIZABLE PROTECTABLE INTERESTS AS OUTLINED IN MISSOURI CASE LAW, IN THAT:

- COPELAND AND HELMS DEVELOPED RELATIONSHIPS WITH OXFORD CLIENTS, MISSOURI DIVISION OF AGING CASE MANAGERS AND SUPERVISORS, AND OXFORD CAREGIVERS WHILE EMPLOYED WITH OXFORD;**
- OXFORD HAD AN EXPECTATION THAT THE CLIENTS SERVED BY IT AND PAID FOR BY MEDICAID FUNDS THROUGH THE MISSOURI DIVISION OF AGING WOULD REMAIN ITS CLIENTS ABSENT THE CLIENT NO LONGER QUALIFYING FOR SERVICES, OR DEATH;**
- COPELAND AND HELMS LEARNED OXFORD'S SYSTEM OF OPERATION WHILE EMPLOYED WITH OXFORD;**
- COPELAND AND HELMS HAD ACCESS TO CONFIDENTIAL AND PROPRIETARY BUSINESS INFORMATION OF OXFORD, INCLUDING SALARIES OF EMPLOYEES, FORMS USED,**

POLICIES, MARKETING METHODS, ETC., WHILE EMPLOYED WITH OXFORD; AND

- **THE NON-COMPETE AGREEMENTS SIGNED BY COPELAND AND HELMS OUTLINED/ADMITTED THE CONFIDENTIAL AND PROPRIETARY NATURE OF OXFORD'S BUSINESS INFORMATION.**

(Answering Appellants' Point Relied On I.)

In the Point Relied On I, Appellants make two (2) assertions. First, Appellants assert that Non-Compete Agreements in issue violate the Missouri Anti-Trust Act, and therefore should not be enforced. Though Appellants admit that a long line of Missouri cases has allowed enforcement of non-compete agreements, they assert that such case law “has run afoul of legislative pronouncements to the contrary.” (Appellants’ Substitute Brief, at p. 26). Appellants then ask this Court to “appropriately re-embrace the Missouri Anti-[T]rust Act and the more aggressive disfavor for covenants not to compete . . .” (Appellants’ Substitute Brief, at p. 28).

Appellants are asking this Court to overturn a long line of cases from the Missouri appellate courts and, more importantly, this Court, enforcing non-compete agreements. For example, *see Willman v. Beheler*, 499 S.W.2d 770, 777-78 (Mo. 1973), abrogated on other grounds, *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004). Respondent asserts that such request should be denied.

Non-compete agreements have become common in the workplace in Missouri (and most other states), and have been accepted and enforced by this Court.² *See Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71 (Mo. banc 1985). *See also* Malsberger, Brian M., *Covenants Not to Compete: A State-by-State Survey* (BNA) (Fourth Ed. 2004). In addition, as stated by this Court on many occasions (*Willman v. Beheler, supra*, 499 S.W.2d at 777):

. . . The courts are concerned with ‘requiring those, who solemnly assume contractual obligations, to observe and fulfill them.’ [Emphasis added.]

Appellants also argue that judicial enforcement of non-compete agreements as “carved out identifiable exceptions” to the Missouri Anti-Trust Act is contrary to the “clearly stated policy by the legislature.” (Appellants’ Substitute Brief, at p. 27). However, such assertion is directly refuted by the Missouri Legislature’s enactment in 2001 of Mo. Rev. Stat. § 431.202.

In the alternative, Appellants assert that the Non-Compete Agreements signed by Copeland and Helms with Oxford in this case are not enforceable because Oxford had no

² Appellants cite *Schmersahl, Treloar & Co. v. McHugh*, 28 S.W.3d 345 (Mo. App. 2000). (Appellants’ Substitute Brief, at p. 25). However, that case, and the resulting Mo. Rev. Stat. § 431.202 (arguably abrogating *Schmersahl*), were issued/enacted after these cases had been filed, the Temporary Restraining Orders issued, and the cases stayed.

protectable interest. (Appellants' Substitute Brief, at pp. 28-29). However, such is not the case.

As outlined in detail by the Trial Court, Oxford had a valid protectable interest in its clients. (L.F. 138). In *Steamatic of Kansas City, Inc. v. Rhea*, 763 S.W.2d 190 (Mo. App. 1988), the court defined a "customer" in regard to protectable interest as "one who repeatedly has business dealings with a particular tradesman or business." *Id.* at 192. Here, Copeland and Helms both admitted during their testimony that there was an expectation as to continued service of clients both by Oxford, and also by their new business at Integrity. (Tr. 117-18, 144). For example, Copeland testified in this regard (Tr. 117):

Q. You talked about the patients, and that you receive patients that were--either requested you or assigned to you. When you received a patient while you worked at Oxford, it was your expectation as the regional manager to hope to keep that patient--

A. Right.

Q. --for a period of time?

A. As long as they needed the services.

Q. And you have that same expectation when you receive a client from the Division of Aging assignment at Integrity?

A. Right.

This expectation of continued service of clients is also supported by the Division of Aging's own Regulation in force during the time period in issue here (February and

March 2000) prohibiting in-home service providers from soliciting clients being serviced by another provider. *See* 13 CSR 15-7.021(18)(V),³ which read:

The in-home service provider shall meet, at a minimum, the following administrative requirements:

...

Shall not solicit, nor cause to be solicited, through agents or employees of the in-home service provider, any person to become a client if that person is currently receiving services from any provider authorized by the Division of Aging. Solicitation means seeking out or initiating contact with another provider agency's clients, in person or by mail, for the purpose of persuading them to choose another provider. Solicitation, as used in this subsection, does not include media advertising directed toward the general public; nor does it include presentations to the general public, organizations or other interested groups regarding the services available; ... [Emphasis added.]

Copeland and Helms had admittedly developed relationships with the clients,⁴ the assigning case managers from the Missouri Division of Aging, the Oxford caregivers,⁵

³ Effective through April 30, 2002.

⁴ *See* Appellants' Substitute Brief, at p. 5, which states:

During the course of their employment, Copeland and Helms had extensive contact with caseworkers and employees of Oxford,

(cont.)

and patients, whose care was funded by Medicaid. (L.F. 109, ¶ 7 and Tr. 58-59). [Emphasis added.]

⁵ Knowledge of the identity of clients assigned to each caregiver, and relationships with each caregiver are very important, as indicated by the following testimony of Helms (Tr. 145):

Q. And you would admit that there were clients of Oxford that followed their providers--excuse me--their individual employees that provided their service, and asked the Division of Aging to switch their provider to Integrity from Oxford?

A. I know of only one in the time frame [sic] that I was there.

Q. But you don't doubt that that happened?

A. I don't doubt that that happened.

Q. That's pretty common in the industry?

A. Yes, that's a common thing in the industry.

Q. So if an employee moves from one provider to another, a lot of times the client will request Division of Aging to reassign their provider to the new employer of the employee?

A. Yes.

[Emphasis added.]

and the network in the in-home services industry. (Tr. 100, 137). Copeland testified in this regard (Tr. 99-101):

Q. You had worked there for about 21 years?

A. Correct.

Q. During those 21 years you had developed a lot of knowledge about the home health industry, correct?

A. Yes.

Q. In fact, before you went to work there you had no knowledge about it?

A. No, I didn't.

Q. And while you worked there for 21 years, you've learned entirely the Oxford system, correct?

A. I --

Q. As it related to the Medicaid patients.

A. Yes.

Q. And you also were aware of the salaries paid to the employees that worked under your direction?

A. Yes.

Q. You were aware of the salary structure?

A. Right.

Q. You were aware of all the forms used by the employees that worked under your direction?

A. Yes.

Q. You developed relationships with the caseworkers of the Division of Aging?

A. Right.

Q. And those were important?

A. Yes.

Q. Because the Division of Aging caseworkers, you want to have good relationships with them so that if some--if someone comes in and requests a provider but doesn't have a specific provider they want to request, you want the Division to refer them to you?

A. You want to have a good working relationship with the case managers.

Q. And you had that?

A. Yes.

Q. And you were the top--as your counsel said, I think the head honcho of the in-home services division in Joplin, Missouri?

A. Well, I was the regional director. You can name it whatever.

As for the transferring of clients, Appellants state in their Substitute Brief (at p. 29-30):

The facts in this case do not present the type of customer contacts or customer trade secrets which are indeed items of property that are freely transferable in other instances, and has heretofore been recognized by our

courts as subject to some limited protection through employee covenants not to compete.

However, as outlined above, such argument is directly contrary to the testimony of Copeland and Helms, wherein they admitted that clients can and do request of the Missouri Division of Aging to be transferred to another in-home provider. (Tr. 118, 145).

In summary, Appellants' underlying argument in this regard, that an employer should be denied the opportunity to protect its client base by non-compete agreements simply because of the source of payments made by the clients (in this case, Medicaid (as opposed to insurance or private payment)), is one of first impression, and without case law support. The fact that such individuals qualified for and had their services paid for by Medicaid should not disqualify Oxford from protecting those client bases.

In addition to Oxford's clients being a "protectable interest," Copeland and Helms, as management personnel of Oxford, had access to confidential and proprietary business information of Oxford, which Copeland and Helms were able to take to and use at their competitive employment. (Tr. 99-100, 137-39). In *Cape Mobile Home Mart, Inc. v. Mobley*, 780 S.W.2d 116 (Mo. App. 1989), the court, in outlining the definition of "trade secrets" as a protectable interest to enforce a non-compete, stated (*id.* at 118-19):

The confidential business information employee possesses falls within the definition of trade secrets. This information, in its entirety, consists of the details of employer's operations and highlights the success or lack of success of the business operations and performance of employees at the

Dexter location and all of the other employer's locations. A competitor could use this information to determine its own risk of success or failure in competition with employer. The confidential information would enable the competitor to structure and operate its own facility to compete successfully against employer. This confidential information was not available to the public or to competitors. . . . [Emphasis added.]

See also Steamatic of Kansas City, Inc. v. Rhea, supra.

In this case, Oxford's founder, Charles Goforth, testified (through admission of his deposition) to the following regarding the uniqueness and confidential nature of Oxford's business (Tr. 77):

. . . I've been in this business for 25 years. I started the business that Pearl is competing with us in, and some health care services- - I started that myself. And I have developed- -we have developed systems over the years that other providers of care don't have. And if you look at the number of agencies that have started, that start up and try to make it in our area, it's over 50 people in 25 years. And there are only about five left. Most of them can't make it. And the reason they can't make it is because we know how to do things that they do not know how to do. And we know how to market and they don't know how to do it. We have a way to recruit and retain our people that they do not have. We have a way to supervise them in the home they do not have. There is nobody that has the system that Oxford Healthcare [sic] has.

Copeland was Regional Director of Oxford's Joplin, Missouri office. Helms was the In-Home Services Nursing Supervisor of that office. Neither had worked in the in-home services industry before, and both learned the industry while employed with Oxford. Everything Copeland and Helms knew about the in-home service industry had admittedly been learned while they were employed with Oxford, and paid by Oxford. (Tr. 99, 136-37). In such management positions, Copeland and Helms had access to confidential and proprietary business information of Oxford, including the salaries of employees, policies, marketing methods, budgets, etc. The unique and confidential nature of such information was acknowledged by Copeland and Helms in Paragraph 1 of their respective Non-Compete Agreements. (L.F. 115, 117).

In their Substitute Brief, Appellants argue that “[p]resumably other employees of Oxford would have been familiar with such systems, such as Muriel Davenport or Kay Gratton who were fired by Oxford for not signing a covenant not to compete.” (Appellants’ Substitute Brief, at p. 29). In response, Oxford points out that, first, Oxford did consider Muriel Davenport and Kay Gratton, as Assistant Supervisors, to have access to some confidential and proprietary business information of Oxford, and therefore requested that they sign a Non-Compete Agreement as had Copeland and Helms. Given that such agreement was a condition of continued employment, Davenport and Gratton were terminated upon their refusal to sign. (Tr. 83, 101-02). Second, there is no evidence in the record that Davenport or Gratton, as Assistant Supervisors, or non-supervisory personnel of Oxford, had access to the same level of confidential information as did

Copeland and Helms. For example, there is no evidence that Davenport and Gratton had access to the salaries of all employees.

The actions of Copeland and Helms in using such confidential information and important relationships to start a competitive business demonstrates the very reason for Oxford having the Non-Compete Agreements with them.⁶ Accordingly, the Trial Court appropriately held that Oxford had protectable interests to be protected by enforcement of the Non-Compete Agreements.

⁶ Interestingly, with the exception of the owner, Greg Horton, Integrity was started using all former Oxford employees, at both the managerial and non-managerial levels. (Tr. 102-03).

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE DOCTRINE OF *RES JUDICATA* FROM THE FEDERAL COURT'S RULING OF COPELAND AND HELMS' FEDERAL COURT SUIT, BECAUSE THE DOCTRINE OF *RES JUDICATA* WAS APPLICABLE, IN THAT:

- **COPELAND AND HELMS' FEDERAL COURT SUIT RAISED THE SAME ISSUE AS ASSERTED IN THE COUNTERCLAIMS IN THIS CASE (*I.E.*, THE APPROPRIATENESS OF A NOT-FOR-PROFIT ENTITY ENTERING INTO AND ENFORCING NON-COMPETE AGREEMENTS); AND**
- **THE FEDERAL COURT'S RULING DID ADDRESS THE MERITS OF THE ISSUE RAISED.**

(Answering Appellants' Point Relied On III.)

Following the unsuccessful attempt by Copeland and Helms to attack Plaintiff's enforcement of its Non-Compete Agreements in Federal Court, they used the same underlying fact, *i.e.*, Plaintiff's not-for-profit, tax-exempt status, as the basis for Count II of their Counterclaims, again seeking to have the Non-Compete Agreements declared unenforceable. For the reasons outlined in detail by the Trial Court (L.F. 144-46), and outlined again below, Oxford asserts that the Trial Court correctly held that such claims are barred by *res judicata*.

The doctrine of *res judicata* was outlined in detail and applied by this Court in *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315 (Mo. banc 2002), where

this Court explained that *res judicata* covers all claims or potential claims arising out of the same core of facts of the earlier suit, stating (64 S.W.3d at 318-19):

The Latin phrase "*res judicata*" means "a thing adjudicated." [Footnote omitted.] The common-law doctrine of *res judicata* precludes relitigation of a claim formerly made. . . .

. . .

. . . The doctrine precludes not only those issues on which the court in the former case was required to pronounce judgment, "but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." *King General Contractors, Inc.*, 821 S.W.2d at 501.

Res judicata, or its modern term, claim preclusion, prohibits "splitting" a claim or cause of action. *Id.* Claims that could have been raised by a prevailing party in the first action are merged into, and are thus barred by, the first judgment. [Footnote omitted.] To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same "act, contract or transaction." *Grue v. Hensley*, 357 Mo. 592, 210 S.W.2d 7, 10 (1948); *King General Contractors, Inc.*, 821 S.W.2d at 501.

The term "transaction" has a broad meaning: *King General Contractors, Inc.* cites the Restatement (Second) of Judgments, section 24, which says that the "claim extinguished includes all rights of the plaintiff to

remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. [Footnote omitted.] [*Italicized* emphasis in original; underlined emphasis added.]

See also Deatherage v. Cleghorn, 115 S.W.3d 447, 454 (Mo. App. 2003)

Further, a prior Federal Court action is *res judicata* for a subsequent State Court action. *See Creative Walking, Inc. v. American States Insurance Company, supra; Andes v. Paden, Welch, Martin & Albano, P.C.*, 897 S.W.2d 19, 25 (Mo. App. 1995).

Appellants assert that they alleged different causes of action in the Federal Court suit than what was alleged in Count II of their Counterclaims here. (Appellants' Substitute Brief, at p. 37). However, such is not the case.

First, their argument in Count II of their Counterclaims here is based on “public policy.” (L.F. 54, 64). Such very argument was raised in their Amended Complaint in the Federal Court suit, at Paragraph 14, which reads (L.F. 85):

In addition to creating an unfair trade advantage, the conduct of the United States, acting by and through Commissioner of Internal Revenue Service, in affording defendant Oxford a tax-exempt status, while defendant Oxford has been engaged in monopolistic efforts, has resulted in a tendency to effect a reduction in the availability of healthcare services to qualified recipients, which is a practice that should be avoided as a matter of public policy. [Emphasis added.]

Second, and most importantly, this Court has rejected this very argument (*i.e.*, “different theories” to prevent *res judicata*). In *Chesterfield Village, Inc. v. City of Chesterfield*, *supra*, 64 S.W.3d at 319, 321, this Court stated:

To determine whether Chesterfield Village asserts the same claims in both cases, a court looks to the factual bases for the claims, not the legal theories. . . .

. . .

. . . A somewhat altered legal theory, or even a new legal theory, does not support a new claim based on the same operative facts as the first claim. . . . [Emphasis added.]

Similarly, in *Andes v. Paden, Welch, Martin & Albano, P.C.*, *supra*, 897 S.W.2d at 23-24, the court stated:

. . . Since the same transactions were involved, the claims are identical even though in federal court it was raised under the federal wiretap statute, while in state court it was denominated invasion of privacy, conspiracy and intentional infliction of emotional distress. *See id.* “Separate legal theories are not to be considered as separate claims....” *Barkley v. Carter County State Bank*, 791 S.W.2d 906, 913 (Mo.App.1990). [*Italicized* emphasis in original; underlined emphasis added.]

Likewise, in *Doherty v. McMillen*, 805 S.W.2d 361 (Mo. App. 1991), the court stated (805 S.W.2d at 363):

. . . Furthermore, it is immaterial that the wording of the counts has been changed in an attempt to correct deficiencies in the original petition.

Finally, Appellants assert that the Federal Court suit was dismissed solely based on lack of standing, and therefore was not a decision on the merits. (Appellants' Substitute Brief, at pp. 38-39). However, such is not the case, as indicated by the Federal Court's Order, at pp. 8-12, where the court analyzed and found that Count II of the Amended Complaint "failed to state a claim upon which relief may be granted." (L.F. 99-103). Such ruling was clearly "on the merits."

In summary, the Trial Court correctly found that Copeland and Helms should not be allowed to have "two bites at the apple." Upon having TROs issued against them by the Trial Court, they sought a stay, and then proceeded to Federal Court to attempt to have the Non-Compete Agreements declared unenforceable. After being unsuccessful in Federal Court, and not appealing, they then returned to the Trial Court in this case and filed their Counterclaims, again asserting the Non-Compete Agreements were unenforceable, based upon the same core fact, *i.e.*, Plaintiff's not-for-profit, tax-exempt status. Therefore, the Trial Court correctly held that Count II of Defendants' Counterclaims were barred by *res judicata*.

III. THE TRIAL COURT DID NOT ERR IN ENFORCING THE NON-COMPETE AGREEMENTS ENTERED INTO BY COPELAND AND HELMS WITH OXFORD, BECAUSE MISSOURI NOT-FOR-PROFIT CORPORATIONS CAN ENFORCE NON-COMPETE AGREEMENTS, IN THAT SUCH CORPORATIONS HAVE UNDER MISSOURI STATUTES THE SAME RIGHTS AND POWERS AS FOR-PROFIT CORPORATIONS.

(Answering Appellants' Point Relied On II.)

Appellants' Point Relied On II argues to this Court the "public policy" argument which Appellants previously made to the Federal Court, and was rejected, and which Appellants then made to the Trial Court in this case, and was rejected. Appellants only reach this argument if this Court finds that the argument is not barred by *res judicata* from the Federal Court case. *See* Point Relied On II above.

However, even if this Court addresses such argument, Appellants have no legal support for their new and novel argument. In their Substitute Brief, Appellants do not cite any case law forbidding a not-for-profit corporation from enforcing a non-compete agreement. In fact, Appellants admit there are no Missouri cases supporting their claim. (Appellants' Substitute Brief, at p. 32). Rather, not-for-profit hospitals often enter into and enforce non-competes with management personnel and physicians, including in Missouri. *See Washington County Memorial Hospital v. Sidebottom*, 7 S.W.3d 542 (Mo. App. 1999).

Mo. Rev. Stat. § 355.131 outlines the powers of a not-for-profit corporation. Included in that list of powers are the following:

- (16) To carry on a business or businesses, either directly or through one or more for-profit or nonprofit subsidiary corporations; and
- (17) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

This statute, effective 1995, is consistent with the case law in this state outlining that the powers of not-for-profit corporations and for-profit corporations are identical. *See City of St. Louis v. Institute of Medical Education and Research*, 786 S.W.2d 885, 888 (Mo. App. 1990); *Pilgrim Evangelical Lutheran Church v. Lutheran Church-Missouri Synod Foundation*, 661 S.W.2d 833, 838-39 (Mo. App. 1983); *Komanetsky v. Missouri State Medical Association*, 516 S.W.2d 545, 552 (Mo. App. 1974).

Further, Oxford's use of non-compete agreements with its management personnel who have access to the proprietary information of the Company was not beyond its purpose. Rather, use of such agreements is part of, and consistent with, Oxford's corporate purpose, as outlined with the Missouri Secretary of State, to: "Provide home care services to those patients with need for such services." (Ex. D1; Appendix to Appellants' Substitute Brief, A33).

Appellants imply that a not-for-profit corporation can do nothing to protect its interests nor compete with a for-profit corporation. However, such is not the case. This Court in *Director of Revenue v. St. John's Regional Health Center*, 779 S.W.2d 588 (Mo. banc 1989), in applying the sales and use tax exemption under Missouri law, stated (*id.* at 591):

. . . competition with commercial enterprises, in and of itself, does not deprive an organization of charitable exemption or, in this case, educational exemption. . . . [Emphasis added.]

Appellants have seemingly confused the effect of not-for-profit status. What distinguishes “not-for-profit” from “for-profit” corporations is not whether each seeks to operate financially prudent, and thereby produce earnings. Rather, what distinguishes the two types of corporations relates to what is done with the earnings. Earnings of not-for-profit corporations are used for continuation of services and to grow the charitable organization, for the good of the public. In contrast, earnings of for-profit corporations are distributed to the owners and/or shareholders.

Accepting Appellants’ argument in this regard would denigrate not-for-profit corporations, and directly hurt the general public. For a not-for-profit corporation to not take steps recognized as “good business” to manage and protect its assets and business would be irresponsible management.

Accordingly, the Trial Court appropriately rejected Appellants’ new and novel “public policy” argument.

IV. THE TRIAL COURT DID NOT ERR IN DISMISSING COPELAND AND HELMS' COUNTERCLAIMS, BECAUSE A TORTIOUS INTERFERENCE ACTION IS NOT APPROPRIATE NOR APPLICABLE IN THE CIRCUMSTANCES IN THIS CASE, IN THAT:

- **OXFORD WAS JUSTIFIED IN SEEKING TO ENFORCE ITS NON-COMPETE AGREEMENTS BASED ON ITS GOOD-FAITH BELIEF IN THE VALIDITY OF THE AGREEMENTS; AND**
- **ANY CLAIM FOR DAMAGES RESULTING FROM THE TEMPORARY INJUNCTIVE RELIEF ENTERED AGAINST COPELAND AND HELMS BY THE COURT REQUIRED A FINDING BY THE TRIAL COURT THAT THE INJUNCTIVE RELIEF WAS IMPROVIDENTIALLY GRANTED, AND WAS LIMITED TO THE AMOUNT OF THE BONDS POSTED BY OXFORD.**

(Answering Appellant's Point Relied on IV.)

The basis of Appellants' "Claims for Tortious Interference" (L.F. 49, 60) was Oxford's action in filing the underlying suits in these cases, seeking and obtaining a Temporary Restraining Order against each Appellant to enforce the respective Non-Compete Agreements between Respondent and Appellants. For the reasons outlined in detail by the Trial Court, Count I of both Counterclaims were properly dismissed.

As admitted by Appellants in their Substitute Brief, Missouri case law is clear that the bond provisions outlined in the *Missouri Statutes* and *Rules* is the only basis for assessment

of damages arising from the wrongful issuance of an injunction. (Appellants' Substitute Brief, at p. 45). However, Appellants simply do not like that case law.

In *Luketich v. Goedecke, Wood & Co., Inc.*, 835 S.W.2d 504 (Mo. App. 1992), the court, in responding to a tortious interference claim for defendant's threats of litigation to enforce a non-compete agreement, stated (835 S.W.2d at 508):

. . . A claim for tortious interference with a contract or business expectancy requires proof of each of the following: (1) a contract or a valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages resulting from defendant's conduct. *Community Title Co. v. Roosevelt Fed. Sav. and Loan Ass'n*, 796 S.W.2d 369, 372 (Mo. banc 1990).
. . . [Emphasis added.]

As to element number 4 (absence of justification), the court continued (*id.*):

Under Missouri law, Luketich has the burden of producing substantial evidence to establish the absence of justification. *Community Title*, 796 S.W.2d at 372. According to Luketich's evidence at trial, the interference with his relationship with Patent was caused by Goedecke's threat to sue Patent and Luketich for violation of its non-compete covenant. The law in Missouri is settled that no liability arises for procuring a breach of contract where the breach is caused by the exercise of an absolute right, that is, an act which one has a definite legal right to do without any qualification. *Herring v.*

Behlmann, 734 S.W.2d 311, 314 (Mo.App.1987); *Pillow v. General American Life Ins. Co.*, 564 S.W.2d 276, 281 (Mo.App.1978). As a matter of law, Goedecke was justified in attempting to enforce its rights under the non-compete agreement with Luketich as long as Goedecke had a reasonable, good faith belief in the validity of the agreement. . . . [Emphasis added.]

In this case, regardless of whether the Non-Compete Agreements were enforceable or non-enforceable, there was no evidence in the Record (nor argument by Appellants) that Oxford did not have a reasonable, good faith belief in the validity of the Non-Compete Agreements.

Accepting Appellants' argument would create a dilemma for employers when an employee resigns and deliberately violates his or her non-compete agreement. The employer would either have to stand by and do nothing to protect its business, or file suit to enforce the non-compete agreement and be faced with a tortious interference claim for punitive damages (as opposed to the injunction bond remedy allowed by this Court's civil rules). Such has not been the law in the past, and should not be the law for the future.

Rather, Rule 92 provides for an injunction bond remedy for improvidently granted injunctions. Such remedy was explained by this Court in *Collins & Hermann, Inc. – Welsbach & Associates Division v. St. Louis County*, 684 S.W.2d 324, 325-26 (Mo. banc 1985):

. . . To ameliorate the occasionally harsh consequences of this rule for enjoined parties who suffered damage and to discourage frivolous actions, the

legislature enacted the provisions now codified as sections 526.070, 526.200 and 526.210, RSMo 1978. *Id.* at 579; Comment, *Damages Recoverable on Injunction Bonds in Missouri*, 44 Mo.L.Rev. 269 (1979). These statutes and R. 92.09 provide the only basis for an assessment of damages arising from the issuance of an injunction. *State ex rel. County of Shannon v. Chilton*, 626 S.W.2d 426 (Mo.App.1981); *Hamilton, supra*, at 579-580. [*Italicized* emphasis in original; underlined emphasis added.]

In *Newcourt Financial USA, Inc. v. Lafayette Investments, Inc.*, 983 S.W.2d 214 (Mo. App. 1999), the Western District Court of Appeals outlined and followed the longstanding rule of law regarding recoverable damages for wrongfully issued injunctive relief as follows (983 S.W.2d at 216-17):

Recoverable damages are limited to the amount necessary to compensate for losses incurred as the “actual, natural and proximate result” of the injunction, while it is in effect. *Collins*, 684 S.W.2d at 326. Damages are further limited to the amount of the bond filed. *Stensto v. Sunset Mem’l Park, Inc.*, 759 S.W.2d 261, 267 (Mo.App.1988). Damages resulting from the underlying suit, rather than the injunction, are not recoverable from the proceeds of the injunction bond. *Kahn v. Royal Banks of Missouri*, 790 S.W.2d 503, 511 (Mo.App.1990). [*Italicized* emphasis in original; underlined emphasis added.]

See also Kenney v. Emge, 972 S.W.2d 616, 621 (Mo. App. 1998); *Stensto v. Sunset Memorial Park, Inc.*, 759 S.W.2d 261, 267 (Mo. App. 1988); *Hamilton v. Hecht*,

299 S.W.2d 577, 580 (Mo. App. 1957). *See also*, Annotation, *Recovery of Damages Resulting from Wrongful Issuance of Injunction as Limited to Amount of Bond*, 30 A.L.R.4th 273 (1984).

The rulings and principles of this Court in this regard, as relied on by the Trial Court, were also cited and adopted by the Missouri Court of Appeals, Southern District, in *Burney v. McLaughlin*, 63 S.W.3d 223, 235-36 (Mo. App. 2001). *See also Ours v. City of Rolla*, 14 S.W.3d 627, 628-29 (Mo. App. 2000); William G. Reeves, *Damages Recoverable on Injunction Bonds in Missouri*, 44 Mo. L. Rev. 269 (1979).

In addition, recovery on an injunction bond is only allowed should the court find that the temporary or preliminary injunctive relief was “improvidently granted.” *See Burney v. McLaughlin, supra*, 63 S.W.3d at 234. *See also Goad v. Mister Softee of the Mississippi Valley, Inc.*, 380 S.W.2d 493, 495 (Mo. App. 1964). However, there was no such finding here. Rather, the Trial Court enforced the Non-Compete Agreements, and held the prior injunctive relief was appropriately granted. (L.F. 142, 148-49). Accordingly, though Appellants raise all kinds of issues in their Substitute Brief regarding the amount of their damages (Appellants’ Substitute Brief, at pp. 44-49), which can be directly refuted by Respondent, such issues are irrelevant unless this Court would reverse the Trial Court’s enforcement of the Non-Compete Agreements, and remand the case to the Trial Court for a hearing and ruling on damages under the bonds.

Finally, Appellants also complain of the procedures used by the Trial Court in regard to the bonds. However, this Court’s Rule 92.02(d) *Missouri Rules of Civil Procedure*, was followed to the letter by the Trial Court.

The purpose of the bond provision is to compensate the defendant for damages or losses sustained while an injunction was in effect, should it later be determined to be wrongly or improvidentially granted. Accordingly, such matters are to be heard quickly by the Court, so that parties are not wrongfully enjoined for lengthy periods of time. In that regard, Rule 92.02(c)(2) provides:

Time. If a temporary restraining order is in effect for more than thirty days without a hearing on an application for a preliminary injunction, the court shall schedule a hearing at the earliest possible date. The hearing shall take precedence over all other matters except older matters of the same character. The hearing on the application for a preliminary injunction may be delayed past these limits if all parties consent. [Emphasis added.]

Judge Perigo followed those requirements in these cases. The suit against Defendant Copeland was filed on February 17, 2000. (L.F. 13). Upon hearing arguments of counsel, a Temporary Restraining Order was issued against Defendant Copeland on February 24, 2000, which included the scheduling of the Hearing on Plaintiff's request for a Preliminary Injunction for March 10, 2000. (L.F. 20-21).

On March 8, 2000, before that Hearing could be held, Defendant Copeland's counsel sought an extension of the date of that Hearing to allow him to conduct discovery to prepare for the Hearing. (L.F. 2). As a result, the Hearing was postponed, and a conference call between the Court and attorneys was scheduled for March 23, 2000. (L.F. 2). In the interim, on March 13, 2000, the suit against Defendant Helms was filed. (L.F. 34).

On March 23, 2000, Defendant Copeland filed a Motion to Dismiss, or, In The Alternative, for Stay, which included the following request (L.F. 31-33):

WHEREFORE, defendant requests the court to enter its order dismissing without prejudice the pending suit instituted by plaintiff or, in the alternative, enter its order staying further prosecution of this action until resolution of the related suit in U.S. District Court. [Emphasis added.]

At the telephone Hearing on March 23, 2000, Judge Perigo entered a Temporary Restraining Order against Defendant Helms, consolidated the two cases, informally stayed the cases at the request of Defendants' counsel, and established a procedure for the undersigned counsel for Plaintiff to submit every 15 days proposed Orders extending the existing TROs. (L.F. 3, 11, 43). Thereafter, Defendant Helms filed a Request for Change of Judge, which resulted in the case being transferred to this Division. (L.F. 73).

Based on the above, Appellants had their opportunity to have the injunctive orders in these cases reviewed by the Court in a quick and timely fashion as provided in Rule 92.02(c)(2), but, rather, opted to pursue a Federal Court action and request a stay of these cases. Accordingly, even if, for the sake of argument, Appellants were to prevail in this appeal, they should not be heard to seek damages for the period during the time of the stay in this case.

V. THE TRIAL COURT ERRED IN NOT AWARDING DAMAGES TO OXFORD AGAINST COPELAND FOR HER BREACH OF THE NON-COMPETE AGREEMENT, BECAUSE COPELAND WAS RESPONSIBLE FOR THE DAMAGES TO OXFORD BY COMPETITION FROM INTEGRITY FROM ITS INCEPTION THROUGH JULY 3, 2000, IN THAT INTEGRITY COULD NOT HAVE BEEN LICENSED AND PROVIDING SERVICES IN COMPETITION TO OXFORD DURING SUCH PERIOD OF TIME EXCEPT FOR COPELAND ALLOWING INTEGRITY TO USE HER CERTIFICATE OF PROVIDER CERTIFICATION TRAINING FROM THE STATE OF MISSOURI WHICH WAS RECEIVED BY COPELAND WHILE SHE WORKED FOR OXFORD.

(Asserting Respondent's Point on Cross-Appeal.)

The Trial Court found that Oxford's request for damages was speculative, finding "[t]here was no evidence that any specific employee or patient of Plaintiff switched employers or providers due to the efforts of Defendants." (L.F. 147). Accordingly, the Trial did not award any monetary damages to Oxford from the breaches by Appellants. For the reasons outlined below, Oxford appeals that decision as it relates to Defendant/Appellant Copeland (and not Defendant/Appellant Helms).

First, it was admitted by all parties in the Joint Stipulation of Fact that the Missouri Division of Aging requires that, for an in-home provider applicant to be licensed, it must submit and have on file with the Division of Aging a Certificate of

Provider Certification Training from one of the managerial individuals employed with the agency. (L.F. 111).

Second, it was also admitted that for Integrity to obtain its contract with the Missouri Division of Aging, Integrity requested, and Copeland allowed Integrity, to use Copeland's Certificate of Provider Certification Training to apply for a contract with the Missouri Division of Aging to provide in-home health care services in competition with Plaintiff. (L.F. 110). It was based upon this Certificate, obtained by Copeland while employed with Oxford (Tr. 85, 107-09, 125-26), that Integrity was allowed to contract with the Missouri Division of Aging, and provide services in competition with Oxford until July 3, 2000, notwithstanding the TRO issued against Copeland. (L.F. 113).

Third, Copeland's allowing Integrity as a competitor of Plaintiff to use her Certificate of Provider Certification clearly violated the provisions of her Non-Compete Agreement with Oxford, specifically Paragraph 2. (L.F. 115).

Fourth, but for Copeland's breach in this regard, Integrity could not have been in business and competition with Oxford for the period from Integrity's formation through July 3, 2000. Therefore, any damages incurred by Oxford during that period were directly related to Copeland's breach of her non-compete agreement with Oxford.

Unfortunately, the Trial Court based its analysis on the incorrect issue, and missed the real issue that, but for Copeland's allowing Integrity to use her Certificate of Provider Certification Training, Integrity would not have been in business. Therefore, there is clear causation between Copeland's breach and the undisputed damages sustained by Oxford.

In regard to the specific damages amount, Oxford's Vice President of Support Services, Rick McGee, testified in detail at the trial in this case of the specific damages resulting from such breach. (Tr. 19-22, 29-46). Mr. McGee testified that the formation of Integrity in January/February 2000 resulted in lost employees and clients to Oxford.

As for lost employees, Mr. McGee outlined the training and recruitment costs for an Aide to be \$497.00, and for an Advanced Personal Care (APC) Aide to be \$553.00 (Ex. P2). Mr. McGee also presented evidence as to employees who had left employment with Oxford and accepted employment with Integrity (Ex. P1). Appellants did not present any evidence contradicting the individuals outlined on the list.

Though Oxford presented evidence regarding all employees lost to Integrity, Oxford only requested damages as to the non-management employees from the Joplin office of Oxford who left employment with Oxford and accepted employment with Integrity (Ex. P3). Using the training and recruitment costs outlined above, the total training and recruitment costs for such non-management employees of the Joplin office of Oxford who left employment with Oxford and accepted employment with Integrity is \$7,518.00. Oxford only requested as damages against Copeland one-half⁷ of that amount (*i.e.*, \$3,759.00).

As for lost clients, Mr. McGee also testified to lost income from all clients who requested their services be switched from Oxford to Integrity following the formation of

⁷ The other one-half was requested against Helms.

Integrity (Ex. P4). Again, Appellants did not present any evidence contradicting a single individual outlined on such list.

As to the amount lost from each client, Mr. McGee testified of the monthly revenue at the time of separation for each client, and, using a gross margin percent of 28%, showed an income loss to Oxford of \$505,176.50 based on the clients remaining on service with Oxford for the average length of service of 30 months (Ex. P4), and \$202,070.60 income loss if the clients had remained on service for 12 months (Ex. P5). However, Oxford did not request damages based on either a 30-month or 12-month expectation of continued services for each client lost to Integrity. Rather, in regard to clients lost to Integrity, Oxford only requested of the Trial Court damages against Copeland for the time her Certificate allowed Integrity to be in business with the Missouri Division of Aging (Ex. P6). Therefore, Oxford requested that the Trial Court assess damages to Oxford for lost clients against Copeland for the amount of income lost by Oxford to Integrity from February 2000 through July 3, 2000, in the total amount of \$29,334.21.

Accordingly, Oxford seeks in its cross-appeal to have reversed the Trial Court's refusal to award Oxford damages against Copeland.

V.

CONCLUSION

WHEREFORE, for the above-outlined reasons, Oxford respectfully requests that this Court affirm the Trial Court's finding of breach by Copeland and Helms of their Non-Compete Agreements with Oxford, reverse the Trial Court's refusal to issue damages against Copeland, issue a Judgment for damages against Copeland in the amount of \$33,093.21, and for any other relief the Court deems just and proper.

Respectfully submitted,

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Respondent/Cross-Appellant

Dated this 9th day of December, 2005.

**CERTIFICATION AS TO
RESPONDENT/CROSS-APPELLANT'S SUBSTITUTE BRIEF**

I, Rick E. Temple, hereby certify that the Respondent/Cross-Appellant's Substitute Brief being filed this date:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b); and
3. Contains 9,941 words.

I also certify that the disk copy of the Respondent/Cross-Appellant's Substitute Brief also being filed this date has been scanned for viruses and is virus-free.

Respectfully submitted,

LAW OFFICES OF RICK E. TEMPLE, LLC

By _____

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DATED: This 9th day of December, 2005.

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Substitute Brief of Respondent/Cross-Appellant was served on the following party, by U.S. mail, postage prepaid, on this 9th day of December, 2005, to wit:

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Rick E. Temple

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