

Supreme Court of Nebraska.

TERRY D. WHITTEN, D.D.S., P.C., doing business  
as Midlands Dental Center,  
Appellant,  
V.  
Terry MALCOLM, D.D.S., Appellee.

No. S-94-230.

Dec. 29, 1995.

Dental practice brought equitable action against former employee for injunctive relief restraining and prohibiting former employee from practicing dentistry within 25-mile radius of two cities for one year, and for damages from breach of contract. The District Court for Richardson County, Orville L. Coady, J., denied requested relief, and dental practice appealed. Removing case from Court of Appeals, the Supreme Court, Lanphier, J., held that: (1) practice had legitimate interest in protecting its existing client base from unfair competition from former employee who worked for practice as dentist, but (2) restriction was broader than was reasonably necessary to protect dental practice's legitimate interest in customer goodwill.

Affirmed.

West Headnotes

[\[1\] Appeal and Error](#)  [893\(2\)](#)  
[30k893\(2\) Most Cited Cases](#)

[\[1\] Appeal and Error](#)  [895\(2\)](#)  
[30k895\(2\) Most Cited Cases](#)

In appeal of equity action, appellate court tries factual questions de novo on the record and reaches conclusion independent of findings of trial court, provided, where credible evidence is in conflict on material issue of fact, appellate court considers and may give weight to fact that trial judge heard and observed witnesses and accepted one version of facts rather than another.

[\[2\] Contracts](#)  [176\(1\)](#)  
[95k176\(1\) Most Cited Cases](#)

When neither terms of contract nor facts and

circumstances demonstrating intent of parties are disputed, construction of contract is question of law.

[\[3\] Appeal and Error](#)  [842\(2\)](#)  
[30k842\(2\) Most Cited Cases](#)

When reviewing question of law, appellate court reaches conclusion independent of lower court's ruling.

[\[4\] Contracts](#)  [116\(1\)](#)  
[95k116\(1\) Most Cited Cases](#)

[\[4\] Contracts](#)  [116\(2\)](#)  
[95k116\(2\) Most Cited Cases](#)

To test validity of partial restraint on trade, such as covenant not to compete, court considers whether restriction is reasonable in sense that it is not injurious to public, it is no greater than reasonably necessary to protect employer in some legitimate interest, and not unduly harsh and oppressive on employee.

[\[5\] Contracts](#)  [116\(2\)](#)  
[95k116\(2\) Most Cited Cases](#)

Dental practice had legitimate interest in protecting its existing client base from unfair competition from former employee who worked for practice as dentist, supporting covenant not to compete, where dentist had opportunity to abscond with goodwill of practice in form of patients.

[\[6\] Contracts](#)  [116\(2\)](#)  
[95k116\(2\) Most Cited Cases](#)

Where employee has substantial personal contact with employer's customers, develops goodwill with those customers, and siphons away goodwill under circumstances where goodwill properly belongs to employer, employee's resultant competition is unfair, and employer has legitimate need for protection against employee's competition.

[\[7\] Contracts](#)  [116\(1\)](#)  
[95k116\(1\) Most Cited Cases](#)

As general rule, covenant not to compete may be valid only if it restricts former employee from working for or soliciting former employer's clients with whom former employee actually did business and has personal contact.

[\[8\] Contracts](#)  [117\(3\)](#)  
[95k117\(3\) Most Cited Cases](#)

Noncompetition clause that would restrict dental employee from soliciting or working with anyone in 25-mile radius of two separate cities, rather than just clients of dental practice with whom dental employee did business and had personal contact, was broader than was reasonably necessary to protect dental practice's legitimate interest in customer goodwill; dental employee did not treat every individual in area described in noncompetition clause, and agreement did not attempt in any way to limit itself to practice's existing client base.

[\[9\] Contracts](#)  [138\(1\)](#)  
[95k138\(1\) Most Cited Cases](#)

It is not function of courts to reform unreasonable covenants for purpose of making them enforceable.

**\*\*46** *Syllabus by the Court*

**\*48 1. Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

**2. Contracts: Intent.** When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law.

**3. Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

**4. Restrictive Covenants: Employer and Employee.** There are three considerations used to test the validity of a partial restraint on trade such as a covenant not to compete: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

**\*49 5. Restrictive Covenants: Employer and**

**Employee.** Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.

**6. Restrictive Covenants: Employer and Employee.** As a general rule, a covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients with whom the former employee actually did business and has personal contact.

**7. Restrictive Covenants: Courts: Reformation.** It is not the function of courts to reform unreasonable covenants for the purpose of making them enforceable.

[Richard L. Halbert](#) and [Michael R. Dunn](#), of Halbert & Dunn, Falls City, for appellant.

Gary F. Smolen, of Law Office of Eric W. Kruger, Omaha, for appellee.

WHITE, C.J., and CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY., LANPHIER, [WRIGHT](#), [CONNOLLY](#), and [GERRARD](#), JJ.

LANPHIER, Judge.

This is an equitable action brought by Terry D. Whitten, D.D.S., P.C., doing business as Midlands Dental Center (Whitten), appellant, to enforce the noncompetition **\*\*47** terms of an "Employment Agreement" with its former employee, Terry Malcolm, D.D.S., appellee. Whitten requested injunctive relief restraining and prohibiting Malcolm from practicing dentistry directly or indirectly within a 25-mile radius of Falls City, Nebraska, for a period of 1 year. Whitten also sought damages as a result of the alleged breach of contract. The trial court refused to grant the injunction or award damages. Whitten appealed. We removed this case from the Nebraska Court of Appeals' docket under our power to regulate the caseloads of the lower courts.

The only issue presented to this court is whether the noncompetition clause of the employment agreement

is enforceable. Upon a de novo review of the record, we find, as a matter of law, that unreasonable covenants are not enforceable and are not subject to reformation. We affirm.

#### \*50 BACKGROUND

Dr. Terry D. Whitten set up his own dental practice in his hometown of Falls City, Nebraska, in 1971. On June 1, 1991, Malcolm, a recent graduate of dental college, entered into an employment agreement with Whitten. Paragraph 12 of the employment agreement states:

In consideration of Employer's obligations under this Agreement, Employee agrees and hereby covenants that for one year following the termination of this Agreement, Employee shall not practice dentistry in any form or under any entity, within a 25 mile radius of Falls City, Nebraska and Sabetha, Kansas. The parties agree that the remedy at law for any breach of this Agreement is inadequate, and that Employer shall be entitled to injunctive and other appropriate remedial relief to enforce this covenant. The parties further agree that in the event a court should determine such restrictions to be unreasonable in any respect, it may modify such restrictions as necessary to make them reasonable.

Just prior to the end of the 2-year contract term, Malcolm informed Whitten that he was not going to enter into a new agreement and was going to practice with a competing dentist. On July 6, 1993, Malcolm began practicing with another dentist in Falls City.

On July 14, 1993, Whitten notified Malcolm that his actions were in violation of the terms of the employment agreement. This suit was filed.

#### ASSIGNMENTS OF ERROR

Whitten assigns as errors:

1. The trial court erred in denying the temporary injunction.
2. The trial court erred in denying the permanent injunction.
3. The trial court erred in failing to award damages to the Plaintiff- Appellant and against the Defendant-Appellee.
4. The trial court erred in its holding that the injunction should be denied based on the Defendant-Appellee's claim \*51 that the covenant attempts to restrict him from practicing and serving clients other than the clients of the Plaintiff-Appellant.

#### STANDARD OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. [City of Lincoln v. Townhouser, Inc.](#), 248 Neb. 399, 534 N.W.2d 756 (1995); [Walker v. Walker Enter.](#), 248 Neb. 120, 532 N.W.2d 324 (1995); [Winberg v. Cimfel](#), 248 Neb. 71, 532 N.W.2d 35 (1995); [University Place-Lincoln Assocs. v. Nelsen](#), 247 Neb. 761, 530 N.W.2d 241 (1995).

[2] When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law. [Vlasin v. Len Johnson & Co.](#), 235 Neb. 450, 455 N.W.2d 772 (1990); [Boisen v. Petersen Flying Serv.](#), 222 Neb. 239, 383 N.W.2d 29 (1986). See [Young v. Tate](#), 232 Neb. 915, 442 N.W.2d 865 (1989).

\*\*48 [3] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. [McCook Nat. Bank v. Bennett](#), 248 Neb. 567, 537 N.W.2d 353 (1995); [Dillard Dept. Stores v. Polinsky](#), 247 Neb. 821, 530 N.W.2d 637 (1995); [Eggers v. Rittscher](#), 247 Neb. 648, 529 N.W.2d 741 (1995).

#### ANALYSIS

[4][5][6] There are three considerations used to test the validity of a partial restraint on trade such as a covenant not to compete:

" "First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable \*52 in the sense that it is not unduly harsh and oppressive on the employee." "

[Vlasin](#), 235 Neb. at 453-54, 455 N.W.2d at 775-76. Accord, [Polly v. Ray D. Hilderman & Co.](#), 225 Neb. 662, 407 N.W.2d 751 (1987); [American Sec. Servs. v. Vodra](#), 222 Neb. 480, 385 N.W.2d 73 (1986). There is insufficient evidence in the record to adequately discuss the effect of the noncompetition

clause on the public; therefore, we turn to whether the restrictions in the covenant are no greater than are reasonably necessary to protect the employer in some legitimate interest.

In [Boisen, 222 Neb. at 245-46, 383 N.W.2d at 33](#), we stated:

Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.

The record shows that Malcolm had the opportunity to abscond with Whitten's goodwill in the form of patients. Therefore, Whitten has a legitimate interest in protecting its existing client base from unfair competition from a former employee. See, [Vlasin, supra; Polly, supra](#).

[7] As a general rule, a covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients with whom the former employee actually did business and has personal contact. [Polly, supra](#).

[8] Here, the covenant not to compete unconditionally prohibited Malcolm from practicing dentistry in any form under any entity for 1 year within a 25-mile radius of two separate cities in two separate states. The record reflects that Dr. Whitten did not treat every individual in the area described in the noncompetition clause. The employment agreement does not attempt in any way to limit itself to Whitten's existing client base.

Without deciding whether any other restriction in the covenant was reasonable or unreasonable, the clause would restrict Malcolm from soliciting or working with anyone in the \*53 described area, rather than just Whitten's clients with whom Malcolm did business and has personal contact. It is therefore broader than is reasonably necessary to protect Whitten's legitimate interest in customer goodwill. See [Vlasin, supra](#). By virtue of this overbreadth or overreaching, the clause is unreasonable and therefore unenforceable.

In so finding, it is not necessary to inquire whether the restriction is unduly harsh and oppressive on Malcolm. The only issue presented to this court was whether the restriction was valid. It is not.

[9] Finally, it is not the function of courts to reform unreasonable covenants for the purpose of making them enforceable. [Vlasin v. Len Johnson & Co., 235 Neb. 450, 455 N.W.2d 772 \(1990\)](#).

#### CONCLUSION

Because the covenant not to compete in the employment agreement is unreasonable and unenforceable, any claim by Whitten for damages allegedly arising from Malcolm's breach of the unenforceable covenant must be denied.

**\*\*49** The judgment of the district court is hereby affirmed.

AFFIRMED.

541 N.W.2d 45, 249 Neb. 48, 1996-1 Trade Cases P 71,321, 11 IER Cases 470

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