Employment Law–Restrictive Covenants–Non-Competes–Restraint of Trade –Foreign Law

MOTORSPORTS OF CONYERS, LLC et al. v. BURBACH, 317 Ga. 206, 892 S.E.2d 719 (2023)[1]

Decided by the SUPREME COURT OF GEORGIA on SEPTEMBER 6, 2023.[2]

Counsel for MOTORSPORTS OF CONYERS, LLC, Plaintiff–Appellant: KEVIN A. MAXIM, THE MAXIM LAW FIRM, ATLANTA, GEORGIA.[3]

Counsel for Burbach, Defendant–Appellee: K. PRABHAKER REDDY, THE REDDY LAW FIRM, P.C., SUWANEE, GEORGIA.[4]

Before Hon. Justice PINSON.[5] Opinion authored by Justice PINSON.[6]

KEY ISSUES PRESENTED

The main issues are whether the restrictive covenant, written with Florida law in mind, fits within the Georgia Restrictive Covenants Act and if not, would it be deemed contrary to public policy and unenforceable?[7]

PROCEDURAL HISTORY & POSTURE

Georgia courts generally honor the choice of law clauses presented within contracts, unless applying that law would violate the public policy of our State.[8] Typically, a choice of law clause within a contract, only violates

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[1] Motorsports of Conyers, LLC v. Burbach, 317 Ga. 206, 892 S.E.2d 719, (2023).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Motorsports of Conyers*, 317 Ga. 206.
[7] *Id*.
[8] *Id*.

public policy when the enforcement of the clause would directly challenge or contradict the statutes or judicial decisions of the forum state.[9] In the instant case, Appellants seek to have a restrictive covenant non-compete reconsidered as a violation against Georgia's public policy, by applying Florida law to enforce the restrictive covenant.[10] The Superior Court, Henry County, Judge Pandora Palmer, granted Motorsports of Conyers's motion for expedited temporary interlocutory injunction.[11] The Superior Court applied Florida law to determine whether the restrictive covenants were enforceable.[12] The Court of Appeals reversed.[13] The Georgia Supreme Court granted certiorari.[14]

SUBSTANTIVE FACTS

Edmund Burbach was hired in 2016 by a group of six Harley-Davidson dealerships with common ownership and promoted to Chief Operating Officer within that same year.[15] The common ownership was under Motorsports of Conyers, LLC d/b/a Falcons Fury Harley-Davidson and Motorsports of Durham, LLC d/b/a Raging Bull Harley-Davidson.[16] Upon promotion, Burbach executed employment agreements with both Falcons Fury and Raging Bull, both of which contained restrictive covenants containing non-compete clauses.[17] Laid out within these identical non-compete clauses were two limitations: (1) that during his employment and three years after, Burbach could not accept employment from any competitor within a 120 mile radius of any of the six dealerships, and (2) a choice of law clause stating that the agreements were governed by Florida law.[18] By December 2019, Burbach's employment came to an end and he began working with Preston Cycles West, LLC d/b/a Thunder Tower West Harley-

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[9] Bunker Hill Intern., Ltd. V. Nationsbuilder Ins. Services, Inc., 309 Ga. App. 503 (2011).
[10] *Motorsports of Conyers*, 317 Ga. 206.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Motorsports of Conyers*, 317 Ga. 206.
[17] *Id*.
[18] *Id*.

Davidson, a competitor of Falcons Fury and Raging Bull (together, "Motorsports") and located only 20 miles away from Falcons Fury.[19] Upon hearing of Burbach's employment, Motorsports asked him to stop working with Thunder Tower West in which Burbach declined to acquiesce to their request leading to Motorsports filing suit in the Superior Court of Henry County to enforce the restrictive covenants.[20]

LEGAL ANALYSIS LEADING TO THE COURT'S DISPOSITION

A. Prior Relevant Law

The tradition within Georgia law is that choice-of-law provisions should be upheld unless they are so "radically dissimilar" to Georgia law that it must uphold Georgia law in order to avoid violating Georgia's public policy.[21] Furthermore, the Georgia trend distinguishes between restrictive covenants as reasonable and those that are unreasonable.[22] Those that are reasonable are deemed as such due to the scope, duration, and geographic reach of the restrictive covenant and are enforceable.[23] Those confirmed unreasonable are classified as contracts "in general restraint of trade."[24] Under Georgia law, the contracts classified to be in general restraint of trade are "deemed contrary to public policy."[25] The Georgia legislature codified these principles in the Georgia Restrictive Covenants Act (GRCA).[26]In regards to a restrictive covenant within a contract bearing a choice-of-law clause that is foreign law, a court will examine the contract to first determine whether the restrictive covenant complies with the GRCA.[27] The choice-of-law provision will be honored if the restrictive covenant is reasonable under the GRCA.[28] Contrarily, deeming the restrictive covenant unreasonable will allow the court

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[19] *Id*.
[20] *Motorsports of Conyers*, 317 Ga. 206.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Motorsports of Conyers*, 317 Ga. 206.
[26] *Id*.
[27] *Id*.
[28] *Id*.

to apply Georgia law which includes a blue-penciling provision within the GRCA that allows the restrictive covenant to be enforced in part.[29]

B. Changes, Modifications, Clarifications, & Extensions to Georgia Law Made in Motorsports of Conyers, LLC et al. v. Burbach

The Supreme Court of Georgia ruled that the restrictive covenant could not be enforced based on Florida's law, even though their contract had a choice-of-law provision choosing the laws of Florida.[30] This decision by the court clarifies Georgia law by setting apart those non-compete restrictive covenants that would be based on the law of another state, if they would not be enforceable in Georgia.[31] This is due to the fact that Georgia courts will not apply the law of another state, despite a choice-of-law provision, if applying that law would violate Georgia public policy.[32] It follows that a Georgia court would not allow the law of another state to govern a restrictive covenant that a Georgia court would not enforce.[33] Effectively, the restrictive covenant must be shown to be enforceable under Georgia law before applying a choice-of-law provision that is in a contract.[34] Justice Pinson confirmed this point when he noted that if a restrictive covenant is against public policy according to Georgia law, then the court "couldn't possibly apply foreign law to enforce it because it would violate Georgia's public policy to do that."[35] Moreover, the restrictive covenant must comply with the GRCA, and if it is deemed unreasonable, it is deemed to be in violation of Georgia's public

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[29] *Id*.

[30] *Motorsports of Conyers*, 317 Ga. 206.

[31] Edward Wasmuth, Jr., *Georgia Courts Continue to Look to Georgia Law when Enforcing Covenants Not Compete*, SGR Blog (April 19, 2024, 2:20 PM), https://www.sgrlaw.com/georgia-courts-continue-to-look-to-georgia-law-when-enforcing-covenants-not-compete/.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] Benjamin I. Fink, *Restrictive Covenants: Is Your Noncompete Unenforceable? Part II*, BFV Perspectives, Noncompete & Trade Secrets (April 27, 2023), https://www.bfvlaw.com/restrictive-covenants-is-your-noncompete-unenforceable-part-ii/.

policy and thus cannot be enforced on the basis of a foreign choice of law provision.[36]

IMPACT UPON GEORGIA BUSINESS PRACTICES

Georgia companies and employees will be impacted as the share of workplaces with at least some employees subject to noncompete agreements is over fifty percent in the state of Georgia according to the Economic Policy Institute.[37] Furthermore, the share of workplaces of which the entirety of the employees are subject to non-compete agreements is over one third.[38] Large companies will have to be particularly careful when constructing and revising non-competes to avoid losing a highly paid executive to a direct competitor as a result of an unenforceable non-compete.[39] The Coca-Cola Company, as an example, is a large company headquartered in Atlanta, that implements Delaware law in their employment contracts.[40] Their choice of law provision within an employment agreement reads, "This Agreement is intended to be governed by the laws of the state of Delaware, without regard for any choice of law principles of any jurisdiction."[41]If Coca-Cola were to rely on Delaware's laws regarding non-competes, which could be more corporate friendly than Georgia's GRCA, and if deemed unenforceable then it could result in a former Coca-Cola executive working for a direct competitor.[42]

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[36] Jacob Gibson and Kathryn McConnell, *Georgia Courts May Not Apply Foreign Law to Restrictive Covenants That Do Not Comply with the Georgia Restrictive Covenants Act*, Littler (September 19, 2023), https://www.littler.com/publication-press/publication/georgia-courts-may-not-apply-foreign-law-restrictive-covenants-do-not.

[37] Alexander J.S. Colvin and Heidi Shierholz, *Noncompete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights*, Economic Policy Institute (December 10, 2019), https://www.epi.org/publication/noncompete-agreements/.

[38] *Id*.

[39] Employment Agreement Between Coca-Cola Enterprises, Inc. and John F. Brock, The U.S. Securities and Exchange Commission (Oct. 2010), https://www.sec.gov/Archives/edgar/data/1491675/000119312510225941/dex101.html.

[40] *Id*.

[41] *Id*.

[42] *Motorsports of Conyers*, 317 Ga. 206.

Issues for Small Businesses to Consider

Small businesses have the potential to be negatively impacted as well if a non-compete is deemed unenforceable, since there is often a smaller pool to choose from when recruiting new, well-experienced, executives for a position.[43] Non-compete agreements also help retain executives and employees which makes a company's investment worthwhile, from training to research and development and trade secrets.[44] For the employee to note, typically the choice of law provision and the non-competition restrictive covenant sections are not close together within the employment contract, so many reading their employment contracts may not think about the law that is governing their non-compete.[45] Accordingly, this type of restrictive covenant can be utterly cumbersome to those seeking new employment so knowing what to look for within their contracts and which law is governing can be a very useful tool.[46] Moreover, understanding how the governing law affects the non-compete is the most important facet, for the company and for the employee.[47] The issue for companies to consider while constructing and revising their non-competes is to be sure they effectively comply with Georgia law and not just the state that is designated within their foreign choice-of-law clause.[48]

Effectively, the law of Georgia regarding non-competes has not changed.[49] The core of Georgia law concerning contractual choice-of-law provisions rests on the court's conclusion that the choice of law provisions "will be enforced unless application of the chosen law would be contrary to the public policy or prejudicial to the interests of this state."[50]

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[43] Dane Stangler and Jason Wiens, *Impact of Noncompetes on U.S. Entrepreneurship and Competitiveness*, Bipartisan Policy Center (Jun. 28, 2023), https://bipartisanpolicy.org/blog/impact-noncompetes-us-entrepreneurship-competitiveness/.

[44] *Id*.

[45] Employment Agreement Between Coca-Cola Enterprises, Inc. and John F. Brock, *supra* note 38.

[46] *Id*.

[47] *Id*.

[48] *Motorsports of Conyers*, 317 Ga. 206.

[49] *Id*.

[50] *Id*.

Furthermore, "mere dissimilarities" between the law of another state and of Georgia's is not enough, but rather the law must be "so radically dissimilar to anything existing in our own system of jurisprudence that it would seriously contravene the policy embodied in Georgia law."[51]Moreover, Georgia has codified in OCGA § 13-8-53, what type of non competes and contracts are enforceable which include that "contracts in general restraint of trade" are against public policy and thus are unenforceable, while "contracts which restrict certain competitive activities, as provided in the GRCA," are enforceable.[52]

Striking a Balance Within the Law

Simply put, the law has been clarified to allow companies to better know what to look for when constructing or revising a noncompete.[53] The restrictive covenant must first satisfy the GRCA, which includes an analysis of whether the restrictions within the noncompete are reasonable in time, geographic area, and scope.[54] Companies would be prudent to review their existing noncompete to make sure they abide by the standards set out in the GRCA, especially those companies that have a foreign choice-of-law clause.[55] So long as the noncompete clause would meet the standards in the GRCA, specifically deemed "reasonable" in time, geographic reach and scope, then a court would "honor the choice-of-law provision and apply the foreign law to determine whether to enforce it…"[56] Once it is determined that a restrictive covenant would be upheld in a Georgia court, whatever foreign law is set forth within the choice-of-law provision will typically be upheld.[57] If the court determines that the noncompete is unreasonable under the GRCA, then it is deemed against public policy and it is unenforceable.[58] The court does have a way to partially enforce restrictive covenants through blue-penciling, which

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[51] *Id*.
[52] *Motorsports of Conyers*, 317 Ga. 206.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] Jacob Gibson and Kathryn McConnell, *supra* note 35.
[57] *Motorsports of Conyers*, 317 Ga. 206.
[58] *Id*.

"modifying the covenant and granting only the relief reasonably necessary to protect the legitimate business interests and achieve the parties intent to the extent possible."[59]

The bottom line is that Georgia companies need to be able to enforce their noncompete agreements, and employees need to know what to look for if they would like to attempt to have a noncompete deemed unenforceable.[60] Georgia has struck a balance between business competition and protection of business interests through the reasonableness standard that is achieved in the GRCA, which is vital to furthering the success and development of Georgia business.[61] Understanding this reasonableness on the restrictions on time, geographic reach, and scope as laid out within the GRCA is the key to keeping this balance.[62] By adhering to the law laid out within *Motorsports of Conyers*, striking the balance between competition and protecting business interests is vital to Georgia's business industry and effectively drafting noncompete will continue to help the legitimate business interests of our state.[63]

Prepared by: *Robert Alexander Warren*

[59] *Id*.
[60] *Id*.
[61] *Motorsports of Conyers*, 317 Ga. 206.
[62] *Id*.
[63] *Id*.