[Cite as *LCD Videography, L.L.C. v. Finomore*, 2010-Ohio-6571.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

LCD VIDEOGRAPHY, LLC,	:	**O P I N I O N**
Plaintiff-Appellant/ Cross-Appellee,	:	**CASE NO. 2009-L-147**
- vs -	:	
MARISA FINOMORE, et al.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 001225.

Judgment: Affirmed.

Keith R. Kraus and *Grant J. Keating*, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellant/Cross-Appellee).

Robert J. Vecchio, Robert J. Vecchio Co., L.P.A., 720 Leader Building, 526 Superior Avenue, East, Cleveland, OH 44114-1401 (For Defendants-Appellees/Cross-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant/Cross-Appellee LCD Videography, LLC ("LCD") appeals the judgment of the Lake County Court of Common Pleas denying its complaint for permanent and temporary injunctive relief against appellees/cross-appellants Marisa Finomore, et al. For the reasons discussed below, we affirm the decision of the trial court.

{¶2} From November of 2005 to December of 2007, appellee/cross-appellant Marisa Finomore ("Finamore") worked with LCD, an upper-echelon photography and videography company specializing in wedding shoots. During that time, Finamore was trained in photography by LCD's owners and employees. Her work duty primarily included assisting in photographing weddings for the company. Prior to her employment at LCD, Finamore had no experience in the field of professional photography. Over the two-year period she was with LCD, Finamore's photography skills were honed by LCD staff. She also received formal training through photography classes and workshops at LCD's expense. While in LCD's offices, Finamore was paid an hourly rate; when she shot weddings, she was paid a pre-established sum per event.

{¶3} From February of 2007 to October or November of 2007, appellee/cross-appellant Nathan Migal ("Migal") also worked with LCD. Migal was an experienced photographer who had previously owned a small photography business in which he shot individual portraits as well as formal events such as weddings. Similar to Finamore, Migal was paid hourly when he was in LCD's offices and per event when he shot weddings.

{¶4} By way of company policy, LCD required its employees to sign a "Non-Compete, Non-Solicitation, and Confidentiality Agreement," which read:

{¶5} "The undersigned, employee of LCD VIDEOGRAPHY & PHOTOGRAPHY, for and in consideration of his/her hiring and/or continuation of employment, agrees that for a period of one year following the termination of employment with LCD *** for any reason:

{¶6} "1. He/she shall not own, manage, advise, control or participate in the ownership, management or control of a videography and photography company or similar business with an office located within seventy-five (75) miles of 8500 Station Street, Mentor, Ohio 444060, or 20525 Center Ridge Road, Rocky River, Ohio, 44116.

{¶7} "2. Be employed or engaged by or otherwise affiliated or associated with as a consultant, independent contractor or otherwise, or receive compensation or financial benefit from any other corporation, partnership, proprietorship, firm, association or other business entity engaged in the business of or otherwise engage herself [sic] in the business of a videography and photography or similar business with an office located within seventy-five (75) miles of the addresses listed above.

{¶8} "3. Solicit, recruit or induce any employee of LCD *** to terminate his/her relationship/employment with LCD ***.

{¶9} "4. Solicit, recruit or induce any customer of LCD *** to terminate its business with LCD *** and or to do business with any other videography and photography company or similar business.

{¶10} "The undersigned employee during his/her employment and following the termination of his/her employment with LCD *** for any reason agrees that he/she will not disclose to anyone or use in any other business any confidential information or material of LCD *** or any information or material received in confidence during his/her employment with LCD ***.

{¶11} "Customers, customer lists, independent representatives, suppliers, sub-contractors, marketing or business plans, documents and forms, fee schedules, pricing, financial information, business contact information, internal policies, goals, projections,

personnel matters including the identity, expertise or job responsibilities, forms, documents and other similar information and/or items is considered proprietary and confidential."

{¶12} Both Finamore and Migal signed the above agreement, Finamore, in February of 2006, and Migal, in February of 2007.

{¶13} In late 2007, both Finamore and Migal resigned from LCD due to, what they described as, a hostile work environment. At the time of their departures, both Finamore and Migal were designated as independent contractors of LCD. After their respective resignations, the duo began booking wedding shoots, doing business as Imogen Photography. They set up a website and included portfolios of their work. These portfolios were made up, in large part, of photographs both Finamore and Migal shot when working with LCD.

{¶14} In March of 2008, Finamore and Migal attended a photography trade show in Las Vegas, Nevada. At the show, they encountered David Cartee and Lauren Petrella, LCD's owners. The parties engaged in a brief, ostensibly friendly conversation then parted ways. Subsequent to this encounter, however, on April 10, 2008, LCD filed suit in the Lake County Court of Common Pleas alleging, inter alia, Finamore and Migal had breached the non-compete agreement. As LCD claimed it suffered irreparable harm for which there was no adequate remedy at law, it sought to have the agreement enforced by way of injunctive relief.

{¶15} At the hearing, Finamore testified that, while working with LCD, she had made digital copies of a collection of images she shot. After her resignation, she then used many of these images to make a digital portfolio, part of which she posted on

Imogen's website. She testified that it was her understanding that a subcontracting photographer owned the rights to the images he or she shot. She therefore believed she was doing nothing wrong in copying the images to use for her own purposes. Finamore testified that, although Imogen had shot several weddings at the time of the hearing and had additional weddings booked for the future, Imogen did not actively advertise its services. According to Finamore, Imogen primarily realized business through family, friends, and word-of-mouth referrals. Finamore testified that, while she works as a dance instructor and at a bar, she would be unable to meet her living expenses if the injunction were granted. Moreover, she opined, the public would be harmed if Imogen were enjoined from conducting its business because it would be unable to shoot upcoming, previously-booked weddings. She elaborated:

{¶16} "*** [P]eople book wedding photographers a year out, sometimes more than that. So for them to have to scramble and find a photographer at the last minute, within a couple weeks, they would be struggling hardcore to find someone."

{¶17} Migal testified his employment at LCD commenced when he was approached by David Cartee, part-owner of LCD. Migal stated that, even though he would be acting as a photographer for LCD, Cartee gave him verbal permission to shoot weddings for friends and family "on the side." Migal admitted he kept personal copies of many images he shot while working for LCD and used these images, like Finamore, to create a portfolio which he posted on Imogen's website. Although many of the images on Imogen's website were shot for LCD, Migal testified he had never used LCD's name to gain business for Imogen. He further stated that after leaving LCD, he has neither contacted any LCD clients nor done anything to undermine LCD's business. He further

stated that, given Imogen's lack of advertising and LCD's overall notoriety, it was his view that Imogen does not realistically compete with LCD. Migal testified:

{¶18} "[U]nless [a bride] knows us, Marisa or myself, personally, [she] is never going to hear of us. So there's really no - - They're not choosing between Imogen and LCD. The only people that are going with us are people that I've met or Marisa has met or run into, saying, Oh, I like Nathan or, I like Marisa. I'd like to use them for my wedding. They're not looking and comparing photographers. They're like, I'm gonna use these guys 'cause they're my friends."

{¶19} At the time of the hearing, the evidence revealed Finamore and Migal, d.b.a. Imogen, photographed four weddings. While three of these weddings were booked due to acquaintanceships they established while shooting weddings for LCD, the evidence demonstrated that 11 others (ten of which had not yet taken place) involved weddings for either family members or friends.

{¶20} Finally, like Finamore, Migal attested that he would be unable to meet his financial obligations if Imogen was enjoined from doing business.

{¶21} Cartee testified LCD is a company which he and his wife, Lauren Petrella have operated for seven years. LCD employed six people and photographed between 100-110 weddings per year. He testified that LCD concentrates on shooting "high-end" weddings and, given its "privileged" clientele, LCD has photographed weddings "all over the world." To maintain its business volume, Cartee testified LCD advertises on the internet and purchases ads in various bridal magazines. He also stated LCD runs booths at several wedding trade shows throughout the year.

{¶22} With respect to the purpose of the non-compete agreement LCD required its employees to sign, Cartee testified:

{¶23} "[W]e had hired other photographers in the past, and we had brought them in and trained them, and then they have went out to compete against us. Therefore, we just couldn't keep affording to do business that way, so we went to an attorney, had the paperwork drawn up. And in order for any other photographer to work for us from that point on, they had to know exactly what it was and sign it, or they wouldn't have worked for us."

{¶24} Cartee testified that when hiring photographers, it typically invested time and resources into their training. In order to protect LCD's investment as well as its general business interests, he and Patrella believed the non-compete agreement was necessary.

{¶25} Cartee further testified that, despite their personal beliefs, neither Migal nor Finamore were authorized to copy LCD's images; rather, he stated LCD owns the copyrights to all images taken by its photographers and all contracts into which LCD enters reflects the ownership rights. Cartee further disputed Migal's claim that he gave Migal personal permission to do side work while working for LCD and testified he was unaware Migal did any side work while a photographer with LCD.

{¶26} When asked to testify what harm LCD would suffer if the non-compete agreement was not enforced against Finamore and Migal, d.b.a., Imogen, he observed:

{¶27} "Well, they've already contacted and they've already been in touch with several of our people, *** feeders, as far as florists, and different hotels and things like that, as well. Absolutely, it possibly has the potential to take business away from LCD."

{¶28} Despite Cartee's concerns, however, he conceded:

{¶29} "As far as taking weddings away from us this year and everything, they probably haven't harmed our company, no"

{¶30} Finally, Patrella testified she was part-owner and president of LCD. Her testimony echoed much of Cartee's relating to the volume and success of LCD's business and its modes of advertisement. When asked how, in her view, Finamore and Migal continuing to photograph weddings would irreparably harm LCD, she opined LCD would lose "leads" for future wedding events. When pressed to quantify the leads she believed LCD had lost (or would lose) due to Imogen's activity, she alleged, absent Imogen's competition, LCD could have shot a wedding for "a girl at the Renaissance's cousin." Patrella, however, conceded that she could not be sure LCD would have landed the job if Imogen was not in business.

{¶31} After considering the evidence, the trial court denied LCD's complaint for injunctive relief. In a detailed judgment entry, the trial court succinctly identified the issues it was required to consider in order to reach its ultimate conclusion:

{¶32} "(1) Whether the defendants were employees of, or independent contractors working with, the plaintiff; (2) If the defendants were independent contractors, whether the non-competition, non-solicitation, and confidentiality agreements were nonetheless applicable to and binding upon them; (3) If so, or if the defendants were employees of the plaintiff, whether the non-compete, non-soliciation [and] confidentiality agreements were reasonable, valid, and enforceable; (4) If so, whether the defendants violated the non-compete, non-solicitation [and] confidentiality agreements; (5) If so, whether the non-compete, non-solicitation [and] confidentiality

agreements entitle the plaintiff to protection; (6) If so, whether irreparable injury will be done to plaintiff should defendant not be enjoined and whether there is no adequate remedy at law; and (7) If so, what remedy should be imposed."

{¶33} After setting forth the relevant legal principles, the trial court concluded that, regardless of their designation as independent contractors, Finamore and Migal were employees and therefore, the non-compete agreement was effective against them. The court next concluded that the non-compete agreements were a valid contract between LCD and Finamore and Migal supported by requisite consideration. The court further determined the evidence at trial demonstrated LCD had legitimate interests to protect in requiring its employees to enter the non-compete agreement. Thus, the court found, the agreement, if reasonable, could be enforceable against employees who were found in breach. Next, the trial court determined, given the evidence presented at trial, that Finamore and Migal violated the non-compete agreement by opening their own photography business shortly after terminating their relationship with LCD.

{¶34} Finally, the court considered whether LCD was entitled to the protection of injunctive relief. In answering this question in the negative, the court determined that, while LCD was likely to succeed on the merits, it failed to establish irreparable harm. The court further observed that the harm of enjoining Finamore and Migal from conducting business outweighed the potential injury LCD would suffer from denying the injunction. Finally, the court concluded the public interest would not be served by granting injunctive relief. Given the foregoing considerations, the court determined LCD did not establish an entitlement to injunctive relief and thus it was unnecessary for the court to address the issue of remedy.

{¶35} After the order was filed, LCD moved to voluntarily dismiss its remaining monetary claims pursuant to Civ.R. 41(A)(2) on September 22, 2009. On September 30, 2009, Finamore and Migal opposed the motion. On the same date, however, the trial court entered judgment granting LCD's motion. On October 28, 2009, LCD filed its notice of appeal of the trial court's entry denying injunctive relief. On November 9, 2009, Finamore and Migal filed their notice of cross-appeal from the same entry. As its disposition is pivotal to the propriety of this appeal, we shall first address Finamore's and Migal's fourth assignment of error on cross-appeal. It provides:

{¶36} "The trial court abused its discretion by granting appellant's motion to dismiss pursuant to Rule 41(A)(2) when a Rule 41(A)(1)(a) voluntary dismissal was available."

{¶37} Civ.R. 41(A)(2) allows for voluntary dismissal of claims by order of the court. It provides, in relevant part, that "*** a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper." Id.

{¶38} Finamore and Migal assert the trial court abused its discretion when it granted LCD's dismissal because it approved its motion without setting any "terms or conditions." They assert the trial court's action was unreasonable because LCD's motion was filed a mere two weeks before trial on the merits of its remaining claims. In granting the motion, Finamore and Migal allege the court's ruling permits LCD to argue and appeal its claims in a fragmented fashion contrary to policies favoring judicial economy. Had LCD wished to dismiss, Finamore and Migal argue it should have

availed itself to Civ.R. 41(A)(1)(a), i.e., a dismissal without order of the court. We disagree.

{¶39} Initially, Civ.R.41(A)(1)(a) states that "a plaintiff without order of court, may dismiss *all claims* asserted by that plaintiff against a defendant by *** filing a notice of dismissal at any time before the commencement of trial ***." The Supreme Court of Ohio has held that Civ.R. 41(A)(1)(a) cannot be used to create a final appealable order when a trial court has resolved some, but not all, claims in a case. *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 145, 2008-Ohio-5276. Thus, given the plain language of the rule and the holding in *Pattison*, LCD could not have dismissed the remaining claims by means of Civ.R. 41(A)(1)(a).

{¶40} That said, we acknowledge the Court's ruling in *Pattison* was premised, in part, on legal policy disfavoring piecemeal litigation and piecemeal appeals. We also acknowledge that, viewed on its face, the trial court's order granting LCD's Civ.R. 41(A)(2) motion seems to undermine this policy. Unlike the language of Civ.R. 41(A)(1)(a), however, the language Civ.R. 41(A)(2) expressly gives a trial court the authority to dismiss "a claim" if the court deems the motion proper. By implication, the court, acting as a gatekeeper under Civ.R. 41(A)(2), may enter a judgment of dismissal on some, but not all, causes of action if the plaintiff sets forth persuasive reasons justifying such action. While the rule announced in *Pattison* was based, in part, on judicial economy, it was also grounded in the plain language of Civ.R. 41(A)(1)(a). The language of Civ.R. 41(A)(2), on the other hand, gives a trial judge the discretion to weigh policy considerations disfavoring fragmentary litigation, against the arguments asserted by a plaintiff in favor granting a dismissal of less than all of his or her claims.

{¶41} Here, LCD's motion to dismiss its remaining claims asserted:

{¶42} "Plaintiff wishes to pursue an appeal of the [order denying injunctive relief.] In order to facilitate an appeal of that decision on the most cost effective basis, Plaintiff offered to Defendant[s] to waive its upcoming jury trial, and have the Court adjudicate all the remaining pending claims based on the evidence it already heard ***. Defendant[s] [were] unwilling to agree to that offer."

{¶43} The court granted the motion and dismissed the remaining claims without prejudice. Even though the court did not attach any specific terms and conditions to the entry, this only indicates it did not consider it appropriate to do so. Nothing in Civ.R. 41(A)(2) indicates a court must make its judgment of dismissal dependent upon the satisfaction of terms and conditions; the rule simply states that a court may enter a judgment of dismissal and condition the judgment upon terms it deems proper. Under the circumstances of this case, we believe the court's decision granting LCD's Civ.R. 41(A)(2) was a reasonable exercise of its authority. We therefore hold the court did not abuse its discretion.

{¶44} Finamore's and Migal's fourth assignment of error on cross-appeal is without merit.

{¶45} We shall next address LCD's sole assignment of error. It provides:

{¶46} "The trial court erred to the prejudice of Appellant by failing to enforce the written non-compete agreement."

{¶47} Under its sole assignment of error, LCD claims the trial court erred in failing to grant injunctive relief after ruling the non-compete agreement was enforceable and breached by Finamore and Migal.

{¶48} We initially point out that the evidence LCD offered in support of its claim for breach of the non-compete agreement is separate from its claim for injunctive relief. Even if LCD established, by a preponderance of the evidence, that Finamore and Migal breached the non-compete, injunctive relief, as an equitable remedy, is appropriate only if the movant demonstrates that immediate and irreparable injury, loss or damage will result without the relief and that no adequate remedy at law exists. See, e.g., *Jaussen v. Fleming* (May 12, 1995), 11th Dist. No. 93-T-4973, 1995 Ohio App. LEXIS 1998, *4; c.f. *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 378, 2002-Ohio-2427 (in which the Supreme Court of Ohio contrasted equitable injunctive relief with statutory injunctive relief, holding: where a statute grants the remedy of an injunction, the movant need not show that irreparable injury is about to occur for which he has no adequate remedy at law, unless the statute specifies that the common law requirements for an injunction are applicable. Id. at 378).

{¶49} That said, "[t]he purpose of an injunction is to prevent a future injury, not to redress past wrongs." *Lemley v. Stevenson* (1995), 104 Ohio App.3d 126, 136, see, also, *State ex rel. Great Lakes College, Inc. v. State Medical Bd.* (1972), 29 Ohio St.2d 198. To establish a claim for injunctive relief, a plaintiff must show, by clear and convincing evidence: (1) the likelihood of success on the merits; (2) granting the injunction will prevent irreparable harm; (3) the potential injury that may be suffered by the defendant will not outweigh the potential injury suffered by the plaintiff if the injunction is not granted; and (4) whether the public interest will be served by the granting of the injunction. *Cleveland v. Cleveland Electric Illuminating Co.* (1996) 115 Ohio App.3d 1, 12.

{¶50} Clear and convincing evidence is defined as:

{¶51} "*** that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." (Emphasis omitted.) *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶52} In considering the propriety of awarding an injunction, a court must balance and weigh the evidence with the flexibility traditionally characterizing the law of equity. *Cleveland Electric Illuminating, Co.*, supra, at 14; see, also, *Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.* (1994), 93 Ohio App.3d 407, 418.

{¶53} The issuance of an injunction lies within the trial court's sound discretion and depends on the facts and circumstances surrounding the particular case. *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, syllabus. Hence, a trial court's denial of injunctive relief will not be disturbed on appeal absent a finding of abuse of discretion**.** See Id., at 125. A trial court abuses its discretion when its judgment neither comports with reason nor the record of the case under review. See, e.g., *Letson v. McCardle*, 11th Dist. No. 2009-T-0122, 2010-Ohio-3681, at ¶21.

{¶54} LCD first asserts the trial court abused its discretion because it proved, by clear and convincing evidence, it suffered irreparable harm from Finamore's and Migal's breach of the non-compete agreement. We do not agree.

{¶55} An irreparable injury is an injury that cannot be redressed via monetary damages or an adequate remedy at law. See, e.g., *Cleveland Electric Illuminating, Co.*,

supra, at 12. In support of its conclusion that LCD failed to establish, by clear and convincing evidence, that it will suffer irreparable harm if an injunction is not granted, the trial court determined:

{¶56} "The defendants, although engaging in the business of photography, are not competitive on the same scale as plaintiffs. The plaintiffs photograph large-scale weddings around the globe. The defendants' shoots have resulted primarily from referrals from family and friends, and have consisted of much smaller-scale events. Additionally, although the plaintiffs allege that they lost leads and/or events as a result of the defendants' actions, the plaintiff presented no evidence of what or how many leads or events have been lost. The plaintiff also alleges that it could potentially lose business as a result of the defendants' actions, but this alleged harm is speculative. The plaintiff also alleges that the defendants have used the plaintiffs images, but these damages can be adequately compensated with a remedy at law."

{¶57} The foregoing findings are supported by the evidence. The parties are in the same industry and their respective principal places of business are in roughly the same geographical region; thus, Finamore and Migal, d.b.a., Imogen, are indeed competitors of LCD. The former, however, is relatively unknown in the industry while the latter is, using Cartee's metaphor, in the "major leagues." LCD advertises extensively and has been booked for weddings both nationally and internationally. Testimony demonstrated that although Imogen has a website, it does not otherwise engage in commercial advertisement. And, of the 14 weddings Finamore and Migal have booked, 11 were a result of word-of-mouth referrals from either family or friends. Competition is a relative term. Even though Finamore and Migal are competing in the

marketplace, the evidence did not indicate they would meaningfully, let alone regularly, compete with LCD for the same events.

{¶58} In addition, Cartee's and Petrella's testimony failed to establish LCD experienced irreparable harm or the threat thereof. Cartee specifically testified that, as of the hearing, Finamore and Migal had not taken any actual business from LCD. Although he opined LCD could lose future leads, he did not substantiate his speculation with any evidence. Further, Cartee alleged (without supportive evidence) that Finamore and Migal had contacted business "feeders," but ultimately conceded that LCD had not suffered any ill-effects from the alleged contact. Similarly, Petrella claimed that Finamore and Migal had taken sales leads from LCD's computer system (without supportive evidence), but was unable to identify which supposed leads were allegedly pilfered.

{¶59} The so-called harm or threat of harm alleged by Cartee and Patrella was merely speculative or conjectural. In an action for injunctive relief, the moving party "must show that irreparable injury has been done or that the threat of injury is immediate or impending." *Portage Cty. Bd. Of Comm'rs v. Akron*, 156 Ohio App.3d 657, 703, 2004-Ohio-1665, citing, *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 937. The moving party must do more than make conclusory allegations about irreparable harm or the threat of the same. *Aero Fulfillment Services, Inc. v. Tartar*, 1st Dist. No. C-060071, 2007-Ohio-174, at ¶26. In short, the movant must offer independent evidence to support its allegations of harm. Id. Without such a requirement, "*** injunctions could be granted with little or no showing of a possibility of irreparable harm." Id. Cartee's and Patrella's testimony

regarding the harm LCD has or will suffer, failed to meet these standards. We therefore hold the trial court did not abuse its discretion when it found LCD failed to establish irreparable harm or the threat of the same.

{¶60} LCD next argues that, even if it failed to establish irreparable harm or its threat, such proof was not required to enforce the non-compete agreement. We disagree.

{¶61} The trial court concluded in its judgment entry that the non-compete agreement was a valid contract, i.e., there was evidence of an offer and acceptance which was supported by valid consideration. *Norsoski v. Fallet* (1982), 2 Ohio St.3d 77, 79. The court further found Finamore and Migal violated the agreement. After considering the necessary factors for injunctive relief, however, the court concluded LCD was not entitled to the protection set forth in the agreement. LCD asserts the trial court committed error in drawing its final conclusion because it failed to give adequate weight to the strength of its case on the merits. LCD points out that in cases where a party seeks injunctive relief, courts have held that the degree of irreparable harm a moving party must show varies inversely with the likelihood of its success on the merits. See, e.g., *Cleveland Electric Illuminating, Co.*, supra. Accordingly, LCD asserts the trial court erred in denying their claim as the harm they identified was sufficient in light of the strong likelihood of its success on the merits. We disagree.

{¶62} As discussed above, LCD failed to provide any specific evidence that they were harmed or would be harmed in the future by Finamore's and Migal's business. While the quantum of proof necessary to establish irreparable harm may concomitantly

decrease as the likelihood of a movant's success on the merits increases, LCD offered no compelling evidence of irreparable harm.

{¶63} Moreover, the court's determination that LCD failed to establish irreparable harm was not the only basis for denying the injunction. In further support of its conclusion, the court determined that "the harm to the defendants if an injunction is granted outweighs the potential injury to the plaintiff if the injunction is not granted." The court found "*** the covenants severely impair the defendants' ability to make a living in photography while providing little likely benefit to the plaintiff as the plaintiff is not able to establish any significant harm resulting from the defendants' activities, and any such harm is compensable monetarily." Finally, the court concluded "that the public interest will not be served by granting an injunction." The court properly noted that a non-compete clause in an employment contract is a restrictive covenant which the law disfavors. In light of this policy, the court underscored the public's interest in preserving competition to the consuming public outweighs the purported benefits LCD would receive if Finamore and Migal were enjoined from doing business.

{¶64} In addition to the policy considerations identified by the trial court, the record also indicates that the public could be actually harmed if the injunction were granted because Finamore and Migal would be unable to perform contracts into which they have already entered. Granting LCD's complaint for injunction would ultimately leave prospective brides and grooms without a photographer at the eleventh hour thereby compromising the interests of innocent consumers. As the record supports the court's findings and conclusions, we hold its decision overruling LCD's complaint for injunctive relief was not an abuse of discretion.

{¶65} LCD's sole assignment of error is overruled.

{¶66} On cross-appeal, Finamore and Migal assert three additional assignments of error challenging the validity and applicability of the non-compete agreement. Our resolution of LCD's appeal demonstrates Finamore and Migal suffered no prejudice from the trial court's ruling. Without some clear harm suffered by Finamore and Migal, the trial court's rulings vis-à-vis the non-compete agreement are of no ostensible legal consequence. Viewed in the context of the controversy at-large, however, the issues raised by Finamore and Migal on cross-appeal have some practical effect upon the legal relationship of the parties. That is, the rulings related to the substance of the non-compete agreement may be germane to future proceedings if LCD chooses to file a new complaint. Thus, the assignments of error on cross-appeal are of some consequence and cannot be deemed "purely academic." See, e.g., *Wagner v. City of Cleveland* (1988), 62 Ohio App.3d 8, 13.

{¶67} For ease of discussion, Finamore's and Migal's assignments of error on cross appeal will be considered out of order. Their third assignment of error asserts:

{¶68} "The trial court's determination that Appellees were employees of Appellant's business was against the manifest weight of the evidence because the Appellees were independent contractors and the agreement only pertained to employees."

{¶69} An individual's status as an employee or an independent contractor is ordinarily an issue of fact**.** *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 145-146. When the evidence is not in conflict, however, the question of whether a person is an

employee or an independent contractor is a matter of law to be decided by the court. Id. at 146.

{¶70} "The principal feature which distinguishes the relationship of employer and employee from that of employer and independent contractor is the right to control the means or manner of doing the work. If the employer has this right to control**,** the worker is his employee. However, if the employer is merely interested in the result and does not retain the right to direct the manner in which the work is completed, the relationship is that of employer and independent contractor." *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, 49, citing *Councell v. Douglas* (1955), 163 Ohio St. 292, paragraph one of the syllabus.

{¶71} In this case, there was little factual dispute about the parties' relationship. All agreed that Finamore and Migal were designated "independent contractors" for tax purposes. They agreed Finamore and Migal were paid hourly when working at LCD offices and per event when out of the offices. Further, it was not disputed that all events photographed for LCD were arranged through LCD and LCD directed photographers such as Finamore and Migal where to be, what time to arrive, and what to shoot.

{¶72} The evidence further established that LCD furnished all equipment for its shoots. Although Finamore had her own camera, Cartee testified she was not "supposed to use it for weddings." Cartee also testified Migal periodically used one of his lenses, but always used an LCD camera. The record established LCD paid for both Finamore and Migal to attend photography workshops in advancement of their training. Finally, from the time they started at LCD until their respective resignation, neither

Finamore nor Migal rendered photography services for another company.[1] Given this evidence, we hold LCD retained the right to control the means and manner of how Finamore and Migal did their work while with LCD. Although they were designated as independent contractors, the functional nature of Finamore's and Migal's relationship with LCD matches that of an employee-employer. Thus, we hold the trial court did not err in ruling Finamore and Migal were employees of LCD.

{¶73} Their third assignment of error is overruled.

{¶74} Their first assignment of error asserts:

{¶75} "The trial court's decision finding that Appellees violated the non-competition agreement was against the manifest weight of the evidence and an abuse of discretion as Appellees were not competing with Appellant."

{¶76} Under the civil manifest-weight-of-the-evidence standard, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court ***." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus

{¶77} At the hearing, the evidence established that Finamore and Migal, d.b.a., Imogen, began shooting weddings in May of 2008, between five and six months after their resignations from LCD. The non-compete agreement which they signed prohibited them from owning, managing, controlling, participating in the ownership, management or control of a photography company or similar business with an office located within 75 miles of LCD's offices.

1. Migal testified he shot several "side jobs" for friends and family while employed by LCD and alleged Cartee permitted him to do so. Even though Cartee disputes giving permission, the evidence that permission was sought indicates LCD enjoyed control over Migal's actions as a photographer.

{¶78} Finamore and Migal assert there are many important disparities between Imogen and LCD, e.g., LCD's notoriety, status, and resources. Given these qualitative differences, Finamore and Migal contend that Imogen could never realistically compete with LCD for the same weddings. They may be right. Nevetheless, the non-compete agreement into which Finamore and Migal entered does not afford employees a "safe-harbor" which would allow them to enter into the photography marketplace so long as they are not "seriously" competing with LCD for the same clients. Viewing Finamore's and Migal's actions in conjunction with the clear and unambiguous language of the agreement, we hold the trial court did not err in concluding the agreement was breached.

{¶79} Finamore's and Migal's first assignment of error on cross-appeal is overruled.

{¶80} Their second assignment of error on cross-appeal alleges:

{¶81} "The trial court erred as a matter of law by assuming that the non-competition agreement was reasonable, valid and enforceable."

{¶82} Under their second assignment of error on cross-appeal, Finamore and Migal argue the trial court committed reversible error when it assumed, for purposes of its analysis of whether LCD was entitled to injunctive relief, the restrictive covenant was reasonable, valid, and enforceable. We disagree.

{¶83} In its judgment entry, the trial court stated:

{¶84} "*** the plaintiff invested time and money into developing the defendants' skills, the defendants possessed confidential information, and therefore, the plaintiff has a legitimate interest to protect. Because the employer has a legitimate interest to

protect, the court need not address the reasonableness of the restriction at this time because a covenant not to compete which is unreasonable will be enforced to the extent necessary to protect the employer's legitimate interests. [*Rogers v. Runfola & Associates, Inc.* (1991), 57 Ohio St.3d 5, 8.] Thus, for purposes of determining whether the defendants have violated the restrictive covenants, the court can assume, for purposes of argument, that the restriction is reasonable or can nonetheless be enforced to the extent that it is reasonable."

{¶85} In light of this assumption, the court proceeded to analyze whether LCD clearly and convincingly established its claim for injunctive relief.

{¶86} A careful reading of the trial court's judgment entry reveals that it did not actually adjudicate the issue of the reasonableness of the restriction contained within the non-compete agreement. Rather, it merely determined LCD possessed legitimate interests to protect in requiring its employees to sign the restrictive covenant. Accordingly, in the interest of reaching the merits of LCD's claim for injunctive relief, the court simply assumed the restriction could be enforced *to the extent it was reasonable*. In *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, at paragraph one of the syllabus, the Supreme Court of Ohio held:

{¶87} "*** A covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests. ***"

{¶88} Here, the court did not consider or specifically rule upon the reasonableness of the restraints contained in the agreement. In order for a controversy to be justiciable or subject to judicial resolution, it must be ripe for review. *R.A.S.*

Entertainment, Inc. v. Cleveland (1998), 130 Ohio App.3d 125, 129. Because the issue of the reasonableness of the restrictive covenant was not resolved at the injunction hearing, but merely assumed for purposes of advancing the court's analysis, Finamore's and Migal's assignment of error is not, at this point, ripe for review.

{¶89} Their second assignment of error is overruled.

{¶90} For the reasons discussed in this opinion, LCD's sole assignment of error is overruled. Furthermore, Finamore's and Migal's four assignments of error on cross-appeal are overruled. The judgment of the Lake County Court of Common Pleas is therefore affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

TIMOTHY P. CANNON, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

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TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶91} I respectfully concur in part and dissent in part with the opinion of the majority. Failure to enforce the terms of the covenant not to compete in this case puts at risk enforcement of *any* covenant not to compete.

{¶92} Appellant claims that appellees have improperly used or converted trade secrets obtained while employed with appellant. Appellant should be entitled to pursue this claim and have it enforced by means of injunction. The record provides support for the fact that appellant took measures to protect certain information from becoming

general public knowledge and evidence that appellees used this information. Even though no prior written agreement is needed to enforce a violation of Ohio's trade secret laws, in this case there *is* a written agreement that spells out the obligations of the parties beyond the provisions of the Ohio Revised Code. The parties enumerated a full litany of information that they agreed would be considered "proprietary and confidential."

{¶93} "The question whether a particular knowledge or process is a trade secret is one of fact to be determined by the trier of fact on the greater weight of the evidence." *Aero Fulfillment Servs., Inc. v. Tartar*, 1st Dist. No. C-060071, 2007-Ohio-174, at ¶40. (Citation omitted.) In this case, the evidence presented is sufficient to conclude that the divulged information was a trade secret. Also, there is no question concerning the validity of the "Non-Compete, Non-Solicitation and Confidentiality Agreement." The trial court further found that appellees violated the non-compete agreement.

{¶94} Most significant is the *enforcement* of the "Non-Compete, Non-Solicitation and Confidentiality Agreement." The trial court made specific factual findings that "plaintiff invested time and money into developing the defendants' skills, the defendants possessed confidential information, and therefore, the plaintiff has a legitimate interest to protect." Restraining or enjoining appellees from violating the agreement would not cause them any harm, as they would be bound only by their valid obligations. The breach of a valid obligation is clearly harm. The question is whether it is irreparable, and, then, who should properly bear the burden of proof on that issue.

{¶95} In assessing appellant's request for injunctive relief, the trial court found that although appellees engaged in the business of photography, they "are not competitive on the same scale as the plaintiffs. The plaintiffs photograph large-scale

weddings around the globe. The defendants' shoots have resulted primarily from family and friends, and have consisted of much smaller-scale events." The trial court further stated that it "finds the plaintiff has not established by clear and convincing evidence that it will suffer irreparable harm if an injunction is not granted. *** The plaintiff also alleges that it could potentially lose business as a result of the defendants' actions, *but this alleged harm is speculative*. The plaintiff also alleges that the defendants have used the plaintiff's images, but these damages can be adequately compensated with a remedy at law." (Emphasis added). I do not believe this analysis employed by the trial court is correct.

{¶96} Nothing on appellees' website suggests they would not perform services for the type of large, upscale wedding that would directly compete with appellant. The trial court could have modified the restriction to specifically prohibit appellees from competing with appellants on what it described as "large scale" weddings, but it did not do so. Therefore, under the trial court's order, appellees are free to violate the valid, binding agreement. Appellees would simply be liable for whatever "damages" appellant is able to prove. This analysis puts appellees, the party who breached a valid agreement, in the driver's seat. One of the main purposes of the covenant not to compete is to prevent the harm before it occurs. The trial court's analysis, however, encourages appellees to engage in conduct that continues to breach the agreement. It then places the very difficult burden on appellant to discover, inter alia, where appellees are working and the amount of damage appellant has sustained. There are also variables such as lost leads (i.e., where wedding guests request contact information) that make assessment of damages extremely difficult. This is precisely why injunctive

relief may be the *only* practical remedy at law. In effect, even though appellant has been determined to be the aggrieved party, they are left with no meaningful remedy.

{¶97} Many of the covenants not to compete contain language where the parties stipulate to the fact that if violation of the agreement occurs, the employer would be entitled to injunctive relief because there is no other "adequate" remedy at law. The contract at hand contains no such provision, but, once the trial court made a finding that the contract was valid and binding and that appellees had breached it, injunctive relief was the only practical remedy.

{¶98} There are many cases cited by appellees and the majority opinion that refer to the "clear and convincing" standard of proof that accompanies and is applicable in equitable-action injunctions. As noted by the Supreme Court of Ohio in *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St.2d 51, equitable-injunction actions were developed in response to a "rigid and often inadequate common law system" that did not adequately address parties harmed by the conduct of another. This is not, however, an equitable-action injunction. In *Ackerman*, the Supreme Court of Ohio held that in the event of a violation of a specific statutory provision that provides for injunctive relief, it would be redundant to require a showing of irreparable harm, and no need to establish a balancing of equities. Id. at 57. Similarly, proof of a violation of a zoning ordinance is sufficient to establish irreparable harm in a zoning case.

{¶99} This case presents a request for injunctive relief as a result of the breach of a specific contract between the parties. The trial court found that there has been a breach of a valid, non-compete agreement. Injunctive relief was the proper, and probably the only meaningful, remedy.