IN THE SUPREME COURT OF TEXAS

NO. 09-0558

MARSH USA INC., AND MARSH & MCLENNAN COMPANIES, INC.,
PETITIONERS

v.

REX COOK, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued September 16, 2010

JUSTICE WAINWRIGHT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE GUZMAN joined.

JUSTICE WILLETT delivered an opinion concurring in the judgment.

JUSTICE GREEN delivered a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE LEHRMANN joined.

We deny Rex Cook's motion for rehearing. We withdraw our opinion of June 24, 2011 and substitute the following in its place.

In this case, we decide whether a covenant not to compete signed by a valued employee in consideration for stock options, designed to give the employee a greater stake in the company's performance, is unenforceable as a matter of law because the stock options did not give rise to an interest in restraining competition. We hold that, under the terms of the Covenants Not to Compete

Act (Act), the consideration for the noncompete agreement (stock options) is reasonably related to the company's interest in protecting its goodwill, a business interest the Act recognizes as worthy of protection. The noncompete is thus not unenforceable on that basis. We reverse the court of appeals' judgment and remand to the trial court for further proceedings.

I. BACKGROUND

Rex Cook had been employed by Marsh USA Inc. (Marsh) since 1983 and rose to become a managing director. Marsh & McLennan Companies, Inc. (MMC) is the parent company for various risk management and insurance businesses, including Marsh. On March 21, 1996, MMC granted Cook the option to purchase 500 shares of MMC common stock pursuant to its 1992 Incentive and Stock Award Plan (Plan). The Plan was developed to provide "valuable," "select" employees with the opportunity to become part owners of the company with the incentive to contribute to and benefit from the long-term growth and profitability of MMC. Under the Plan, stock option awards would vest in twenty-five percent increments each year, becoming fully vested and exercisable after a period of four years. To exercise a stock option under the Plan's terms, employees must provide MMC with a Notice of Exercise of Option Letter, a signed Non-Solicitation Agreement (Agreement), and payment for the stock at the discounted strike price. The term of the option was ten years. Cook's option was set to expire on March 20, 2006.

In February 2005, Cook signed the Agreement and a notice form stating that he wanted to exercise the stock options to acquire 3000 shares[1] of MMC common stock at the strike price. The

[1] The increase in the number of shares subject to Cook's option is apparently due to MMC stock splits.

Agreement Cook signed provided that if he left the company within three years after exercising the options, then for a period of two years after termination Cook would not:

> (a) solicit or accept business of the type offered by [MMC] during [Cook's] term of employment with [MMC], or perform or supervise the performance of any services related to such type of business, from or for (I) clients or prospects or [MMC] or its affiliates who [Cook] solicited or serviced directly . . . or where [Cook] supervised, directly, indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (II) any former client of [MMC] or its affiliates who was such within two (2) years prior to [Cook's] termination of employment and who was solicited or serviced directly by [Cook] or where [Cook] supervised directly or indirectly, in whole or in part, the solicitation or servicing activities related [to] such former clients; or
>
> (b) solicit any employee of [MMC] who reported to [Cook] directly or indirectly to terminate his employment with [MMC] for the purpose of competing with [MMC].

In addition, the Agreement provided that Cook would keep MMC's confidential information and trade secrets confidential during and after his employment with Marsh.

Less than three years after signing the Agreement and exercising the stock options, Cook resigned from Marsh and immediately began employment in Dallas with Dallas Series of Lockton Companies, LLC (Lockton), a direct competitor of MMC. Within a week after Cook's resignation, MMC sent Cook a letter including allegations that he violated the Agreement through his efforts to solicit Marsh clients and employees.

MMC filed suit against Cook and Lockton for breach of contract and breach of fiduciary duty, claiming, among other things, that Cook had solicited and accepted business from clients and prospects of Marsh who were serviced directly by Cook or where Cook supervised, directly or indirectly, the solicitation activities related to the client or potential client. Cook filed a motion for

partial summary judgment on the ground that the Agreement constituted an unenforceable contract because it was not ancillary to or part of an otherwise enforceable agreement under *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 643, 647 (Tex. 1994). The trial court granted Cook's motion for partial summary judgment on the breach of contract claim, concluding in the order that the Agreement was unenforceable as a matter of law. Marsh non-suited its other claims and appealed the partial summary judgment. Relying on *Light*, the court of appeals affirmed the trial court's judgment, holding that the transfer of stock did not give rise to Marsh's interest in restraining Cook from competing. *Marsh USA Inc. v. Cook*, 287 S.W.3d 378, 382 (Tex. App.—Dallas 2009, pet. granted). Marsh appealed.

We granted Marsh's petition for review to address the enforceability of the covenant at issue. We review de novo issues of statutory construction and application of the law to undisputed facts in summary judgments. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

II. ENFORCEABILITY OF THE COVENANT NOT TO COMPETE

The Agreement generally prohibits Cook from soliciting or accepting business of the type offered by MMC and in which Cook was involved from clients, prospective clients, and former clients of MMC or its affiliates who were such within the two years prior to Cook's termination. It also provides that Cook may not solicit any MMC employee who reported directly or indirectly to Cook and includes a nondisclosure requirement to keep confidential MMC's trade secrets during and after his employment with Marsh.

Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681–82 (Tex. 1990); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 599–600 (Tex. App.—Amarillo 1995, no writ) (stating that non-solicitation covenants prevent the employee from soliciting customers of the employer and effectively restrict competition); *see also Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464–65 (5th Cir. 2003) (applying Texas law and stating that non-solicitation covenants restrain trade and competition and are governed by the Act); *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 438–39 (S.D. Tex. 2008) (holding that a "nonsolicitation covenant is also a restraint on trade and competition and must meet the criteria of section 15.50 of the Texas Business and Commerce Code to be enforceable" (citations omitted)). Agreements not to disclose trade secrets and confidential information are not expressly governed by the Act. *See, e.g., CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992, no writ); *see also Olander v. Compass Bank*, 172 F. Supp. 2d 846, 852 (S.D. Tex. 2001). The parties concur that the Agreement in this case is governed by the Act. To the extent this Agreement extends beyond the non-disclosure of Marsh's trade secrets and confidential information, we address its enforceability under the Act.

A. Rationale for Enforcement of Covenants Not to Compete

The Texas Constitution protects the freedom to contract. *See* TEX. CONST. art. I, § 16; *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663–64 (Tex. 2008); *see also In*

re Prudential Ins. Co. of Am., 148 S.W.3d 124, 128–29 (Tex. 2004). Entering a noncompete is a matter of consent; it is a voluntary act for both parties. However, the Legislature may impose reasonable restrictions on the freedom to contract consistent with public policy. *See Fairfield Ins. Co.*, 246 S.W.3d at 664–65. It has done so with the Texas Free Enterprise and Antitrust Act of 1983, TEX. BUS. & COM. CODE ch. 15, which includes the Act, TEX. BUS. & COM. CODE §§ 15.50–.52.

The purpose of Chapter 15 is "to maintain and promote economic competition in trade and commerce" occurring in Texas. TEX. BUS. & COM. CODE § 15.04. Unreasonable limitations on employees' abilities to change employers or solicit clients or former co-employees, *i.e.*, compete against their former employers, could hinder legitimate competition between businesses and the mobility of skilled employees. *See id.*; *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934 (Tex. Civ. App.—Austin 1929, writ ref'd) (holding that a contract between two insurance companies to limit compensation and not hire their competitors' companies was unenforceable as it was intended to "crush and destroy competition"). On the other hand, valid noncompetes constitute reasonable restraints on commerce agreed to by the parties and may increase efficiency in industry by encouraging employers to entrust confidential information and important client relationships to key employees. *See Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 176–77 (Tex. 1987) (Gonzalez, J., dissenting) (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c (1981)), *superseded by statute*, TEX. BUS. & COM. CODE § 15.50(a). Legitimate covenants not to compete also incentivize employers to develop goodwill by making them less reluctant to invest significant resources in developing goodwill that an employee could otherwise immediately take and use against them in business. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (2d ed. 1977),

cited in Hill, 725 S.W.2d at 176 (Gonzalez, J., dissenting); *Patterson v. Crabb*, 51 S.W. 870, 871 (Tex. Civ. App. 1899, writ dism'd) (recognizing under the common law the inequity of allowing a former employee to compete against an employer by using that employer's goodwill against him when the employee had agreed not to compete with the employer). Stated differently, valid covenants not to compete ensure that the costs incurred to develop human capital are protected against competitors who, having not made such expenditures, might appropriate the employer's investment. Greg T. Lembrick, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2296 (2002) (noting the employers' high cost of developing human capital, including extensive training, revelation of confidential information and exposure to key customers); *see* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 652 (1960), *cited in Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 660 (Tex. 2006) (Jefferson, C.J., concurring).

The House Business and Commerce Committee echoed this purpose of the Act:

> It is generally held that these covenants, in appropriate circumstances, encourage greater investment in the development of trade secrets and goodwill employee training, providing contracting parties with a means to effectively and efficiently allocate various risks, allow the freer transfer of property interests, and in certain circumstances, provide the only effective remedy for the protection of trade secrets and good will [sic].

House Comm. on Bus. & Commerce, Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989).[2]

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[2] The English common law reasoned:

> Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. . . . [T]he public derives an advantage in the . . . security [a reasonable noncompete covenant] affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his

The Legislature, presumably recognizing these interests could conflict, crafted the Act to prohibit naked restrictions on employee mobility that impede competition while allowing employers and employees to agree to reasonable restrictions on mobility that are ancillary to or part of a valid contract having a primary purpose that is unrelated to restraining competition between the parties.[3] *See* TEX. BUS. & COM. CODE §§ 15.05(a), .50(a). By doing so, the Legislature facilitates its stated objective of promoting economic competition in commerce. *Id.* § 15.04.

In section 15.05(a) of the Business and Commerce Code, the Legislature included a policy limitation on the freedom between employers and employees to contract: "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful." *Id.* Our cases recognize

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> own skill and experience, from the fear of his afterwards having a rival in the same business.

Mallan v. May, 11 Mees. & W. 652, 665–66 (Ex. of P. 1843). The Massachusetts Supreme Court recognized nearly two centuries ago:

> [S]mall discouragements will have no injurious effect in checking in some degree a spirit of competition. An agreement with a tradesman to give him all the promisor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another.

Palmer v. Stebbins, 3 Pick. 188, 192–93 (Mass. 1825). Valuing "honesty and fidelity" among businesspeople in the consideration of restrictive covenants, the Georgia Supreme Court explained that it would be a "scandal" if the law is forced to uphold a "dishonest act" as in denying enforcement of contract terms with a person "in violation of his solemn engagement." *Hood v. Legg*, 128 S.E. 891, 896–97 (Ga. 1925) (internal quotation omitted).

[3] Numerous courts espoused a similar practical common law rationale for enforcing consensual noncompetition covenants that constitute limited restraints on trade. Such reasonable restraints "afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." *Horner v. Graves*, 7 Bing. 735, 743 (C.P. 1831); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899); *McClain & Co. v. Carucci*, No. 3:10-cv-00065, 2011 WL 1706810, at *4–5 (W.D. Va. May 4, 2011) (quoting *Merriman v. Cover, Drayton & Leonard*, 51 S.E. 817, 819 (Va. 1905)); *Gafnea v. Pasquale Food Co.*, 454 So. 2d 1366, 1368–69 (Ala. 1984); *Freeman v. Brown Hiller, Inc.*, 281 S.W.3d 749, 754–55 (Ark. Ct. App. 2008); *Freudenthal v. Espey*, 102 P. 280, 284 (Colo. 1909); *Scott v. Gen. Iron & Welding Co.*, 368 A.2d 111, 114 (Conn. 1976); *Hood v. Legg*, 128 S.E. 891, 896–97 (Ga. 1925); *Hursen v. Gavin*, 44 N.E. 735, 735 (Ill. 1896); *Hammons v. Big Sandy Claims Serv., Inc.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978); *Montgomery v. Getty*, 284 S.W.2d 313, 317 (Mo. Ct. App. 1955); *Eldridge v. Johnston*, 245 P.2d 239, 250–51 (Ore. 1952); *Turner v. Abbott*, 94 S.W.64, 66–69 (Tenn. 1906); *Kradwell v. Thiesen*, 111 N.W. 233, 234 (Wis. 1907).

that such naked restraints on trade are unlawful. *See, e.g.*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973) (citations omitted); *Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 952 (Tex. 1960). Where the object of both parties in making such a contract "is merely to restrain competition, and enhance or maintain prices," there is no primary and lawful purpose of the relationship "to justify or excuse the restraint." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899), *cited in Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 738 (1988) (Stevens, J., dissenting); *see also Potomac Fire Ins. Co.*, 18 S.W.2d at 934. This is the basis for the requirement that the covenant be ancillary to a valid contract or transaction having a primary purpose that is unrelated to restraining competition between the parties.

The Legislature also recognized that, even though it may restrain trade to a limited degree, a valid covenant not to compete facilitates economic competition and is not a naked restraint on trade. TEX. BUS. & COM. CODE § 15.04. A noncompetition agreement is enforceable if it is reasonable in time, scope and geography and, as a threshold matter, "if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made." TEX. BUS. & COM. CODE § 15.50(a).

We engage in a two-step inquiry to determine this threshold requirement for enforceability under the Act. First, we determine whether there is an "otherwise enforceable agreement" between the parties, then we determine whether the covenant is "ancillary to or part of" that agreement. *Mann Frankfort*, 289 S.W.3d at 849; *Light*, 883 S.W.2d at 644.

B. History of the Threshold Standards to Enforceability

At one time the common law generally prohibited all restraints on trade, *Addyston Pipe & Steel Co.*, 85 F. at 279–80,[4] and Texas jurisprudence once held covenants not to compete to be unenforceable because they were in restraint of trade and contrary to public policy. *Chenault v. Otis Eng'g Corp.*, 423 S.W.2d 377, 381–82 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.) (citations omitted). But "people and the courts" came to recognize that "it was in the interest of trade that certain covenants in restraint of trade should be enforced." *Addyston Pipe & Steel Co.*, 85 F. at 280; *see also Cline v. Frink Dairy Co.*, 274 U.S. 445, 461 (1927); *Justin Belt Co.*, 502 S.W.2d at 685. And the rule became well-established in Texas that reasonable noncompete clauses in contracts pertaining to employment are not considered to be contrary to public policy as constituting an invalid restraint of trade. *DeSantis*, 793 S.W.2d at 681; *Chenault*, 423 S.W.2d at 381. Texas courts have enforced reasonable covenants not to compete dating back at least to 1899. *Patterson*, 51 S.W. at 871–72. "The courts of this State have in numerous cases enforced negative restrictive covenants not to compete when ancillary to employment involving trade or professions although such covenants may be in limited restraint of trade, provided they are reasonably limited as to duration and area." *Chenault*, 423 S.W.2d at 381–82 (citations and quotations omitted); *see also McAnally v. Person*, 57 S.W.2d 945, 949 (Tex. Civ. App.—Galveston 1933, writ ref'd); *Koenig v. Galveston Ice & Cold Storage Co.*, 18 S.W.2d 1099, 1100 (Tex. Civ. App.—Galveston 1929, no writ); Michael D. Paul & Ian C. Crawford, *Refocusing* Light*:* Alex Sheshunoff Management Services, L.P. v. Johnson *Moves Back to the Basics of Covenants Not to Compete*, 38 ST. MARY'S

[4] In the thirteenth through the sixteenth centuries, the English common law generally regarded all restraints in employment contracts as departures from the principle of economic freedom and therefore void. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. at 631–32.

L.J. 727, 731 (2007). In 1973, we articulated for the first time the common law requirement recognized by courts of appeals in Texas and other states that a covenant not to compete must be "ancillary" to another contract, transaction or relationship. *Justin Belt Co.*, 502 S.W.2d at 683–84; *see also Potomac Fire Ins. Co.*, 18 S.W.2d at 934; *Chenault*, 423 S.W.2d at 382; *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 376 (Mass. 1961). *See generally Bond Elec. Corp. v. Keller*, 166 A. 341, 342 (N.J. Ch. 1933).

In the short-lived opinion of *Hill v. Mobile Auto Trim* in 1987, the Court adopted the Utah common law precept that covenants not to compete are unenforceable if they prohibit employees from obtaining jobs that share a "common calling" with their current employment. 725 S.W.2d at 172. This essentially barred noncompete agreements that protected even reasonable business interests of an employer. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652–53 (Tex. 2006) (citing Sen. Research Ctr., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989)).

In *DeSantis v. Wackenhut Corp.*, a covenant not to compete was held to be unreasonable and unenforceable because the employer had not shown that it needed the protection a noncompete would afford. 793 S.W.2d at 684. In that case, the interest allegedly being protected was confidential information, but the employer failed to prove that the information could create a competitive advantage and was not obtainable by persons outside of its employ. *Id.* There was no dispute in *DeSantis* that the agreement was ancillary to an otherwise valid relationship, but in defining the common law principles that govern in Texas, we stated that, for noncompete agreements to be valid and enforceable, the common law required that they be "part of and subsidiary to an

otherwise valid transaction or relationship which gives rise to an interest worthy of protection." *Id.* at 682 (citing RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981)).

While *DeSantis* was pending before this Court, the Legislature passed the Act, adding to Chapter 15, Monopolies, Trusts and Conspiracies in Restraint of Trade, of the Texas Business and Commerce Code. *Id.* at 684 (citing Act of May 23, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852). Section 15.50(a) of the new Act provided:

> Notwithstanding section 15.05 of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE § 15.50(a). The Act was intended to reverse the Court's apparent antipathy to covenants not to compete and specifically to remove the obstacle to their use presented by the narrow "common calling" test instituted by *Hill*, and to "restore over 30 years of common law developed by Texas Courts and remove an impairment to economic development in the state." *Sheshunoff*, 209 S.W.3d at 653 (quoting House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989)). Quite simply, "[t]he purpose of the act was to return Texas' law generally to the common law as it existed prior to *Hill v. Mobile Auto Trim*." *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (citation omitted).[5] Under the common law prior to *Hill*, the "rule

[5] In addition to legislatively overruling *Hill*'s "common calling" requirement, the Act also made explicit that a court could reform covenants that contained unreasonable restrictions on time, geographical area, or scope of activity or restrictions that were greater than necessary to make them reasonable and no greater than necessary, and could provide money damages for a violation occurring after reformation. *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991); TEX. BUS. & COM. CODE § 15.51(c); *see also Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994) (citing TEX. BUS. & COM. CODE § 15.52) (stating that the Act supplanted prior common law).

[was] well established in Texas that non-competition clauses in contracts pertaining to employment [were] not normally considered to be contrary to public policy as constituting an invalid restraint of trade." *Chenault*, 423 S.W.2d at 381.

In the two-step threshold inquiry to determine if a covenant not to compete is enforceable under the Act, we determine whether there is an "otherwise enforceable agreement" between the parties, and, if so, we determine whether the covenant is "ancillary to or part of" that agreement. *Mann Frankfort*, 289 S.W.3d at 849 (quoting *Light*, 883 S.W.2d at 644). The "otherwise enforceable agreement" requirement is satisfied when the covenant is "part of an agreement that contained mutual non-illusory promises." *Sheshunoff*, 209 S.W.3d at 648–49 (quoting *Light*, 883 S.W.2d at 646); *see also DeSantis*, 793 S.W.2d at 681 (noting that "the agreement not to compete must be ancillary to an otherwise valid transaction or relationship," including purchase and sale of a business and employment relationships (citations omitted)). No one contests that an "otherwise enforceable agreement" exists in this case—Cook entered into an agreement that he would not solicit Marsh's clients, recruit Marsh's employees, or disclose confidential information in exchange for the stock option price. There is offer, acceptance, and consideration for the mutual promises, and the nondisclosure agreement is an "otherwise" enforceable agreement. *See Sheshunoff*, 209 S.W.3d at 648; *see also Mann Frankfort*, 289 S.W.3d at 850 (noting that an implied promise may support an "otherwise enforceable agreement"). The question in this case is whether Cook's covenants are "ancillary to or part of" the otherwise enforceable agreement.

In *Light v. Centel Cellular Co. of Texas*, we first considered a two-pronged approach to determine whether the covenant is "ancillary to or part of" the otherwise enforceable agreement, requiring that:

> (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.

883 S.W.2d at 647. Today we address the first prong of *Light's* explication of the "ancillary to or part of" requirement, *i.e.*, whether the Act requires that consideration for covenants not to compete must "give rise" to the employer's interest in restraining the employee from competing. *Id.*

C. The "Give Rise" Requirement

It is important to note that the Act itself does not include a "give rise" requirement, nor does it define "ancillary." In Texas, the common law "give rise" requirement was first stated in *DeSantis* in 1987. 793 S.W.2d at 682. We held that the common law prior to the enactment of the Act required that noncompete agreements be "part of and subsidiary to an *otherwise valid transaction or relationship* which gives rise to an *interest worthy of protection*." *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981)) (emphasis added). *Light* diverged from the common law definition of "give rise" as articulated in *DeSantis*. *See id.* Rather than requiring that the otherwise enforceable agreement give rise to "an interest worthy of protection," *Light* imposed a stricter requirement: that the consideration give rise to "the employer's *interest in restraining the employee from competing*." *Light*, 883 S.W.2d at 647 (emphasis added). *Light*'s "give rise" condition on the enforceability of noncompetes was more restrictive than the common law rule the

Legislature intended to resurrect. Although we have recognized on multiple occasions that goodwill, along with trade secrets and other confidential or proprietary information, is a protectable business interest, *Light*'s "give rise" language narrowed the interests the Act would protect, excluding much of goodwill as a protectable business interest. *See id.*; *DeSantis*, 793 S.W.2d at 682; *see also Sheshunoff*, 209 S.W.3d at 649; *Olander*, 172 F. Supp. 2d at 855 & n.12 (noting that *Light* recognized covenants to protect confidential information as otherwise enforceable agreements but suggesting that the stock options at issue could give rise to protection of goodwill); *cf. McAnelly v. Brady Med. Clinic, P.A.*, No. 03-04-00095-CV, 2004 WL 2556634, at *2–3 (Tex. App.—Austin Nov. 12, 2004, no pet.) (stating that noncompetes are "disfavored contract[s]" and holding that the sale of a medical practice was merely a sale of medical supplies and thus not an interest worthy of protecting through a covenant not to compete). Commentators noticed that in Texas caselaw, "[o]ther than a promise not to disclose trade secrets and confidential information, little else seems to satisfy this prong of the statute." Paul & Crawford, *Refocusing* Light, 38 ST. MARY'S L.J. at 752.[6] This, despite the apparent objective of the Legislature in overruling *Hill* to "restore over 30 years of common law developed by Texas Courts and remove an impairment to economic development in the state." *Sheshunoff*, 209 S.W.3d at 653 (quoting House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989)); *see also Peat Marwick*, 818 S.W.2d at 388.

In the two instances after *Light* in which this Court interpreted the Act, *Light*'s "give rise" standard was not at issue. However, we retreated from some of *Light*'s other precepts. Under *Light*,

[6] The covenant also had to be designed to enforce a return promise of the covenantee, which further narrowed beyond the common law precepts the applicability of covenants not to compete. *See* Paul & Crawford, *Refocusing* Light, 38 ST. MARY'S L.J. at 752.

a unilateral contract (formed when one of the promises was illusory) could not support a covenant not to compete because it was not "'an otherwise enforceable agreement at the time the agreement [was] made.'" *Light*, 883 S.W.2d at 645 n.6 (quoting TEX. BUS. & COM. CODE § 15.50). In *Alex Sheshunoff Management Services, L.P. v. Johnson*, we revisited the meaning of the phrase "at the time the agreement is made," and determined that *Light* was overly restrictive. 209 S.W.3d at 651. We held that "at the time the agreement is made" modified "ancillary to or part of" rather than the "otherwise enforceable agreement," and thus a unilateral contract that was unenforceable when made could support a covenant not to compete as long as the covenant was "ancillary to or part of" the agreement at the time the agreement was made. *Id.*; *see also Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 302–03 (Tex. 2009) (applying *Sheshunoff*'s unilateral contract rationale). The covenant not to compete in *Sheshunoff* was enforceable despite being supported by an executory unilateral contract. *Sheshunoff*, 209 S.W.3d at 651. In addition, we re-emphasized that the focus in applying section 15.50 should be on the reasonableness of the covenant. *Id.* at 655–56.

In *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, we took another step away from *Light*'s restrictiveness and toward greater enforceability of noncompete agreements. 289 S.W.3d 844 (Tex. 2009). The employer did not expressly promise to provide the employee with confidential information, but the employee's position mandated such information be provided. *Id.* at 850. The employee promised not to disclose confidential information obtained. *Id.* We held that "[w]hen the nature of the work the employee is hired to perform requires confidential information to be provided . . . the employer impliedly promises confidential information will be provided." *Id.*

Turning to the "give rise" question, the Legislature did not include a requirement in the Act that the *consideration* for the noncompete must give rise to the interest *in restraining competition with the employer*. Instead, the Legislature required a nexus—that the noncompete be "ancillary to" or "part of" the otherwise enforceable agreement between the parties. TEX. BUS. & COM. CODE §15.50(a). There is nothing in the statute indicating that "ancillary" or "part" should mean anything other than their common definitions. "[A]ncillary means 'supplementary' and part means 'one of several . . . units of which something is composed.'" *Sheshunoff*, 209 S.W.3d at 651, 665 (Wainwright, J., concurring) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 84, 857 (9th ed. 1990)).

In this case, the trial court and court of appeals held that the covenant not to compete was not ancillary to an otherwise enforceable agreement under the *Light* test. 287 S.W.3d at 381–82. The court of appeals concluded that "the fact that a company's business goodwill benefits when an employee accepts the offered incentive and continues his employment does not mean that the incentive gives rise to an employer's interest in restraining the employee from competing." *Id.* Under section 15.50 and the Texas common law, it does not have to. The statute requires that a covenant not to compete be ancillary to an otherwise enforceable agreement. TEX. BUS. & COM. CODE § 15.50(a). The common meaning of those words control; the covenant not to compete must be ancillary to (supplementary) or part of (one of several units of which something is composed) an otherwise enforceable agreement. *See Sheshunoff*, 209 S.W.3d at 664–65 (Wainwright, J., concurring). This interpretation is confirmed by the pre-existing common law requirement that the otherwise enforceable agreement must be "part of and subsidiary to" the employment relationship

giving rise to the interest worthy of protection. *DeSantis*, 793 S.W.2d at 682. Furthermore, there is no compelling logic in *Light*'s conclusion that consideration for the otherwise enforceable agreement gives rise to the interest in restraining the employee from competing. *See Sheshunoff*, 209 S.W.3d at 664–65 (Wainwright, J., concurring). Consideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus; and there is no textual basis for excluding the protection of much of goodwill from the business interests that a noncompete may protect. *Light*'s requirement is contrary to the language of the Act; thwarts the purpose of the Act, which was to expand rather than restrict the enforceability of such covenants; and contradicts the Act's intent to return Texas law on the enforceability of noncompete agreements to the common law prior to *Hill*. *See Sheshunoff*, 209 S.W.3d at 652–63.

Requiring that a covenant not to compete be ancillary to an otherwise enforceable agreement or relationship ensures that noncompete agreements that are naked restraints of trade will not be enforceable under the Act. *See* RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981). The common law requirement that there be a nexus between the otherwise valid transaction and the interest worthy of protection bolsters the ancillary requirement. *DeSantis*, 793 S.W.2d at 681–82. The stated purpose of the Act is to "maintain and promote economic competition in trade and commerce," and it countenances the enforcement of reasonable covenants not to compete. TEX. BUS. & COM. CODE §§ 15.04, .50(a). Robust competition and reasonable covenants not to compete can co-exist. Adding more stringent requirements on top of those in the Act is unnecessary to

prevent naked restraints on trade and would thwart the Legislature's attempt to enforce reasonable covenants under the Act. *See Mann Frankfort*, 289 S.W.3d at 858–59 (Hecht, J., concurring).

D. MMC's Covenant Not to Compete

"A person's right to use his own labor in any lawful employment is . . . one of the first and highest of civil rights." *Int'l Printing Pressmen & Assistants' Union of N. Am. v. Smith*, 198 S.W.2d 729, 740 (Tex. 1947) (citing 2 COOLEY'S LAW OF TORTS 584, 587 (3d ed. 1906)). This value is protected by sections 15.05 and 15.50(a) of the Texas Free Enterprise and Antritrust Act of 1983 and is not offended by enforcing covenants not to compete that comply with section 15.50(a). *See* TEX. BUS. & COM. CODE §§ 15.05, .50(a); Michael Newman & Shane Crase, *The Rule of Reason in Drafting Noncompete Agreements*, FED. LAW., Mar.–Apr. 2007, at 21 (discussing how noncompete agreements can benefit both the employer and employee); s*ee generally* B. Prater Monning, III, Note, *Employee Covenants Not to Compete: The Justin Bootstrap Doctrine*, 28 Sw. L.J. 608, 613 (1974).

In this instance, Cook exercised the stock options and became an owner. Sally Dillenback, the head of Marsh's Dallas office, explained in her uncontested affidavit:

> The purpose of the Incentive Plan was to advance the interests of MMC and its stockholders by providing a means to attract, retain, and motivate employees of MMC and its affiliates, including Marsh, and to strengthen the mutuality of interest between employees and MMC's stockholders. The Incentive Plan was designed so that a valuable employee could ultimately benefit from an increase in the value of the business and profits, whereas, as an employee without stock options, Cook was limited to only those benefits provided to any employee of the firm. The Incentive Plan provides select employees with an incentive to stay with Marsh long-term; namely, an ownership interest in the company. This, in turn, gives employees an interest in ensuring that the company performs well and that its stock rises (thereby increasing the value of their options). The Incentive Plan also serves to enhance the

> relationships between Marsh and its customers by helping the company retain highly-motivated employees with an interest in the long-term success of the company, which, in turn enhances the goodwill of Marsh. The covenant not to compete provision of the Non-Solicitation Agreement prevents employees from using that goodwill, *i.e.*, the relationship between Marsh, the employee, and the customer, to attract the customer to a competitor.

Cook was a managing director of Marsh, and as affirmed by Dillenback, he was a "valuable employee who had successfully performed at his position at Marsh . . . and had been successful with attracting and retaining business for Marsh." She further explained that in the insurance brokerage industry, "long-term, personal contact between the employee and customer is especially important due to similarity in the product offered by competitors. The advantage acquired through the employee's long-term relationship and contact with customers is part of MMC's goodwill." For those reasons, he was awarded the stock options. Awarding to Cook stock options to purchase MMC stock at a discounted price provided the required statutory nexus between the noncompete and the company's interest in protecting its goodwill. Exercising the stock options to purchase MMC stock triggered the restraints in the noncompete.

By awarding Cook stock options, Marsh linked the interests of a key employee with the company's long-term business interests. Stockholders are "owners" who, beyond employees, benefit from the growth and development of the company. Owners' interests are furthered by fostering the goodwill between the employer and its clients. The stock options are reasonably related to the protection of this business goodwill. Thus, this covenant not to compete is ancillary

to an otherwise enforceable agreement.[7] And, in the Legislature's apparent judgment, reasonable noncompetes encourage greater investment in the development of goodwill and employee training. The dissent concedes that exercising stock options to become an owner "could motivate an employee to create goodwill, thus increasing the value of the interest worthy of protection." ___ S.W.3d ___ n.9 (Green, J., dissenting).

The hallmark of enforcement is whether or not the covenant is reasonable. *See Sheshunoff*, 209 S.W.3d at 655 (citing TEX. BUS. & COM. CODE § 15.50(a)). The enforceability of the covenant should not be decided on "overly technical disputes" of defining whether the covenant is ancillary to an agreement. *Sheshunoff*, 209 S.W.3d at 655. "Rather, the statute's core inquiry is whether the covenant 'contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.'" *Id.* (quoting TEX. BUS. & COM. CODE § 15.50(a)).

Marsh sought an agreement not to compete from Cook to protect the company's goodwill—namely, the relationships the company has developed with its customers and employees and their identities, due in part to Cook's performance as a valued employee. The Act provides that "goodwill" is a protectable interest. TEX. BUS. & COM. CODE § 15.50(a); *see also Mann Frankfort*, 289 S.W.3d at 848 (quoting TEX. BUS. & COM. CODE § 15.50(a)); *Sheshunoff*, 209 S.W.3d at 648 (same); *Peat Marwick*, 818 S.W.2d at 386. Texas law has long recognized that goodwill, although

[7] The second prong of the *Light* test to determine if a covenant not to compete is ancillary to an otherwise enforceable agreement, which requires that the covenant be designed to enforce the employee's promise, is not at issue in this case. *Light*, 883 S.W.2d at 647. However, we re-emphasize that the Act provides for the enforcement of *reasonable* covenants not to compete. TEX. BUS. & COM. CODE § 15.50(a).

intangible, is property and is an integral part of the business just as its physical assets are. *Alamo Lumber Co. v. Fahrenthold*, 58 S.W.2d 1085, 1088 (Tex. Civ. App.—Beaumont 1933, writ ref'd); *Taormina v. Culicchia*, 355 S.W.2d 569, 573 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.). Goodwill is defined as:

> the advantage or benefits which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant and habitual customers on account of its local position, or common celebrity, or reputation for skill, or influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Taormina, 355 S.W.2d at 573; *see also* BLACK'S LAW DICTIONARY 703 (7th ed. 1999) (defining "goodwill" as "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business . . ."). The Act recognizes Marsh's goodwill as an interest worthy of protection.

We do not decide whether the Agreement is reasonable as to time, scope of activity, and geographical area. If the trial court determines that any particular provision is unreasonable or overbroad, the trial court has the authority to reform the Agreement and enforce it by injunction with reasonable limitations. TEX. BUS. & COM. CODE § 15.51(c); *Campbell*, 340 S.W.2d at 952. We hold that if the relationship between the otherwise enforceable agreement and the legitimate interest being protected is reasonable, the covenant is not void on that ground.

III. TIMING REQUIREMENT

Marsh also contends that the court of appeals imposed a new timing requirement, where the employer's interest in restraining the employee cannot exist before the employer's consideration is

given. 287 S.W.3d at 382. Such a requirement is inconsistent with our ruling in *Sheshunoff*. In *Sheshunoff*, the employer agreed to provide confidential information in exchange for the employee's agreement to keep the information confidential and covenant not to compete, however the employee had already received confidential information from the employer. 209 S.W.3d at 647. We concluded that the agreement was reasonable and enforceable despite the passage of confidential information from employer to employee prior to the agreement. *Id.* at 647, 657. We did note that the parties disputed whether the nature of the confidential information received prior to the agreement differed from the confidential information received after the agreement, but focused on the fact that confidential information was provided after the agreement, fulfilling the employer's promise. *Id.* at 647. There is no requirement under Texas law that the employee receive consideration for the noncompete agreement prior to the time the employer's interest in protecting its goodwill arises.

IV. RESPONSE TO DISSENT

The dissent argues that our opinion thwarts the legislative intent. ___ S.W.3d ___ (Green, J., dissenting). Legislative intent is discerned from the words used. As determined from the language of the statute, our opinion requires that the covenant not to compete be ancillary to or part of an otherwise enforceable agreement. The former judicial requirement that the "consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing" is not anchored in the text of the Act. *See Light*, 883 S.W.2d at 647. We attempt to construe the Legislature's words. *See* Eric Behrens, *A Trend Toward Enforceability: Covenants Not to Compete in At-Will Employment Relationships*

Following Sheshunoff *and* Mann Franfort, 73 TEX. B.J. 732, 738 (Oct. 2010) (stating that the Court's interpretations of section 15.50(a) "show a trend toward enforceability of non-compete clauses that is true to the legislative intent behind the Covenants Not to Compete Act and the 1993 amendments").

The Legislature passed the Act to overturn this Court's opinion *Hill v. Mobile Trim*. Reinforcing this point, the House Research Organization indicated that the purpose was to reverse the Court's antipathy toward such covenants. House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989). We are somewhat befuddled by the continued antipathy to reliance on consensual and reasonable noncompetes as one means "to encourage greater investment in the development" of business goodwill. *Id.* The dissent frowns on noncompetes reasonably related to goodwill that are not tied specifically to trade secrets, confidential information or special training. ___ S.W.3d ___ (Green, J., dissenting) (stating that "[t]rade secrets, confidential information, and special training" may support a covenant not to compete but failing to include goodwill). The comparison is presumably to trade secrets and confidential information, which, the dissent's logic suggests, are well-defined and easily proved or disproved, a position with a number of detractors. *See In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003) (recognizing that the six factor test for trade secrets in the Restatement (Third) of Unfair Competition is "relevant but not dispositive," and that it is appropriate to weigh trade secret factors in the context of surrounding circumstances); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (1995) ("It is not possible to state precise criteria for determining the existence of a trade secret."). There are close calls in disputes over trade secrets, confidential information, and goodwill. Irrespective of differing views of the

importance of business goodwill, the issue has been resolved. The Act expressly provides that goodwill is an interest worthy of protection, and the common law before that agreed. TEX. BUS. & COM. CODE § 15.50(a); *Mann Frankfort*, 289 S.W.3d at 858; *Sheshunoff*, 209 S.W.3d at 649 (citations omitted); *DeSantis*, 793 S.W.2d at 682.

Further, *stare decisis* does not compel perpetuating an interpretation of section 15.50 that the entire Court agrees cannot be discerned from the text of the statute. *See* ____ S.W.3d ___ (Green, J., dissenting). Construing statutes as written is necessary to predictability in statutory interpretation and to validating the public's trust in and reliance on the words it reads in the statute books. Certainly, the doctrine of *stare decisis* is essential to the stability of the law, which is the reason departures from it are rare. Here, the doctrine has little force as we have questioned *Light* each time we have discussed it and have never affirmed *Light*'s "give rise" requirement. We explained in *Southwestern Bell Telephone Co. v. Mitchell*:

> Generally, the doctrine of stare decisis dictates that once the Supreme Court announces a proposition of law, the decision is considered binding precedent, but we have long recognized that the doctrine is not absolute. [W]e adhere to our precedents for reasons of efficiency, fairness, and legitimacy, and when adherence to a judicially-created rule of law no longer furthers these interests, and the general interest will suffer less by such departure, than from a strict adherence, we should not hesitate to depart from a prior holding. [U]pon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered.

276 S.W.3d 443, 447 (Tex. 2008) (internal quotation marks omitted, alterations in original). Our brethren have reasoned that *stare decisis* does not compel them to follow a past decision when its rationale does not withstand "careful analysis." *Arizona v. Gant*, 129 S. Ct. 1710, 1722 (2009)

(citation omitted). The Court agreed twice before that careful analysis compels a modification of our construction of section15.50, and it is appropriate to modify *Light* here as well.

V. CONCLUSION

In this case, the covenant not to compete is "ancillary to or part of" an otherwise enforceable agreement because the business interest being protected (goodwill) is reasonably related to the consideration given (stock options). Section 15.50 requires that there be a nexus between the covenant not to compete and the interest being protected. TEX. BUS. & COM. CODE § 15.50(a). This requirement is satisfied by the relationship that exists here. We reverse the judgment of the court of appeals and remand to the trial court for further proceedings consistent with this opinion.

_____

Dale Wainwright
Justice

OPINION DELIVERED: December 16, 2011