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Supreme Court of Texas.
Mann Frankfort Stein & LIPP Advisors, Inc., MFSL GP, L.L.C. and MFSL Employee
Investments, Petitioner,
v.
Brendan J. Fielding, Respondent.
No. 07-0490.

November 13, 2008.

Appearances:
Warren W. Harris, Bracewell & Giuliani LLP, Houston, Texas, for petitioner.
Levon G. Hovnatanian, Martin, Disiere, Jefferson & Wisdom, L.L.P., Houston, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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SPEAKER: Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is now sitting. God save the State of Texas and this Honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you. Please be seated.

Good morning. The Court has three matters on its oral submission docket. In the order of their appearance, they are docket no. 07-0490, Mann Frankfort Stein & LIPP Advisors, Inc. et. al. v. Brendan J. Fielding from Harris County in the First Court of Appeals District.

Docket no. 07-0806, Walter E. Harrell v. The State of Texas from Terry County in the Seventh Court of Appeals District. This cause is part of the Supreme Court recent adoption and appellate pro bono program in cooperation with the appellate section of the State Bar and the Court appreciates the assistance of the pro bono lawyers in that case.

The third matter is 07-0970, Lauri Smith and Howard Smith v. Patrick W. Y. Tam Trust from Collin County in the Fifth Court of Appeals District.

The Court has allotted 20 minutes per side in each argument. We will take a brief recess between the arguments and should complete all of them by noon. The proceedings are being recorded and a link to the

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argument should be posted on the court's Web site by the end of the day today.

The Court is now ready to hear argument in 07-0490, Mann Frankfort Stein v. Brendan J. Fielding.

SPEAKER: May it please the Court. Mr. Harris will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF WARREN W. HARRIS ON BEHALF OF THE PETITIONER

MR. HARRIS: May it please the Court. The main issue in this case is whether the Covenant Not to Compete Act controls the awards of attorney's fees, specifically, whether Section 15.52 preempts the claim for fees. The second issue I'll discuss is whether there is sufficient consideration for the client purchase provision in Fielding employment agreement. I'll first address the preemption issue and then I'll address the issue of consideration.

Fielding's claim for attorney's fees is preempted by Section 15.52 of the Covenant Not to Compete Act. The trial court held that Section 15.52 preempted the claim for attorney's fees. The court of appeals reversed. For the court of appeals said that Section 15.52 does not apply here because this is an action attempting to prevent enforcement of a Covenant Not to Compete not an action to enforce a covenant not to compete.

The court of appeals relied on another court of appeals decision. The court relied on the Gage Van Horn v. Tatom decision. In that case, the employee filed a Declaratory Judgment Act seeking to construe a Covenant Not to Compete. The employer, later that same day, filed a breach of contract action seeking damages on the Covenant Not to Compete. The [inaudible] court and the Gage Van Horn v. Tatom case determined that the action was not an action to enforce a Covenant Not to Compete as defined in Section 15.52. The reasoning of the court was that because the employee's Declaratory Judgment Action was the first filed so there couldn't be an action to enforce.

The resulting rule is that Section 15.52 preemption cannot apply where the employee is the first to file suit. That's the same reasoning that Fielding argued in this case at the court of appeals. And the court of appeals in this case agreed with that.

Section 15.51 provides the circumstance where an employee can recover attorney's fees. And Section 15.52 is clear that the remedies and procedures in Section 15.51 are exclusive and preempt any other law. Although Section 15.52 applies to an action to enforce a covenant not to compete, under the court of appeals' rule, it can be circumvented just by an employee filing suit first.

In this case, we're only talking about the preemption of attorney's fees, but the court of appeals rule if it's right will allow-- will take away the preemption and exclusivity of all provisions of Section 15.51. Under the court of appeals' rule, any time the employee files first so he can get a declaratory judgment, it will not be an action to enforce a Covenant Not to Compete. And Section 15.52 doesn't apply. That's --

JUSTICE O'NEILL: Would it preempt the attorney's private agreement in their contract? You can say they agreed that the prevailing party would be able to recover attorney's fees.

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MR. HARRIS: Section 15.52 says it preempts under common law or otherwise it preempts all other statutes, there's been no argument in this case that it wouldn't preempt the contract, and I found no authority that would limit it to only -- only a statute or anything other than the contract.

The research I've done has not been able to turn up any authority that it would not extend to the preemption of a contract.

JUSTICE O'NEILL: He can't contract around it would be your argument.

MR. HARRIS: That's correct. 15.52 says it preempts under common law or otherwise and that's an exclusive preemption so there's no way to contract around it.

Although 15.52 applies to an action to enforce, it shouldn't be decided by a race to the courthouse. Preemption under Section 15.52 should apply whether it's employer that files first for breach of contract and then has the employee file a counterclaim for -- under the Declaratory Judgment Act seeking to have a covenant found invalid or whether the opposite is true. Whether it's the employee that gets to the courthouse first with a declaratory judgment proceeding asking to have the Covenant Not to Compete construed to be invalid and then it's the employer that files the counterclaim on the breach of contract.

JUSTICE JOHNSON: What about no counterclaim?

MR. HARRIS: I'm sorry, your Honor?

JUSTICE JOHNSON: What about if there's no counterclaim for breach?

MR. HARRIS: If there's no counterclaim for breach, I think that would be a different situation because there would be nothing in the case to enforce the Covenant Not to Compete but here, there is. I mean if it were --

JUSTICE JOHNSON: So your position is limited to this one whether it is a counterclaim for breach?

MR. HARRIS: That's correct. But in all of the cases, we have found there has been the counterclaim for breach. The only case that we've seen that do not have the counterclaim for breach is the National Cafe Services case out of Waco. And there the employer rather than filing a counterclaim for breach, asserted release because when the employees -- when the employment was terminated, the employees signed a release. So the employer in coming in to defend against the counterclaim or to defend against the declaratory judgment instead of asserting the validity of the Covenant Not to Compete asserted release. And that's the only case that we've seen that did not have the counterclaim asserted for breach of the Covenant Not to Compete.

And even in that case, the Waco Court of Appeals said, you know, the original claim was the Declaratory Judgment Act to have the Covenant Not to Compete declared invalid. And it noted that the employer did not seek to enforce the covenant. I mean, it was a very specific holding that the court didn't -- that the court relied on the employer was not seeking to enforce it.

So to answer your question, if there were no counterclaim of any sort, that would be a different case, but that's not the rule that was handed down in Tatom. Tatom has been followed by the Dallas Court of Appeals in the Strauser decision. Without any further discussion, the Dallas Court of Appeals chose to follow it.

And there, the courts are simply looking at who filed first, if the employee got to the courthouse first with the Declaratory Judgment Action then that will wipe out the Section 15.52 preemption.

JUSTICE BRISTER: It -- remind me. Is there something in the statute that says if you -- the employer sues for breach they can get

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attorney's fees?

MR. HARRIS: The employer is able to get damages and the damages provision typically allows attorney's fees. Attorney's fees aren't specifically mentioned for the employer --

JUSTICE BRISTER: of course, the damages -- damages often is not attorney's fees. Your -- you have damages on a tort claim but that does not include attorney's fees.

MR. HARRIS: That is typically true. I believe it's not an issue in this case but I believe typically in covenant not to compete cases that employers are awarded damages -- excuse me -- are awarded attorney's fees under the damages provision.

JUSTICE BRISTER: I'm just wondering about this. I mean, you know, it's been the law for a hundred years. If you breach a contract, the other side breaches a contract and I have to sue them and then I'd get my damages and attorney's fees 'cause they breached the contract. On the other hand, if I sue them for breach of contract and they have to defend and they win, they don't get attorney's fees. You don't get attorney's fees for defending breach of contract.

So I'm wondering if this provision for attorney's fees in here that you get your attorney's fees if you defend was not intended to preempt get your attorney's fees if you breach, if the other side breaches, but this was just an addition rather than a substitution. Sounds to me, I mean, you're arguing that in fact this substitute, this is it. The only way you get attorney fees under this act is by defending.

MR. HARRIS: And that is the way 15.51 has been construed. It has a very specific provision to allow the employee to recover attorney's fees. They are very sp--

JUSTICE BRISTER: They normally do. But I'm -- isn't that just a supplement rather than a preemption and replacement?

MR. HARRIS: Section 15.52 says very clearly that 15.51 is the exclusive method --

JUSTICE BRISTER: I know it says that. But if damages doesn't mean attorney's fees which it doesn't in tort and lots of other areas and we don't mean it to be exclusive because nobody has ever thought that if you sue somebody for breaching the covenant, you can't get attorney's fees.

MR. HARRIS: But Section 15.52 doesn't use the word "damages," it used the word "remedies." And that would be sufficient to pick up attorney's fees. It's very specific. In the courts whenever attorney's fees are not provided for in Section 15.51, have been clear not to allow them --

JUSTICE BRISTER: But in any event, the plaintiff here is not suing for breach. Your-- is there any allegation that your client breached?

MR. HARRIS: No. They are suing under Declaratory Judgment Act just to have it declared --

JUSTICE BRISTER: Your client's enforcing exactly what was signed, they just -- whether it violates the statute.

MR. HARRIS: Absolutely. The declaratory judgment action is just to have it construed to be not enforceable and they have not attempted to claim fees under 15.51.

JUSTICE O'NEILL: That's what was going to ask you. What disposition are you seeking? Would it be a render or would it be a remand for a determination of attorney's fees under 15.51?

MR. HARRIS: It would be a rendition because they have not sought that. They sought claim -- they sought attorney's fees under the Declaratory Judgment Action and under the breach of contract, under the

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language of the contract itself under the agreement. The court of appeals -- the trial court and court of appeals disposed of the claim for the Declaratory Judgment Action so that's no longer an issue. The only issue before this Court is whether Fielding is entitled to fees under the contract. And if 15.52 preempts that, this Court should render judgment that he take nothing on his claim for attorney's fees.

JUSTICE O'NEILL: Since we've never answered that question before, do you think a remand in the interest of justice would be appropriate?

MR. HARRIS: I don't believe it would, Judge. The issue has been up before this Court. As you know in Tatom, the court dismissed it as improperly granted because it wasn't preserved. 15.51 is very clear. That is the provision that allows attorney's fees. 15.52 is very clear that 15.51 is the exclusive method for construing the procedures as well as the remedies under a Covenant Not to Compete.

So I believe the statute is clear that the court should not in the interest of justice issue a remand.

JUSTICE O'NEILL: And let me ask y'all it wasn't real clear from your briefing, are you claiming here that the covenant was reasonable? There's a little piece in your brief that the penalty provision really is not a penalty and it was reasonable. Do we have to address that issue first?

MR. HARRIS: No, your Honor, you don't. That was put in the brief to address some of the language in the court of appeals decision talking more about the other agreement. That's not an issue before the court, the one that dealt with the stock options, etc. That isn't the issue here. The only issue that's before this Court is really the issue of consideration on the Covenant Not to Compete. That's the only issue that's here.

MR. HARRIS: Fielding's claim for attorney's fees is preempted by Section 15.52 of the Covenant Not to Compete Act. And as a result this Court should reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Turning now to the issue of consideration. Mann Frankfort gave consideration for the client purchase provision in the employment agreement and there're two reasons why this consideration was sufficient.

MR. HARRIS: First, there was an implied promise by Mann Frankfort that was later performed. And second, even if there was no implied promise, Mann Frankfort actually performed and that is sufficient to form a unilateral contract.

There are two relevant provisions of the employment agreement. Paragraph 7 says that the employee shall not disclose any confidential information it receives from the employer. And paragraph 13 says that the employee will be working on client files that contain confidential information. There's also evidence in the record that Fielding's position gave him access to confidential information.

These provisions are sufficient to form an implied promise that Fielding would receive confidential information.

JUSTICE O'NEILL: Well, you don't really need an implied promise here though, do you?

MR. HARRIS: That's right. Under the current state of the law, you don't. That's been an issue in the case. But under -- clearly under Sheshunoff but I think even under Light you didn't to form a unilateral contract. And that's where the court of appeals got off-track.

The court of appeals said, very clearly, that an implied promise or a promise is required and the fact that the consideration was actually given, that is that confidential information was provided was

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basically irrelevant. That is clearly wrong under Sheshunoff and Light.

JUSTICE O'NEILL: The problem I have with the implied promise piece is the employee could not go and -- and force the employer to reveal private confidential information. And so, it's kind of hard to imply a promise there if it's unenforceable by the employee.

MR. HARRIS: And I understand. The key in a lot of the implied promise cases deal with access and whether the employee had access, the argument on the implied promise is basically if there were no implied promise to provide it, Section 7 and Section 13 of the employment agreement would basically be meaningless. That's why there should be an implied promise, plus, his position actually gave him access. But as you noted, your Honor, the Court doesn't need to even find an implied promise because here there was actual performance. It's undisputed that the information was provided and that was how the -- the promise by Fielding was accepted.

Fielding in the employment agreement promised not to disclose. Mann Frankfort actually provided confidential information throughout his employment. That's sufficient for the unilateral contract.

The court of appeals was in error in requiring that there'd be a promise on the part of Mann Frankfort because under unilateral contract, of course, there is only one promise. And that's the promise by the employee in this situation which is actually accepted by performance.

Mann Frankfort provided the confidential information and that isn't disputed and Fielding had access to that throughput his employment. And that is sufficient to form a unilateral contract. And because there's sufficient consideration for the employment agreement, this Court should also reverse on the issue of consideration and reverse the judgment [inaudible].

CHIEF JUSTICE JEFFERSON: What was the nature of that confidential information?

MR. HARRIS: It was client list and other client information. They had all the client work papers, files, billing information, and that's discussed in the record on pages 803, -04, and 799 of the clerk's record. And I believe it's undisputed that the information was in fact confidential.

Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

The Court is now ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Hovnatanian will present argument for the respondent.

ORAL ARGUMENT OF LEVON G. HOVNATANIAN ON BEHALF OF THE RESPONDENT

MR. HOVNATANIAN: May it please the Court. She said my name better than I ever could. I actually recognized it that time.

Your Honors, let me begin with addressing Judge O'Neill's -- Justice O'Neill's question to Mr. Harris about whether a promise is necessary when you have performance, and the answer to that question under Sheshunoff is yes, a promise is still required.

The court in Sheshunoff made the specific holding on page 646 that an at-will employee's noncompete covenant becomes enforceable when the employer performs the promises it made in exchange for the covenant. Performance is necessary certainly but the promise is also necessary.

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The court reiterated that point a little later in the opinion on page 651 where it said, "The covenant need only be ancillary to or part of the agreement at the time the agreement is made. Accordingly, a unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the act."

So there does have to be a promise. And that's dispositive of the issue, in this case, of that particular issue. Because as the court of appeals held, there was no promise to provide the consideration for the restrictive covenant. Now the promise can be expressed and that happened in Sheshunoff. It was an expressed promise where the agreement said the employer will provide confidential information to the employee. And it can be implied. There are cases which have held ther's an implied promise. But it can't be implied from the mere fact of performance because that's not logical.

In other words --

JUSTICE O'NEILL: But what if the contract said, "We might give you confidential information from time to time. We're not obligated to but we just might." And if they do, why isn't that then an enforceable promise once it's revealed if there's a promise also to keep it confidential?

MR. HOVNATANIAN: To go the other way. Your Honor, because it's not a promise. That's not a hard and fast promise. That would come under the category of something that's illusory. We might give it to you, but then again, we might not.

JUSTICE O'NEILL: Well, it's illusory at the time it's made.

MR. HOVNATANIAN: Correct.

JUSTICE O'NEILL: But why wouldn't performance then make it binding?

MR. HOVNATANIAN: I see your point. It does. Under Sheshunoff, it does. But --

JUSTICE O'NEILL: So then, once the information is given and accepted, why don't the mutual obligations kick in?

MR. HOVNATANIAN: They would, your Honor, if it was -- if the promise to give the information had been made. And that's the distinction between Sheshunoff and this case.

In Sheshunoff, there was an expressed promise. We will give you confidential information. And the employer gave the confidential information. This Court said, the fact that you didn't do it when the contract was made doesn't matter, you did it later. And so you took that unilateral contract and performed it. So there's your promise. Okay?

But in this case, the distinction is there was no initial promise made to begin with, not expressed or implied. And what MFSL was asking you to do is to look only at the fact that they did give the confidential information, and so we'll -- therefore, we must have promised to do it.

JUSTICE BRISTER: Maybe I'm just looking at this too simplistically, but it seems if you promised a guy, look, we've got these clients, they need accounting work, come to work for us, we'll pay you. You're gonna do the accounting work, they're gonna pay us money, and we're gonna give you a bunch of that money and that's gonna be your salary. But we don't you to steal them. Okay? We've got clients, you need work. Come work, we'll get the money, we'll give you part of it, but we don't want you to steal them. And so the guy comes to work, and then the guy steals them.

Why wasn't that coming to work an enforceable agreement?

MR. HOVNATANIAN: it was.

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JUSTICE BRISTER: I mean, the deal was -- and why wasn't that part of the ancillary to, we're gonna allow you access to these clients from which we get money, you get money. Everybody benefits. But we don't want you to steal them from us. And then you do it, then the guy says, I changed my mind, I'm gonna steal them. Why isn't that breaching an ancillary agreement?

MR. HOVNATANIAN: Well, your Honor, and I have to hasten to point out that that's not what happened here. I understand, I'm probably being a little defensive. On behalf of the client.

JUSTICE BRISTER: Hypothetically.

MR. HOVNATANIAN: 'Cause Mr. Fielding went into court and filed suit first for the Declaratory Judgment Action first to find out what, you know, what he was allowed to do and what he wasn't allowed to do. But I think the answer to your question is that is an enforceable agreement. There's an enforceable agreement from MFSL on the one hand to "I'm gonna pay your salary and I'm gonna give you fringe benefits." The agreement on the other hand, the other side of that coin is Mr. Fielding is gonna work 40 hours a week. Mr. Fielding is going to give his full attention to MFSL, and not having a job on the side.

But the agreement that we're talking about in this case, the particular agreement, the restrictive covenant, that is what was not ancillary to an otherwise enforceable agreement. It is true that there were other enforceable agreements in the employment contract but those -- but the restrictive covenant wasn't ancillary to any of those.

What it would have been ancillary to, if it existed was an obligation or a promise on the part of the MFSL to provide the confidential information to Mr. Fielding in the first place. But of course, that promise doesn't exist, neither expressly nor impliedly.

JUSTICE BRISTER: But what they really did was introduce him, gave him introductions to people that have work to be done.

MR. HOVNATANIAN: Yes, sir.

JUSTICE BRISTER: Forget about all these, you know, [inaudible]. All these cases seem to focus on, you know, oh we've got this secret information. What they really provided him to was an introduction to people he didn't know, who had work to be done. Why isn't that -- this ancillary to that? That's something. That's worth something. That's what people go to these networking meetings. All that stuff, that's worth money.

MR. HOVNATANIAN: It is.

JUSTICE BRISTER: That's a valuable thing, those contacts. So why didn't they -- they introduce him to those workers, why isn't this ancillary to that and enforceable?

MR. HOVNATANIAN: Well, your Honor, because that's not really one of the functions of the employment agreement. If you look at the employment agreement, it doesn't say anything about MFSL will introduce Mr. Fielding to clients and potential clients.

JUSTICE BRISTER: Everybody knew for a fact that's what's gonna happen.

MR. HOVNATANIAN: Without question. That happens in every case like this, no question about it. But it's not one of the purposes of the employment agreement, not from MFSL's standpoint nor from Mr. Fielding's standpoint. And I'll give you an example.

There was no consideration for that hypothetical promise in the employment agreement.

JUSTICE HECHT: Sure, there was. He got the work.

MR. HOVNATANIAN: He -- he did, your Honor. But that's the work that he does for MFSL servicing MFSL's clients.

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JUSTICE HECHT: Well, I mean, he got to know who they were. He got to know all their business.

MR. HOVNATANIAN: Correct.

JUSTICE HECHT: He got to be in a position where he could take it with him if he left.

MR. HOVNATANIAN: Agreed, but that's not --

JUSTICE HECHT: Something he didn't have before why isn't that consideration.

MR. HOVNATANIAN: Well, your Honor, it's not because that's not really the purpose of the employment agreement. It's not one of the purposes of the agreement. In other words, MFSL, I think it's fair to say, did not have in mind when it signed the contract with Mr. Fielding that we are going to introduce you to a lot of people, to a lot of clients that you can service and maybe down the road if you leave, they'll leave us and go with you.

JUSTICE HECHT: Well, looks like that's the only thing they had in mind.

MR. HOVNATANIAN: Well --

JUSTICE HECHT: You have to buy him back and it has to be 90 percent --

MR. HOVNATANIAN: Right.

JUSTICE HECHT: -- and has to be on this formula. Looks to me like that's the very thing they would [inaudible].

MR. HOVNATANIAN: Well, but, your Honor, that's true as far as the restrictive covenant goes but that sort of brings us full circle. The consideration for the restrictive covenant is what's lacking. The only possible consideration for that would have been here's the confidential information, we promise, rather, to give you this confidential information. There's nothing wrong with Mr. Fielding leaving and competing at some point in the future, what would be wrong is if Mr. Fielding left, took the confidential information with him and then went out and used it to solicit MFSL's clients. That was the restrictive covenant. That was the purpose of the covenant. The problem was that there was no promise to provide the confidential information in the first place.

JUSTICE HECHT: I just don't see why there needs to be if you get -- if in fact you do get the information --

MR. HOVNATANIAN: Your Honor --

JUSTICE HECHT: Which you're about to do.

MR. HOVNATANIAN: Understood. I see your point.

JUSTICE HECHT: And it's pretty a hollow statement to say, right before the guy is shown the file cabinet, I promise to give you access to confidential information. I mean, he can't do his job unless he goes to the file cabinet.

MR. HOVNATANIAN: That's true, your Honor. But it's the promise that's the consideration. That's what this Court said in Sheshunoff. Repeatedly, the court uses the word "promise." The promise is the consideration. And repeatedly the court pointed out that in Sheshunoff there was an explicit expressed promise to give the consideration.

CHIEF JUSTICE JEFFERSON: What is the -- what would the harm be if the court said, yes, we said promise then, but we don't -- we don't think that's necessary. What -- I mean look at it more globally? What does do to employer-employee relations? I mean, is there any reason not to adopt that holding, and say, no, the promise is not critical at all. It's a fact that the employer actually gave information that they -- every one knew they wanted and trusted not to go outside of that corporation. What's the harm?

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MR. HOVNATANIAN: Sir, I can, you know, I can see two harms, one practical and one legal. The practical harm is that since Sheshunoff came out which is only been in 2006, a lot of people, a lot of businesses, a lot of companies, have arranged their contracts pursuant to what this Court said the law was a couple of years ago. You know, the Court said what it said in Light, and in particular, footnote 6, then in Sheshunoff, the court came along and said, well, let's retreat a little bit from footnote 6 and explain it but otherwise leave Light alone. And for the Court now to say, Light and Sheshunoff were both wrong, and in fact, you don't need a promise at all, I mean, not to tell the Court its business but I think that goes too far. I don't thin that's --

JUSTICE O'NEILL: But -- but --

CHIEF JUSTICE JEFFERSON: Just a second. I want to make sure we get both of the -- the second point.

MR. HOVNATANIAN: The second, your Honor, the legal issue or the legal harm I see is that if the Court makes that holding, then you've just taken the consideration out of the contract. You've said you don't need consideration --

JUSTICE HECHT: That's the part that I don't understand because you do get the information --

MR. HOVNATANIAN: You do, your Honor.

JUSTICE HECHT: -- which is something that you didn't have and it's valuable.

MR. HOVNATANIAN: You -- absolutely right, but it's not the promise. And this court in Sheshunoff and in Light said it's the promise that's the key. And that's one reason the court of appeals was correct in this case because it -- it followed Sheshunoff and followed Light and said --

JUSTICE BRISTER: But -- but we do lots of contracts that way. When I -- when I go to Walmart and pick up some jeans and take them to the counter, nobody promised me jeans.

MR. HOVNATANIAN: True.

JUSTICE BRISTER: They just had them there, and I took them, and I pay for them, and I get to keep them. And that was the consideration. I didn't talk to Sam Walton or anybody else with Walmart, nobody else made me any promises. But they're just the jeans and I took them and everybody understands that's my consideration because I will leave the store with them.

MR. HOVNATANIAN: Right.

JUSTICE BRISTER: And so, if you get the contact of people, that are willing to pay you for doing accounting work, even if nobody ever promised you were going to get work -- which I think is kind of odd to say, "An accounting firm hired me but they never promised me I would do any accounting work." Well, what did they hire you to do, sweep up?

MR. HOVNATANIAN: Well, they -- they said that. They just -- they didn't say that they would provide confidential information to do the accounting work.

JUSTICE O'NEILL: But -- but the clue in the agreement the employee says, "I will not disclose confidential information." That statement is meaningless unless it implies some performance on the employer's part.

MR. HOVNATANIAN: Well Your Honor, except -- except that the exact statement -- not to quivel with the Court, but the exact statement is "any confidential information." In fact, it's any secret or confidential information or knowledge obtained by the -- the promissor, the employee, Mr. Fielding. So, the door is open there with the -- with the use of the word "any" that none will be provided. And undoubtedly

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there are cases where none is provided and I think that, again, that's what distinguishes this case from Sheshunoff and other cases where there was an explicit promise that we will provide you the confidential information. That's what's lacking in this case.

And -- and, Chief Justice Jefferson, that's -- that's -- I guess that's the conclusion to my answer on the legal harm is that if the court goes that far, then you've effectively wiped out Sheshunoff and said now you just don't need a promise at all. Now, the consideration doesn't have to exist when the contract is made, it'll exist later when we actually provide the information. That's much further than this court went in Sheshunoff, much further than this court went in Light, and we respectfully suggest too far for this court to go in this case.

JUSTICE BRISTER: To address the attorney's fees question?

MR. HOVNATANIAN: I will, your Honor. Thank you. If -- if court reads 15.52 and 15.51, one particular message comes through from the legislature and that is the employer is not supposed to get attorney's fees. 15.51 awards attorney's fees if certain conditions are met to the person who is defending against the action to enforce the covenant. Well, that -- that obviously is the employee since employees --

JUSTICE BRISTER: Haven't -- haven't courts been awarding attorney's fee -- if -- if you breach the covenant, you get attorney's fees, and courts have been awarding attorney's fees if you win on the Covenant Not to Compete for a long time.

MR. HOVNATANIAN: Not under 15.51 and 15.52, your Honor.

JUSTICE BRISTER: But what -- but they've been awarding them under something.

MR. HOVNATANIAN: I don't disagree. Absolutely, yes.

JUSTICE BRISTER: That's the -- and that -- and that's because of breach of contract. You always get your attorney's fees if you prevail.

MR. HOVNATANIAN: Under 3801, absolutely.

JUSTICE BRISTER: And so -- but -- wouldn't you continue to do that --

MR. HOVNATANIAN: There is --

JUSTICE BRISTER: But what part of this -- what part of -- what part of this says if they sue -- well, let me ask you first, your clients suit is not that they breached anything?

MR. HOVNATANIAN: Correct. Well, that's correct. We -- we are -- we are challenging the restrictive covenant, that's all.

JUSTICE BRISTER: But you're not saying they breached the covenant or they breached any part of the contract?

MR. HOVNATANIAN: Correct. Correct. And --

JUSTICE JOHNSON: Sorry to ask.

MR. HOVNATANIAN: Yes.

JUSTICE JOHNSON: The -- under statute, if you breach a contract or you recover on the contract, you get attorney's fees, just that. But that's covered under this -- this -- this -- this preempts statutory or common law?

MR. HOVNATANIAN: I believe it does, your Honor. The wording is so broad, I think it does.

JUSTICE JOHNSON: How does a common law get us to -- to wiping out a contractual agreement between the parties?

MR. HOVNATANIAN: Well, you know, I'm constrained in this case to agree with Mr. Harris. I think the word "otherwise" is probably -- it says, "the common law or the law or otherwise," that's an awfully broad term. And I -- I got from it what Mr. Harris got from it which is that it -- it applies to private contracts between the parties, so I echo his answer to Justice O'Neill reluctantly, but I echo that answer. And

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-- and that I think it's probably broad enough to cover private contracts between the parties. Certainly, that's how both sides have litigated this case; that's how Judge Jameson, the trial court, looked at it; that's how the court of appeals looked at it. So, I think that's a fair interpretation.

JUSTICE O'NEILL: What -- what do you think a proper disposition would be were you not to prevail, would it be a render or would it be a remand to assert attorney's fees under the Covenants Not to Compete Act?

MR. HOVNATANIAN: Your Honor, I hope that's another one of Justice Brister's hypothetical points.

JUSTICE O'NEILL: Hypothetical. Hypothetical.

MR. HOVNATANIAN: Certainly a remand and not a render. If -- if -- if the Court is going to say that the law is going to be a little different than Sheshunoff, and the court is going to say, "You're -- you're under the wrong statute," you know, or, "You're under the wrong provision," then we would respectfully suggest a remand certainly in the interest of justice so we can litigate this case under the law as the court decrees it.

JUSTICE O'NEILL: But it would be under the interest of justice because you didn't seek attorney's fees under the act, is that right?

MR. HOVNATANIAN: Well -- well, if you mean 15.51, that's correct.

JUSTICE O'NEILL: 15.51, that's the number.

MR. HOVNATANIAN: That's correct. And -- and I guess, we -- we really couldn't because -- well, we could if the court says we are defending against anaction. In other words, if the counterclaim controls over the claim and we are defending against an action, then, yes, we could under 15.51.

JUSTICE O'NEILL: But I guess what I'm saying is you didn't seek that alternatively.

MR. HOVNATANIAN: We did not. Well, we certainly did not argue that in the court of appeals or before this -- before this Court, and the reason is because we think 15.52 is clear that if it is an action to enforce a covenant, there's no attorney's fees, but, of course, this is not an action to enforce a covenant.

CHIEF JUSTICE JEFFERSON: So, it is a race to the courthouse.

MR. HOVNATANIAN: Your honor, it is. It absolutely is. And -- and the reason it is, is not because of what the court of appeals said, it's because of what the legislature said.

JUSTICE MEDINA: What does this do if the Court overturns -- Justice Alcala's opinion and has a new standard here, seems like it would create more races to the courthouse and there's more litigation because now the line has moved further down the road.

MR. HOVNATANIAN: I -- I agree, your Honor. That's exactly what it'll do. It -- it's always going to be a race to the courthouse. In other words, part of MFSL's brief says, "Well, that's not fair because you've made it a race to the courthouse. And if the employee gets there first, then preemption is out the window." But see if you look at the other side of that argument, you would be creating a race to the courthouse that now the employer has the -- has the motivation to win because if the employer gets there first, then there's no attorney's fees in that event. So, either way, it's going to be a race to the courthouse, that's unavoidable, but there's nothing wrong with that. If you look at cases like Perry v. Del Rio, where, this court addressed dominant jurisdiction in 2001. The court said, "It's a race to the courthouse."

The -- the winners -- the winner of the race that party's suit

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controls for the purposes of dominant jurisdiction. The Corpus Christi court of appeals has also said in regard to medical malpractice cases that 4590(i) created a race to the courthouse because on the 181st day, either the plaintiff or the defendant needed to do something before the other one. Either the plaintiff needed to file a voluntary nonsuit or the defendant needed to file a motion to dismiss with prejudice. The court of appeals said. "It's a race to the courthouse but it's not our race." That's the way the legislature wrote the statute, and in that event, the race is on. The court can't do anything about the race.

And in this case, certainly it's a race to the courthouse but no matter what the court says it's going to be, either the employer or the employee won, is always going to be motivated to get to the courthouse first and, therefore, impact 15.52 and 15.51's application to the case.

CHIEF JUSTICE JEFFERSON: Any further questions?

Thank you, Counsel.

REBUTTAL ARGUMENT OF WARREN W. HARRIS ON BEHALF OF THE PETITIONER

MR. HARRIS: May it please the court. I'll first address the issue of whether a promise is required. Fielding has pointed to language in Sheshunoff that talks about the employer performing his promise, and there are two places in the opinion where that language appears. The language quoted at page 646 as well as language over at page 655 where it talks about an employer performing his promise. It appears that the court was simply talking about the facts of the case in both the beginning and end of the opinion where that language appears because in Sheshunoff, there actually was a promise. There's a promise to provide access to confidential information and the court construed that as being a promise. So, the court was discussing the facts of the case.

If you look at the opinion in the discussion, for example over at page 651 in the discussion of unilateral contract, the opinion says there's no sound reason why unilateral contract made enforceable by performance should fail under the act. No mention of a promise. Later in the paragraph, if as in this case the employer's consideration is provided by performance and becomes nonillusory, then that should be enforced both and we see no reason to hold the covenant fails. Again, no mention of a promise.

The opinion is internally consistent that no promise is required --

CHIEF JUSTICE JEFFERSON: What if it's not a -- this kind of situation which kind of does suggest, you know, that if you're going to hire these employees, you've got to give them confidential information. But what if we're talking the -- in the IT business and an employee comes there, they've got to develop, you know, before they're going to get to the next level and get this information. And so, the employer says, "If you work here for a time, we're going to -- at some point we're going to give you confidential information. Maybe it's going to take a couple of years for you to work up to that level." And so, you join on -- on the -- on the "hope" or this implied promise that at some point, you're going to reach the next level, get this information, become more valuable to the employer. Shouldn't there be something like that to give -- give the -- the employee some, you know, idea of why they're there or why they should join that company.

MR. HARRIS: Well -- well, in this case we -- we do have that, but

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in your hypothetical situation, often whenever an employee changes position to when a promotion is done, there may be a new agreement that's entered into at that time that the employee will be receiving the confidential information, that they may have that agreement when this new IT person gets a promotion and they're now under department or at a supervisory level.

CHIEF JUSTICE JEFFERSON: But I'm saying would -- would an employee be more likely to want to come to a corporation if the promise is made, and if one is not made, well, then, maybe I'm -- maybe I'll find some company that will give me this promise. Now, what I'm trying to get to is, is promise an important part of this or not? I mean, I hear your argument saying you don't have to have a promise, implied or expressed, and I'm just wondering if that's good.

MR. HARRIS: I think it's a practical point and maybe that the employee likes that promise. When the employee is coming to work and the employee doesn't like the promise so much when the employee is leaving the employment because there are strings that get attached to it. So, I think -- I think it somewhat depends at the time you're looking at it. Yeah, coming in the door, they like having access to all this important information, they got a very high-level position, but when they leave and take that business with them --

CHIEF JUSTICE JEFFERSON: But, they may not know in the first place if they have no assurance that they at least have this -- this possibility of -- of reaching the next level, of getting -- you know, if you're an engineer, you know, and it's a defense project and that's where you want to be because once you're there and you get the security clearance, then, you know, later on -- I mean, your career goes. You can be -- become a professor. I mean, there's -- there's a lot that comes with access to very -- very confidential information. Maybe the employee wouldn't go to that business if they didn't have that promise.

MR. HARRIS: Yeah. And -- and it's -- this employment situation is also unique depending on what the person is looking for, promotions, etc., what is entailed in the position.

CHIEF JUSTICE JEFFERSON: And so, the question I'm asking is, is it more a fundamental one. Should we do away with this idea of promise altogether or is there some reason to maintain it in the law. And I -- I just don't know the answer.

MR. HARRIS: I don't think -- why I don't think there's a reason to maintain it in the law -- and I think the court, in essence -- I mean, it has done away with it. I mean, that -- that's what is required or -- or what is the issue under the law. Under a unilateral contract, there is only one promise. I mean, for the Court to say that we're now going to require a promise in addition to providing the information, I believe the court would have to change the law to do that because the court would have to now overrule footnote 6 in Light and say that unilateral contracts cannot be sufficient consideration. To require a promise requires a bilateral contract. And it's long been the law in Texas, at least since Light in the employment in Covenant Not to Compete situation that a unilateral contract is sufficient performance. And by definition in the unilateral contract, there's only one promise.

JUSTICE JOHNSON: If -- if that's the case, then almost any profession, where you come through college, or graduate school, whatever you have the knowledge, and you go to actual work for a company, almost any professional then who promises -- who -- who enters into a contract, the employer can put one of these Covenants Not to Compete in and simply by going to work for all practical purposes, has agreed not to compete, whatever that contract is so long as it's

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reasonable and complies with the other matters. Is that -- is that a fair statement where your position will take the law?

MR. HARRIS: And there's actually confidential information that's provided. I mean, that -- that's an important requirement, your Honor. It's not just that you bring the person and then put the Covenant Not to Compete in, you have to actually provide them confidential information.

JUSTICE JOHNSON: Of course, this one says, "if you acquire from the employer, its other employees, or its clients." And confidential information is a pretty broad category, it seems.

MR. HARRIS: It is. But that term is defined in law and there are cases that turn on whether the information really is confidential, whether it's available in the public domain, and so there is that requirement that -- that pulls you back in so that you can't just put these in all of those provisions. And on the facts of this case -- I mean, Mann Frankfort is a little different than a lot of other accounting firms in that it sends its employees out, it provides this information. Another way for an employer to do it is to say, "We're going to have our employees, we're not going to expose them to clients. We're not going to give them this information, so if they leave, they can't hurt us." I mean, that -- that's one of the decisions the employer has to make is how much access they're going to give their employees to this confidential information. And when they decide to do that, they should be able to protect it by having an agreement.

CHIEF JUSTICE JEFFERSON: Any further questions?

Thank you, Counsel.

The cause is submitted. And the court will take a brief recess.

SPEAKER: All rise.

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