IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 17, 2009 Session

DAREL L. JONES, ET AL. v. UNITED PROPANE GAS, INC., ET AL.

Appeal from the Chancery Court for Bradley County
No. 07-119 Jerri S. Bryant, Chancellor

No. E2009-00364-COA-R3-CV - FILED DECEMBER 28, 2009

Darel L. Jones, Donald A. Maples, Jr., and Heritage Operating, L.P., dba Hydratane of Athens (collectively "the Plaintiffs") commenced this litigation originally against United Propane Gas, Inc. ("UPG"), with a petition seeking a declaration that the Pricing, Confidentiality and Post-Employment Activities Agreement (referred to as "the Agreement," "the Jones Agreement," or "the Maples Agreement" as the context requires) signed by Jones and Maples in favor of their past employer, Ocoee River Propane Gas, Inc. ("ORP"), was unenforceable and that their new employer, Hydratane, had no liability for hiring them. The Plaintiffs later amended their petition to add ORP as a defendant. UPG and ORP (collectively "the Gas Companies") filed an answer asserting, among other things, (1) that they were independent entities and (2) that Jones and Maples were not UPG employees. ORP filed a counterclaim against Maples asking that he be held in breach of contract and enjoined from violating the Agreement as well as a counterclaim against Hydratane for tortuous interference with the Agreement. After a bench trial, the court announced its findings in favor of the Plaintiffs from the bench and later signed and entered an order submitted by the Gas Companies that limited the effect of the court's ruling to "the non-compete provision" of the Agreement. The Plaintiffs filed a motion to alter or amend which the trial court granted, the effect of which was to hold that the Agreement in its entirety, rather than just the non-compete provision, was unenforceable. The Gas Companies appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Paul R. Leitner and Bruce D. Gill, Chattanooga, Tennessee, for the appellants, United Propane Gas, Inc., and Ocoee River Propane Gas, Inc.

J.Y. Elliott, III, Chattanooga, Tennessee and R. Charles Wilkin, III, Tulsa, Oklahoma, for the appellees, Darel L. Jones, Donald A. Maples, Jr., and Heritage Operating, L.P., dba Hydratane of Athens.

OPINION

I.

ORP is one of approximately 52 companies that operate under the "umbrella" of UPG. UPG's general counsel serves as general counsel for all the various companies that fall under UPG's umbrella. All the companies, including ORP, require, as a condition of employment, that all employees execute a form document substantially identical to the Agreement in this case. Maples began his employment with ORP on or about August 20, 2003, as a "tank setter," at which time he signed the Maples Agreement. The Maples Agreement was also signed on behalf of ORP by its corporate representative. Maples left ORP in early February 2007 and began work with Hydratane in March of 2007 at its Athens location. At the time of his resignation from ORP, Maples was a delivery driver.

Jones began his employment with ORP, presumably as a delivery driver, on or about January 15, 2007, and signed the Agreement three days later at the UPG corporate office in Kentucky during his orientation. No corporate representative signed the Jones Agreement. Jones became disgruntled and left ORP the day after his orientation, and began with Hydratane shortly thereafter. All Jones did during his short employment with ORP was report for work, ride along on one delivery, sit in the office, and report for orientation.

As the Agreement is the driving force behind this litigation, the provisions we must examine are lengthy and we set them forth verbatim as follows:

> Pricing, Confidentiality and Post Employment Activities Agreement
>
> 2. <u>Definitions</u> – A) The term "Confidential Information" includes, but is not limited to, information, whether in tangible form or otherwise, concerning business and marketing plans; past, present and prospective customer identities, lists, credit information and gas usage patterns; pricing and marketing policies and practices; financial information; acquisition and strategic plans; and other operating policies and practices. B) The term "Customer" refers to any business or person who purchased propane or any other goods or services from THE CORPORATION during the three year period prior to the ceasing of EMPLOYEE'S employment or who solicited or was solicited by, or received a proposal from, THE CORPORATION to supply it with propane or any other goods or services during the three year period prior to the ceasing of EMPLOYEE'S employment. C) The term "THE CORPORATION" shall include (i) offices, sales and service centers and plants owned, leased or operated by United Propane Gas Companies, Inc., its predecessors, subsidiaries, parent companies or affiliates, regardless of what name operated under, and (ii) offices, sales and service

centers and plants that are subsequently acquired by THE CORPORATION.

3. Confidential Information and Corporation Property – A) EMPLOYEE agrees to protect the confidential information of THE CORPORATION its predecessors, subsidiaries, parent companies and affiliates from disclosure and will not divulge it during or after EMPLOYEE's term of employment to any person or entity not associated with THE CORPORATION. B) All reports, manuals, memoranda, computer disks and tapes and other materials made available to EMPLOYEE by THE CORPORATION during the performance of EMPLOYEE's duties are the property of THE CORPORATION and EMPLOYEE will use all such property exclusively for THE CORPORATION's benefit and will return it, including copies, to THE CORPORATION at the ceasing of employment.

4. Prohibited activities – During the course of EMPLOYEE's employment with and for a period of three years after the ceasing of EMPLOYEE's employment with THE CORPORATION for any reason:

A) EMPLOYEE will not directly or indirectly for himself or any other person, firm or entity solicit the business of any Customer who is located within a fifty aerial mile radius of any location of THE CORPORATION where EMPLOYEE worked during the three year period prior to the ceasing of employment. Furthermore, EMPLOYEE will not interfere or attempt to interfere with any relationship, contractual or otherwise, that THE CORPORATION has with its vendors, employees or customers;

B) EMPLOYEE will not directly or indirectly sell or provide propane or any other goods or services sold or provided by THE CORPORATION as of the date of the ceasing of employment to any Customer who is located within a fifty aerial mile radius of any location of THE CORPORATION where EMPLOYEE worked during the three year period prior to the ceasing of employment;

C) EMPLOYEE will not personally employ nor induce any other person or entity to employ in a propane related business, or offer such employment, to any employee of THE CORPORATION with whom EMPLOYEE worked or who was employed at any location of THE CORPORATION where EMPLOYEE worked during the three year period prior to the ceasing of EMPLOYEE's employment. Furthermore, EMPLOYEE will not induce or attempt to induce

> directly or indirectly any employee to terminate his or her employment with THE CORPORATION.
>
> D) EMPLOYEE will not, directly or indirectly, own, obtain ownership and/or financial interest in, manage, operate, join, control, be employed or retained by, or enter into any other similar contractual arrangement with, be connected in any manner with, or participate or engage in the management, operation, or control of any business which is engaged in any business competitive with or similar to that engaged in by THE CORPORATION now as well as any future time during the course of EMPLOYEE'S EMPLOYMENT. The foregoing does not prohibit or restrict EMPLOYEE from purchasing publicly traded securities.
>
> E) EMPLOYEE will not, directly or indirectly, make any representation to any customer either orally or in writing that EMPLOYEE has authority to alter any price offered by THE CORPORATION and will advise all customers of this fact. . . . EMPLOYEE further understands and acknowledges that all pricing policies are set by THE CORPORATION by and through its President and that EMPLOYEE is in no way authorized to offer any price which varies from the price sheets provided by THE CORPORATION.

(Capitalization in original.) The Agreement treats each employee as a "key employee," recognizes a breach as an "irreparable harm" to the corporation justifying injunctive relief, and provides for attorney fees to the corporation in the event it secures either injunctive relief or damages in any proceeding.

Hydratane is a competitor of ORP and its Cleveland office where Maples and Jones were employed is located less than 50 miles from ORP's office. The geographic area of the customer base overlaps, but is not identical. ORP learned of Hydratane's employment of Jones and Maples when Hydratane called ORP to check Maple's application and employment history.

ORP and UPG wrote three letters and an email protesting the move of its past employees to Hydratane. All were made exhibits at trial. Trial exhibit 11 is a letter dated February 28, 2007, from "General Counsel" written on letterhead bearing the name of both UPG and ORP to "Mr. Don Maples." The letter enclosed a copy of the Agreement and summarized some of its contents. The letter to Maples further stated: "Ocoee River demands that you abide by the terms and conditions of these covenants and will take any and all action necessary to enforce these obligations including the initiation of legal proceedings to enjoin activities which violate the covenants as well as to recover the damages caused by such violations." Included, as an enclosure to the Maples letter, was a second letter, trial exhibit 20, from "General Counsel" on the same letterhead as the Maples letter, also dated February 28, 2007, addressed to "Hydratane of Athens, Inc." The letter was similar in

content and tone to the Maples letter, including the following statement addressed directly to Hydratane:

> Please be advised Ocoee River expects Mr. Maples to abide by the terms and conditions of these covenants. Ocoee River will not tolerate any violation of these covenants or the employment agreement and will take any and all action necessary to enforce said agreement, including appropriate action to recover damages against any entity which facilitates Mr. Maples' violations or interferes with the contractual relationship between Ocoee River and Mr. Maples. Such damages would include not only those caused by Hydratane's interference with the relationship between Ocoee River and Mr. Maples but may also include attorney fees and exemplary damages as provided for under the Uniform Trade Secrets Act.

Trial exhibit 21 is an email dated April 25, 2007, wherein UPG complained to general counsel for Hydratane that "[w]e have previous[ly] contacted Hydratane when you hired Maples but they have ignored that and in fact hired Jones after that contact." In a letter from outside counsel dated May 9, 2007, sent on behalf of "United Propane Gas, Inc., and its affiliate Ocoee River Propane Gas, Inc.," Hydratane was advised, "As United Propane has had these covenants upheld in past cases, we are confident they would be upheld in the instant situations as well." The letter also stated:

> Please consider this as my client's final request for written assurance from Hydratane, and any related entities, that it will not aid, abet or participate in any way in the ongoing violations of Mr. Maples' or Mr. Jones' restrictive covenants. If such assurance in writing is not provided **before May 15, 2007**, my client has instructed me to initiate legal proceedings to include a request for injunctive relief, damages, attorney's fees and other possible remedies.

(Bold in original.) The May letter became trial exhibit 22.

Hydratane responded with its petition for declaratory judgment pursuant to Tenn. Code Ann. § 29-14-103 (2000). The company was joined by Maples and Jones as plaintiffs. The petition asks, among other things, for a declaration that the Agreement "is unenforceable and contrary to Tennessee law" and that "Hydratane has no liability to UPG for the hiring of Jones or Maples." The petition alleges that the Agreement is a restraint of trade, an inequitable burden on the ability of employees to earn a living, unsupported by a legitimate business interest, contrary to public interest, broader in time and territory than needed, intended to restrain ordinary competition, and that there is no actual danger to UPG in the absence of the Agreement. The petition also alleges that neither Jones nor Maples received any specialized training as employees of UPG. As to Hydratane, the petition alleges that the Agreement is unenforceable for the stated reasons and that to the extent it is enforceable, Hydratane had no knowledge of the agreement, and did not act with intent to induce a breach. The Plaintiffs amended their petition to name the defendant "United Propane Gas, Inc.,

a Kentucky Corporation, dba Ocoee River Propane Gas, Inc." with a similar allegation in the body of the petition.

UPG and ORP responded by denying that Maples and Jones were UPG employees and asserting that they were separate corporations, ORP, a Tennessee corporation, and UPG, a Kentucky corporation. They admitted that Maples and Jones were previous employees of ORP subject to the Agreement, and denied any facts that would make it unenforceable. ORP asserted a counterclaim against Maples and Hydratane asking for an injunction and damages against Maples for breach of the agreement by working with Hydratane and for damages against Hyratane for intentionally inducing Maples to breach the Agreement. ORP's counterclaim alleges Maples had access to "customer and employee lists and contact information, rate schedules, sales records, customer preferences, and operational information concerning training, policies and procedures associated with running an effective and successful propane business," all of which purportedly constitute "confidential" information.

Well in advance of trial, the court entertained motions for summary judgment from both sides of the dispute. As a result, it held that during Jones' short employment with ORP he had not acquired any training or information or customer relationship that could give rise to a protectable interest on the part of ORP, and granted summary judgment in favor of Jones. Also, the trial court held that the "territorial limits and times are overly broad, unreasonable and oppressive, justifying the court to modify the same to a time period of two years and a fifty (50) mile radius from the point of employment. . . ." Otherwise, the court denied the summary judgment motions.

Only five witnesses testified at trial. Don Maples was the first witness called. He is a high school graduate who has always earned his living as an hourly wage earner and never worked in a supervisory capacity. His first employment in the propane industry was with Suburban Propane about 15 years into his work life. After about a year he left Suburban Propane to go to work for ORP. Without objection, he testified that "Ocoee River is United Propane." Maples identified his signature on the Agreement, but testified that he did not read it, and it was not explained to him. Rather, it was part of a "whole stack of paperwork" that was put in front of him to sign before he could begin work.

His only training before beginning his job with ORP as a tank setter was to ride with a co-employee for a week and learn to "do it the way they [ORP] do." As a tank setter, his job was to pick up orders and forms at the Cleveland office in the morning, load the tanks, deliver and set them, fill out the appropriate forms, and return to the office with the paperwork at the end of the day. His interaction with the customers was limited. He inquired of the customers where to set the tank, went into the home to record serial numbers of gas appliances, collected any monies due, and had the customers sign any necessary paperwork. Maples admitted being paid partially according to the number of tanks he set, but he denied soliciting customers.

Later, Maples worked as a delivery driver for ORP. As a delivery driver, he would fill tanks that were already set. He would pick up a handful of tickets from the Cleveland office on any given morning and start making deliveries. The tickets were computer generated and involved no customer

contact on Maples' part. Once Maples filled a tank, his delivery truck was equipped to generate a ticket which he would present to the customer or sometimes leave "under the dome" of the tank.

Both as a tank setter and delivery driver, Maples had limited opportunities to socialize with customers. Occasionally, a customer would offer a refreshment which Maples would sometimes accept. Maples testified that he was not one to tarry with customers, although he was friendly and courteous as he knew his employer was always interested in customers. Although Maples was paid partially on the basis of gallons delivered, he denied the duty or ability to solicit customers. Price was preset and he had no ability to alter the price. He could access customer files but only did so when there was a problem with a tank. Drivers were provided price sheets on a weekly basis, but Maples testified that he simply discarded the old price sheets and never kept any. Maples resigned when he was sent to make deliveries out of the employer's Dayton facility and nobody was present when he arrived to allow him to load his truck with gas.

Maples filled out an application with Hydratane two days after he had resigned from ORP, but he did not submit it to Hydratane immediately. When he did submit the application, he was interviewed and hired on the spot by the Hydratane manager on duty. Maples denied even knowing there was a non-compete much less telling Hydratane about it. However, Maples was cross-examined with a statement of sorts he had written out at Hydratane's request concerning his hiring. One sentence in his statement read, "Bill [of Hydratane] was not shure [sic] about letting me have a job because I worked for United Propane Gas." His employment paperwork with Hydratane was all dated February 19, 2007, some two weeks after the last date of employment with ORP, as established by trial exhibit 33, an ORP termination notification. Maples denied giving anyone at Hydratane any information about ORP pricing, credit policies, or customers. Further, Maples denied removing any documents from ORP or sharing any documents with Hydratane from his employment with ORP. Maples denied switching out any ORP customer tanks or soliciting ORP customers. By the time of trial, Maples had left Hydratane because of the litigation and had taken work as a propane delivery driver in north Georgia. That location is also within 50 miles of ORP and about 50 to 60% of the delivery area overlapped with ORP. According to Maples, if he could not work within 50 miles of ORP, he would "have to find another line of work or pick up cans on the side of the road."

Jones was the second witness and testified he applied with ORP in Cleveland and was sent to work in Dayton. The first two days he arrived on time but no one appeared at the Dayton office until mid-morning, at which time they rode around for awhile, got a "chicken biscuit" and went back to the office. The third day he rode with the office supervisor to make a delivery. The next day he reported back to Cleveland and then rode with another ORP employee to the Kentucky corporate office where he signed a stack of paperwork, which included the Jones Agreement. Jones denied reading the Agreement and testified that it was not explained to him in any respect. He did not receive any training or information other than standard employment paperwork. He reported to the Dayton office the next day, but made an excuse to go to Cleveland where he interviewed with and accepted a job with Hydratane. Jones denied telling Hydratane anything about a non-compete with ORP. Jones completed his employment paperwork with Hydratane on February 26, 2007.

The next witness was attorney Eric Gibson, general counsel for UPG and about 50 other companies, including ORP, that operate under UPG's umbrella. Gibson was produced in discovery

by the Gas Companies pursuant to Tenn. R. Civ. P. 30.02(6) as the person with knowledge pertaining to the Agreement and this present dispute. Gibson admitted that even though Jones did not work even a full day, ORP sought to enforce the Agreement against him. Only after losing the issue on summary judgment did ORP abandon its efforts to enforce the agreement against Jones. Gibson was asked extensively about his letters to Maples and Hydratane dated February 28, 2007. He would not admit that he was trying to persuade Hydratane to terminate Maples but admitted that it was his intent to keep Maples from being employed in the liquid propane business in any location within 50 miles of a UPG business. UPG has business locations in 9 states. Gibson also admitted that he viewed Maples' present propane delivery job with someone other than Hydratane to be in violation of the Agreement and that if the Agreement were enforced, Maples would lose his job. Gibson confirmed that UPG and ORP consider all employees to be "key" because they all have access to customer and pricing information. They "expect their employees to be bound by [the Agreement] without regard to whether they actually obtain confidential information." The Agreement, as read by general counsel, prohibits any post-employment contact with a UPG or ORP customer, regardless of whether the employee ever had any contact with the customer. Also, it prohibits the employee from accepting employment of any kind, including sweeping floors or mechanic work, with a competing company, even if the employee does not sell propane or tanks. Gibson confirmed that the Agreement is presented on a "standardized printed form" to at-will employees as a condition of employment. Gibson could not name one area of specialized training to Maples other than "doing things the way Ocoee River did them." Gibson could not testify of any confidential information that Maples or Jones received other than the knowledge that one customer uses a lot of propane and another uses less. Gibson could not dispute Maples' testimony that he had taken no confidential documents with him when he left ORP. Neither could Gibson identify any specific customer with whom Maples had developed a special relationship worthy of protecting. Gibson further admitted that simply taking instructions from a customer or accepting a refreshment would not rise to the level of establishing a special customer relationship that needed protection. Gibson admitted that the Agreement is a complex legal document that even professionals can dispute. Further Gibson admitted that he had compared lists produced in discovery of new customers to Hydratane and lost customers to ORP and there was no overlap. In other words, Maples had not moved any ORP customers to Hydratane. Gibson reluctantly, only after being taken through his deposition and quibbling with the phrasing of questions, had to agree that "I don't have anything to offer today to say [Hydratane] induced them to come to work for them." Finally, Gibson agreed that anyone, customers included, can call ORP and obtain the current price of propane.

In a friendly cross-examination conducted by defense counsel. Gibson testified that non-compete agreements "are the standard of the propane delivery industry." However, under further questioning by the Plaintiffs' counsel, he had to admit that several industry leaders did not use non-competes, at least for non-management employees. Gibson testified that Maples had access to confidential information including customer credit information, customer usage information, and customer pricing, especially as to "bid" pricing. He also stated that delivery drivers have access to all customer information through the computer onboard the delivery trucks. Gibson later admitted that customer credit information is not necessarily ORP's information – it is the customer's, and that tank setters and delivery drivers do not need customer credit information to do their job. Gibson testified that the 50 mile geographical radius specified in the Agreement corresponds to the feasible delivery area for a propane sales office. Gibson testified that the market for propane is limited, the

demand is largely seasonal, and the customers are typically low to mid income. Gibson was ORP's damage witness and testified that ORP's damages were the cost of the counterclaim.

During Gibson's testimony, defense counsel attempted, without success, to elicit testimony about a lawsuit filed by a Heritage affiliate against a UPG affiliate, Henry County Propane, and two of Henry County Propane's new hires who had left the Heritage affiliate to work for the UPG affiliate. The Henry County case did not involve a non-compete. Beyond that basic information, Gibson was not allowed to testify over a hearsay objection. In an offer of proof, Gibson read numerous allegations from the complaint including (1) that the employees "each agreed to refrain from disclosing certain confidential information, including, but not limited to, 'marketing research, pricing information and sales programs,' " (2) that the employees later hired by the UPG affiliate "developed relationships with Heritage customers and had access to and became familiar with confidential volume of sales histories, payment histories, usage patterns, sensitive pricing and credit information," and (3) that "pricing information, bidding strategies, cost structure and specific confidential customer financial, usage, and payment data constitute trade secrets." Gibson testified in the offer of proof that the Henry County case involved the same type information and the same type conduct ORP was "complaining about" in the present case. When cross-examined in the offer of proof Gibson admitted that the UPG affiliate, Henry County Propane, had denied all the allegations of trade secret and affirmatively alleged that Heritage did not have a legitimate business interest in the information it sought to protect.

The Plaintiffs rested their case at the end of Mr. Gibson's testimony, and the Gas Companies moved "for a directed verdict." First, the Gas Companies argued there had "been no evidence at all with respect to the relationship between [ORP and UPG] and whether or to what extent United Propane Gas would be a party to that [Agreement]." Next, as to all the remaining allegations, the Gas Companies reminded the court that despite the fact the Plaintiffs sought a negative declaration, they still bore the burden of proving the allegations in their petition. Counsel focused on the factors of specialized training, confidential information, proprietary trade secrets, and special customer relationships, arguing the Plaintiffs had failed to negate those factors. Counsel for the Plaintiffs responded by first arguing "[i]t's been made clear that both UPG and Ocoee River seek to enforce this noncompete against Mr. Maples and Mr. Jones." Counsel further argued that the Plaintiffs' burden of proof was only to establish that a "justiciable controversy exists" and that it defied common sense to suggest that the person filing a declaratory judgment "who previously did not bear the burden of proof now bears the burden of proof on all its claims to establish a negative." Counsel for the Gas Companies responded by conceding that if the case had been filed by the Gas Companies to enforce the Agreement, the Gas Companies would bear the burden of proof, but in the case of a declaratory judgment it, the burden of proof, "flips." The trial court's ruling was succinctly stated as follows: "I do think the plaintiff has put – come forward with enough proof to shift the burden in this case to the defendants, and the motion for directed verdict is overruled."

The Gas Companies called as their first witness the regional manager of Heritage Propane for the Cleveland area, Tony Slayden. Counsel attempted to question Mr. Slayden about whether or not he agreed with certain statements made in the Henry County lawsuit, but was prevented by the court's ruling that Mr. Slayden was not designated as a corporate witness on the Henry County matter and his personal opinion, whether consistent or inconsistent with statements in court filings,

had no relevance. Counsel was allowed to establish through Mr. Slayden that Heritage considers information it gathers from its customers such as address, telephone number, social security number, credit information, income, and employment to be confidential and that it also advises customers that it has security measures in place to protect that confidential information from disclosure. Slayden also agreed that ORP and UPG would be justified in treating the same type information as confidential. Counsel, however, was prohibited from eliciting testimony concerning the statements in Heritage's employee handbook concerning the types of information that it deemed confidential, other than the fact that Heritage tells its employees that customer information is confidential. Heritage's handbook does not contain any post-employment restrictions.

The final trial witness was Ken Walker, general manager of UPG. Walker worked himself up the UPG corporate ladder from delivery driver to management. Walker testified of his training, which consisted of about ten days or two weeks of on the job training in operating the trucks and meter delivery system, filling tanks, installation of tanks, and repairing tanks. During his 10 years as a delivery driver, Walker concentrated on "customer service and customer friendly." Walker claimed that he worked such days and hours as necessary to service his customers and that the customers reciprocated by bringing him refreshments and inviting him into their homes. But, Walker admitted a driver can make his delivery without a customer being home. Walker testified that as a delivery driver he had access to the following information that he now considers to be confidential: name, location, phone number, pay habits and usage of customers; whether the tank was owned or rented and price sheets.

On cross-examination, Walker admitted that he had no knowledge of Maples taking any customer lists or similar documents with him when he left UPG, no knowledge that he used anything he learned at UPG in his job with Hydratane, and no knowledge of the specifics of Maple's relationships with his customers. Further, Walker admitted that he had no knowledge of a customer leaving ORP and going to Hydratane because of Maples. Walker also admitted that the training he received as a driver was nothing specific to ORP or UPG, but was "related to the industry in general." Drivers do not set prices, do not create contracts, and do not make credit determinations. With Walker, the Gas companies closed their proof.

The court deemed all motions as taken under advisement until the end of the case, and instructed the parties to proceed with closing arguments. After hearing oral arguments, the trial court announced its ruling from the bench in favor of the Plaintiffs finding "this agreement as to these two employees is not enforceable." Earlier in its memorandum opinion the trial court had clarified that the agreement it was referring to was the "PRICING, CONFIDENTIALITY AND POST EMPLOYMENT ACTIVITIES AGREEMENT" (capitalization added), sometimes referred to by the court and the parties as the non-compete or covenant not to compete. Further, the trial court ordered the counterclaim dismissed with prejudice. The trial court signed and entered the "Final Order," or judgment, submitted by the Gas Companies, the pertinent terms of which are as follows:

> Upon the conclusion of proof, the Court finds that Plaintiffs proved that there existed a controversy between the Plaintiffs and Defendants with regard to the non-compete provision of Defendants' Pricing, Confidentiality and Post Employment Activities Agreement, which

was sufficient to satisfy their burden of proof with regard to the declaratory judgment action. To that end, the Court finds that the burden of proof with regard to the enforceability of the non-compete provision of the Pricing, Confidentiality and Post Employment Activities Agreement shifted to Defendants, which they failed to meet. The Court finds for Plaintiffs on all claims, as indicated in the transcript of the ruling from the bench . . . which is incorporated into this Final Order in its entirety . . . as Exhibit 1.

The Court finds that Defendants did not demonstrate that Plaintiffs Darel Jones and Donald Maples, Jr. received any confidential information or trade secrets giving rise to a protectable business interest. In so ruling, the Court finds that the prices to customers, customer identifications, credit information, customer usage history or patterns is not under the ***Amarr*** case, confidential information. The Court finds that the credit information of customers is not confidential, and while potentially a trade secret, that Defendants did not establish that such information was provided to Plaintiffs Darel Jones or Donald A. Maples, Jr. Furthermore, the Court finds that Defendants failed to establish that Plaintiffs Darel Jones and/or Donald A. Maples, Jr. were provided any formula, process, pattern, device, or compilation that would be regarded as a protectable trade secret.

The Court finds that Defendants did not establish that Plaintiffs Darel Jones and/or Donald A. Maples, Jr. were provided any specialized training that rose to the level of a protectable business interest.

The Court finds that Defendants did not establish that Plaintiffs Darel Jones and/or Donald A. Maples, Jr. had a special customer relationship, thereby making them the face of Defendants with regard to customers, so as to give rise to a protectable business interest.

The Court further finds that Defendants did not establish any hardship with regard to the post-employment activities of Plaintiffs Darel Jones and/or Donald A. Maples, Jr.

Based upon the foregoing, the Court finds that the non-compete provision of the . . . Agreement as to Plaintiffs Darel Jones and Donald A. Maples, Jr. is invalid and unenforceable.

Given the Court's finding on the invalidity of the non-compete provision of the . . . Agreement, the Defendants' Counterclaims are dismissed for mootness. Nevertheless, the Court finds that Defendants did not establish that . . . Hydratane induced a breach of

> the non-compete provision of the . . . Agreement. Moreover, Defendants did not establish that . . . Hydratane acted with an improper motive or that Defendants sustained any damages other than attorney fees. Therefore, the Court dismisses Defendants' Counterclaims for tortuous interference with contract and breach of contract.

The Plaintiffs would not approve the document submitted by the Defendants, and shortly after entry as the court's judgment, the Plaintiffs filed a motion that the Final Order be altered or amended to reflect that the entire Agreement, as opposed to just the "non-compete provision" was unenforceable. The trial court granted the motion and filed its order to that effect. This appeal followed.

II.

The Gas Companies state the following issues for our consideration:

> Whether the trial court improperly shifted the burden of proof to Defendants with regard to the declaratory judgment action.
>
> Whether the trial court erred in refusing to grant Defendants' motion for involuntary dismissal based upon failure of Plaintiffs to negate all essential elements of an enforceable non-compete agreement.
>
> Whether the trial court erred in refusing to grant Defendant United Propane Gas, Inc.'s motion for involuntary dismissal based upon failure of Plaintiffs to establish any connection to the non-compete agreement made subject of the declaratory judgment action.
>
> Whether the trial court erred in refusing to admit into evidence a Complaint filed by Plaintiffs in another case for purpose of establishing an estoppel on an essential element of non-compete agreements.
>
> Whether the trial court erred in the entry of the Final Order to reflect the invalidation of the entire contract in question, rather than the non-compete provision made subject of the declaratory judgment action.

III.

In ruling on a motion to dismiss made at the close of the plaintiff's proof in a non-jury case,

> the trial judge must impartially weigh and evaluate the evidence in the same manner as though he were making findings of fact at the conclusion of all of the evidence for both parties, determine the facts of the case, apply the law

> to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the plaintiff on the merits, or, the trial judge, in his discretion, may decline to render judgment until the close of all the evidence.

City of Columbia v. C.F.W. Construction Co., 557 S.W.2d 734, 740 (Tenn. 1977). The standard of review, provided the dismissal is based on findings of fact, is *de novo* on the record, with a presumption of correctness. ***Cole v. Clifton***, 833 S.W.2d 75, 77 (Tenn. Ct. App. 1992). If the trial court makes no factual findings, we simply review the judgment *de novo* for the preponderance of the evidence, without a presumption of correctness. ***Kesterson v. Varner***, 172 S.W.3d 556, 566 (Tenn. Ct. App. 2005). A trial court's conclusions of law are accorded no presumption of correctness. ***Vantage Technology, LLC v. Cross***, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999). We review evidentiary rulings of the trial court for abuse of discretion. ***White v. Vanderbilt Univ.***, 21 S.W.3d 215, 222 (Tenn. Ct. App. 1999) Failure to follow the controlling legal standards to the prejudice of one of the parties constitutes an abuse of discretion. *See* ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999). A trial court's decision whether to alter or amend a judgment is also reviewed for abuse of discretion. ***Chambliss v. Stohler***, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003).

IV.

We will start with the issue of whether the trial court improperly shifted the burden of proof to the Gas Companies. This is an issue of law which we will review *de novo*. The Plaintiffs argue that the trial court was correct to shift the burden of proof. "Although Jones, Maples and Hydratane are technically the Plaintiffs in the declaratory judgment action, this alignment is illusory, as Defendants bear the burden of proof not only as to the counterclaims, but as to the enforceability of the Non-Compete." Alternatively, the Plaintiffs argue that the law places a "heavy burden" on the party seeking to enforce a covenant not to compete, and, in light of that heavy burden, they established their entitlement to declaratory relief.

We do not interpret the Plaintiffs' brief as arguing that the trial court did not shift the burden of proof. Our reading of the judgment is that the trial court indeed did put the burden of proof on the Gas Companies. The trial court made a specific finding that the "burden of proof . . . shifted to Defendants." Further, almost every finding was phrased in terms of what the "Defendants did not demonstrate."

Both parties rely upon ***Blake v. Plus Mark, Inc.***, 952 S.W.2d 413 (Tenn. 1997). ***Blake*** was a worker's compensation case initially filed by the worker. ***Id.*** at 414. The employer filed a counterclaim asking "for a determination of the . . . benefits, if any, to which [the worker] was entitled." ***Id.*** On the morning of trial, the worker filed a motion for continuance stating that she had been unable to secure her needed medical proof. ***Id.*** When the trial court denied the motion to continue, the worker moved that she be allowed to dismiss her case without prejudice. The motion was granted. ***Id***. The judgment recited that the case proceeded on the employer's counterclaim, but it was undisputed that neither party offered any proof. ***Id.*** The trial court nevertheless entered judgment that the worker "recover no workers' compensation benefits for her claimed injury." ***Id***.

at 415. After upholding the denial of a continuance, and also holding that the counterclaim of the employer stated a claim for relief, our Supreme Court held that the "trial court erred in awarding judgment for the employer without hearing proof." ***Id***. at 416. The Court treated the employer's counterclaim as the equivalent of a complaint for declaratory judgment. ***Id***. at 417. The Court's holding was stated as follows:

> [The majority view is that] the burden of proof in a declaratory judgment action is the same as in ordinary actions at law or suits in equity, and the plaintiff bringing a declaratory judgment action must, in order to succeed, prove his case in accordance with and within the meaning of such rules, and this rule is not affected by the fact that a negative declaration is sought – of nonliability. It may be stated as a general rule, that the burden of proof is upon the plaintiff to show that conditions exist to justify the court in exercising its discretionary powers to grant declaratory relief pursuant to the declaratory judgment statute. It seems that an applicant for a declaratory judgment has the burden of showing that present justiciable controversy exists, and if this fact is not shown then a cause of action for declaratory relief is not established. . . .
>
> 2 Walter H. Anderson, *Actions for Declaratory Judgments* § 375 (2d ed. 1951). *See also* ***Jared v. Fitzgerald***, 183 Tenn. 682, 195 S.W.2d 1, 4 (1946); ***Century Indus., Inc. v. Wenger Corp***, 851 F.Supp. 1260, 1263 (S.D. Ind. 1994).
>
> The employer had the burden of proving the allegations set forth in its pleadings – jurisdictional facts, the issue in controversy and the circumstances that gave rise to the controversy. The employee will be entitled to such benefits, if any, as this evidence may show, unless the employee produces evidence which shows that she is entitled to additional benefits. Consequently, even though the employer's pleading alleging a counterclaim was not dismissed with the employee's complaint, the pleading, without proof, does not entitle the employer to a judgment.

Blake, 952. S.W.2d at 417 (brackets in original).

To the extent there is ambiguity in ***Blake*** that allows the parties to rely on it for opposite sides of the same issue, the general rule is summarized in 22A Am. Jur. 2d, *Declaratory Judgments*, § 231, at 873 (1988), as follows: "[T]he burden is generally, with the exception of certain insurance cases . . ., on the plaintiff, who must prove all the allegations of his complaint by a preponderance of the evidence." Accordingly, we hold that the Plaintiffs bore the burden of proving the invalidity of the Agreement.

Our holding does not, however, mean that we must assume that the trial court's judgment is defective and must be reversed. If the trial court's judgment is correct, even though the court

reached that correct result for the wrong reason, we will affirm. ***Duck v. Howell***, 729 S.W.2d 110, 113 (Tenn. Ct. App. 1986); *see* Tenn. R. App. P. 36(b). Thus, we will proceed to examine the remaining issues in light of our above holding to see whether the Plaintiffs established a prima facie case at the close of their proof and whether the evidence ultimately preponderates in favor of judgment for the Plaintiffs.

This leads us to the issue of whether the trial court was obligated to grant the Gas Companies' motions for involuntary dismissal. Since the trial court made its determination based on a misunderstanding of which party bore the burden of proof, we will treat the denial of the motion as one without factual findings and review to determine where the preponderance of the evidence lies. We agree with the parties that we must begin with a basic understanding of Tennessee law regarding covenants that restrict employment. We look to ***Vantage*** as an accurate summary, wherein we stated:

> Covenants not to compete, because they are in restraint of trade, are disfavored in Tennessee. ***Hasty v. Rent-A-Driver, Inc.,*** 671 S.W.2d 471, 472 (Tenn. 1984). As such, they are construed strictly in favor of the employee. ***Id.*** However, when the restrictions are reasonable under the circumstances, such covenants are enforceable. ***Id.*** The factors that are relevant in determining whether a covenant not to compete is reasonable include "the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest." ***Allright Auto Parks, Inc. v. Berry,*** 219 Tenn. 280, 409 S.W.2d 361, 363 (1966).
>
> The first factor, consideration, is not an issue on appeal. In balancing the other three factors, a threshold question is whether the employer has a legitimate business interest, *i.e.,* one that is properly protectable by a non-competition covenant. *See* ***Hasty,*** 671 S.W.2d at 473.
>
> Several principles guide the determination of whether an employer has a business interest properly protectable by a non-competition covenant. Because an employer may not restrain ordinary competition, it must show the existence of special facts over and above ordinary competition. ***Id***. These facts must be such that without the covenant, the employee would gain an unfair advantage in future competition with the employer. ***Id***. Considerations in determining whether an employee would have such an unfair advantage include (1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's

business with the employee due to the employee's repeated contacts with the customers on behalf of the employer. ***Id***. These considerations may operate individually or in tandem to give rise to a properly protectable business interest. *See, e.g.,* ***AmeriGas Propane, Inc. v. Crook,*** 844 F.Supp. 379 (M.D. Tenn. 1993); ***Flying Colors of Nashville, Inc. v. Keyt,*** No. 01A01-9103-CH-00088, 1991 WL 153198 (Tenn. Ct. App. M.S., filed August 14, 1991).

An employer does not have a protectable interest in the *general* knowledge and skill of an employee. ***Hasty,*** 671 S.W.2d at 473. This is not only true of knowledge and skill brought into the employment relationship, but also true as to that acquired during the employment relationship, even if the employee obtained such general knowledge and skill through expensive training. *See* ***Hasty,*** 671 S.W.2d at 473 ("general knowledge and skill appertain exclusively to the employee, even if acquired with expensive training and thus does not constitute a protectible [sic] interest of the employer").

In contrast, an employer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer, at least when such training is present along with other factors tending to show a protectable interest. ***Id.***; ***Selox, Inc. v. Ford,*** 675 S.W.2d 474, 476 (Tenn. 1984) ("A line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business.") (quoting Restatement (Second) of Contracts § 188 cmt. g (1981)). *See also* ***Flying Colors of Nashville,*** 1991 WL 153198 at *5 (holding that training in specialized techniques and processes of paint-mixing, together with a special relationship with the employer's customers, gives rise to a properly protectable interest).

Thus, whether an employer has a protectable interest in its investment in training an employee depends on whether the skill acquired as a result of that training is sufficiently special as to make a competing use of it by the employee unfair.

An employer has a legitimate business interest in keeping its former employees from using the former employer's trade or business secrets or other confidential information in competition against the former employer. ***Hasty,*** 671 S.W.2d at 473. A trade secret is defined as any secret "formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." ***Hickory Specialties, Inc. v. B & L Labs., Inc.,*** 592 S.W.2d 583, 586 (Tenn. Ct. App. 1979) (quoting ***Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng'g. Corp.,*** 255 F.Supp. 645, 653 (E.D. Mich. 1966)). The subject matter of a trade secret must be secret and not well known or easily ascertainable. ***Hickory Specialties,*** 592 S.W.2d at 587.

What constitutes "confidential information" is somewhat less clear. In ***Heyer-Jordan & Assocs., Inc. v. Jordan,*** 801 S.W.2d 814 (Tenn. Ct. App. 1990), we held that the identities of the employer's customers did not amount to "confidential business information" within the meaning of the employment agreement because such information was generally available in the trade. We reasoned that "confidential information" is analogous to "trade secret" and that, because customer identities are not secret, they cannot be considered confidential. *See also* ***Amarr Co. v. Depew,*** C/A No. 03A01-9511-CH-00412, 1996 WL 600330, *4-*5 (Tenn. Ct. App. W.S., filed October 16, 1996) (holding that customer lists, customer credit information, pricing information, and profit and loss statements did not constitute confidential information because such information is easily available from sources other than the employer).

> An employer may also have a legitimate protectable interest in the relationships between its employees and its customers. *See* ***Hasty,*** 671 S.W.2d at 473. It is often the case that the customer associates the employer's business with the employee due to the employee's repeated contacts with the customer. The employee in essence becomes "the face" of the employer. This relationship is based on the employer's goodwill. The employee's role in this relationship is merely that of the employer's agent. In this role, the employee is made privy to certain information that is personal, if not technically confidential. Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship, or the information that flows through it, for his own benefit. This is especially true if this special relationship exists along with the elements of confidential information and/or specialized training.

Vantage, 17 S.W.3d at 644-646 (paragraph headings omitted).

The Gas Companies seem to argue that the Plaintiffs could not make out a prima facie case without negating all four factors that go to the threshold question of whether an employer has a legitimate business interest to protect. We disagree. What was required of the Plaintiffs was to present such proof that, if believed, would show that the employer was seeking "to restrain ordinary competition" and, that upon leaving, the "employee would [not] gain an unfair advantage in future competition with the employer." ***Vantage***, 17 S.W.3d at 644. In the present case, both at the close of the Plaintiffs' proof and at the end of proof, we find that the evidence preponderated strongly in favor of finding that Maples acquired only general training that applied across the industry rather than knowledge or training that was peculiar to ORP. In fact, Maples knew how to set tanks and deliver propane when he came to ORP. We also agree with the trial court that the factor of trade secrets or confidential information had been effectively negated by the Plaintiffs because "prices to customers, customer identifications, credit information, customer usage history or patterns is not, under the ***Amarr*** case, confidential information." *See* ***Amarr***, 1996 WL 600330, at *4-5. This was true at the end of the Plaintiffs' proof and at the end of the trial. Thus, the only factor left to sustain a finding in favor of the Gas Companies was the special customer relationship factor. Certainly by the end of the Plaintiffs' proof, there was an evidentiary basis for finding that ORP had no reason to worry that Maples had developed special customer relationships that he was going to use for his own benefit once he left. According to Maples, he was friendly to customers but all business and wasted no time in going on his way once his delivery was made. The person identified by the Gas Companies as their corporate witness could not name one customer with whom Maples had developed a special relationship. Further, that same witness had to admit that simply taking directions from a customer or taking a refreshment did not establish a special customer relationship. According to the proof, some two years after Maples left ORP not one single customer had left ORP for Hydratane. The only thing that changed between the end of the Plaintiffs' proof and the end of all proof was the testimony of Mr. Ken Walker to the effect that he worked all days and hours

necessary to meet the needs of his customers and that they reciprocated by offering him refreshments and inviting him into their home during deliveries. We are not willing to read a special bond into such common courtesies, nor are we willing to infer that all delivery drivers, and especially Maples, are like Mr. Walker in their customer relations. In fact Mr. Walker's characterization of himself strikes us as the "gung ho" type and we note that Mr. Walker's efforts propelled him into management. The same is obviously not true of Maples.

The Gas Companies place great reliance in ***Crook***, 844 F. Supp. at 379. In ***Crook***, the federal district court enforced a covenant not to compete in favor of former employer Amerigas against both a propane branch manager and a delivery driver and restrained those employees and their new employer from soliciting Amerigas customers. The court also restrained the use of confidential information obtained from Amerigas. In the course of reaching its conclusion, the district court made some sweeping findings of fact that purport to characterize "The Propane Gas Industry" in a way that is favorable to the Gas Companies. We will not quote ***Crook*** at length. It is sufficient to say that ***Crook*** characterizes the industry as highly competitive with limited demand and sales driven solely by prices and service. As to the service aspect, the ***Crook*** opinion can be read to state that all customers tend to accept their delivery and service person as their source rather than the actual supply company. Were we to simply import the findings of ***Crook*** into this case, we would be ignoring some of the most basic concepts of jurisprudence. More importantly, we would be ignoring the holding of our High Court that the enforceability of non-compete agreements is to be determined on a case-by-case basis. ***Allright Auto Parks***, 409 S.W.2d. at 363. Notwithstanding any parallels drawn by the Gas Companies, the proof in ***Crook*** was not the proof in this present case. We know only that the district court in ***Crook*** "heard evidence" on an expedited basis in a hearing on whether to convert a temporary restraining order into a preliminary injunction. 844 F. Supp. at 381. For the most part, we do not know the particulars of the evidence. However, in one important respect, we know there was strong evidence in ***Crook*** that the departed employees and their new employer were engaged in unfair, as opposed to ordinary, competition. The new employer stressed the importance of soliciting new customers, "by every conceivable means." ***Id.*** at 384. It was undisputed in ***Crook*** that both departed employees actually solicited the customers of Amerigas after they left. In the nine months between their departure from Amerigas and the date of the hearing, the employees had taken 106 of their new employer's 219 customers from Amerigas. ***Id***. It is also significant that the employees took their new job with the assignment of opening a new branch office with the customers they could procure. The proof in this present case is that Maples did not solicit ORP customers and that ORP did not lose any customers to Hydratane. Since ***Crook*** is not binding precedent and is factually different from the present case, the Gas Companies' reliance on that case is misplaced.

UPG makes the alternative argument that it was entitled to dismissal because the Plaintiffs did not establish its involvement in the controversy. Again, we must disagree. The Agreement, in fact, defines UPG as a principal and defines any satellite beneficiary in terms of UPG. When the Gas Companies started their efforts to enforce the Agreement, they did it on letterhead of both ORP and UPG. When a witness was needed, it was UPG general counsel, who came to the stand. Maples testified without objection that "Ocoee River is United Propane." The substance of Gibson's testimony is that UPG is the umbrella under which all affiliates and satellite offices operate and that

they seek to enforce the Agreement anywhere in the nine states where there are affiliate offices. We find no error in making UPG subject to the judgment.

Accordingly, we hold that the trial court, notwithstanding its error in regard to the burden of proof, correctly denied the motions for involuntary dismissal. We hold that the evidence preponderates against enforcing the Agreement because of the lack of a legitimate interest to be protected. Because we have sustained the trial court on this "threshold" issue, we will not engage in the details of balancing the respective burdens on the employer and employee. We observe however that, under the proof in this case, the burden on Maples and Jones would be substantial and the burden on the Gas Companies from not enforcing the Agreement is not significant. Likewise, we will not examine the time and geographical scope of the Agreement, and whether it should be "blue pencilled" to make it less restrictive.

We move now to the issue of whether the trial court abused its discretion in not allowing the Gas Companies to prove that Hydratane filed a complaint in another dispute in Henry County wherein it alleged that the same type customer information at issue in the present case was confidential, although it disputed the confidentiality of such information in the present case. Specifically, the Gas Companies argue that the Plaintiffs are estopped, because of the position Hydratane took in the other case, to contest the confidentiality of the same or similar information in this case. We are puzzled as to how the Gas Companies contend estoppel applies to Maples and Jones, since they were not parties to the Henry County case. Nevertheless, we need not struggle long with this inconvenient truth. Estoppel in judicial proceedings was most recently addressed by our Supreme Court in ***Cracker Barrel Old Country Store, Inc. v. Epperson***, 284 S.W.3d 303 (Tenn. 2009). It is clear from ***Epperson*** that "[i]n the absence of a sworn statement, the doctrine of judicial estoppel does not apply." ***Id***. at 315. The Gas Companies relied on judicial estoppel at the trial conducted before the release of the ***Epperson*** opinion. They now concede that the Henry County complaint was not sworn and the doctrine of judicial estoppel is not applicable. The Gas Companies now make the weakened assertion that equitable estoppel "may" apply. We are not persuaded. Elements of equitable estoppel are knowledge of the "real facts' and an intent that the false statement be relied on by the party asking for estoppel. ***Id***. at 316. Courts are understandably slow to find estoppel based on unsworn statements made in pleadings because the modern rules of practice and procedure "specifically allow for inconsistent pleading." ***Id***. Even if we were inclined to give this "may be" argument serious sway, we could not find that the Gas Companies relied on anything that happened in the Henry County case because they (Henry County Propane, an affiliate of UPG) denied the confidential nature of the information in that case. It is unlikely that Hydratane intended for the Gas Companies to admit and immediately adopt all its pleadings. Accordingly, we hold that the trial court did not abuse its discretion in refusing to admit the Henry County filings and estop the Plaintiffs from denying the confidential nature of the information available to Maples and Jones.

The final issue we must address concerns the trial court's expansion of the scope of its judgment from the "non-compete provision" to the entire Agreement. The Gas Companies argue the "the trial and evidence focused solely on the non-compete provision." They argue that there was an "absence of any proof with regard to the other provisions" without identifying exactly what those "other provisions" were. Indirectly, the Gas Companies mention "the language to keep proprietary information confidential, as well as the non-solicitation provision," so we infer that

these are the parts of the Agreement that they say should not have been invalidated. We cannot agree with the Gas Companies that there was no evidence related to the need for enforcing these provision. The Gas Companies assert that "the parties both discussed in detail Tennessee law as it relates to the enforceability of a covenant not to compete, to include a required showing of a protectable business interest in specialized training, trade secrets or confidential information, or special customer relationships." We agree, and we have held that the evidence preponderated against a legitimate need for protection as to any of those factors. The same proof that supports the judgment relates to whether there is in fact "confidential information" and whether there was a danger of "solicitation." We do not understand how there can be some unproven "proprietary information" that needs protecting or some unidentified person that should not be solicited. The Gas Companies' brief is markedly absent of any authority in support of their argument to the contrary. We also agree with the Plaintiffs that the amended final order is consistent with the trial court's announcement from the bench. Specifically, the trial court noted that the entire Agreement was before the court even though the parties often spoke in terms of a covenant not to compete. Accordingly, we hold that the trial court did not commit error in amending its final order to encompass the entire Agreement as opposed to any particular provision.

V.

The judgment of the trial court is affirmed. Cost on appeal are taxed to the appellants, United Propane Gas, Inc., and Ocoee River Propane Gas, Inc. The case is remanded, pursuant to applicable law, for collection of costs assessed below.

____
CHARLES D. SUSANO, JR., JUDGE