MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Julie A. Camden
Camden & Meridew, P.C.
Fishers, Indiana

ATTORNEYS FOR APPELLEES

Kimberly D. Jeselskis
B.J. Brinkerhoff
Jeselskis Brinkerhoff and Joseph, LLC
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Telecom, LLC d/b/a Priority Communications, LLC,

Appellant-Plaintiff,

v.

Affordable Telephones, LLC, and M. Scott Taylor,

Appellees-Defendants

April 23, 2021

Court of Appeals Case No. 20A-PL-2122

Appeal from the Marion Superior Court

The Honorable Patrick J. Dietrick, Judge

Trial Court Cause No. 49D12-1912-PL-50489

Crone, Judge.

Case Summary

[1] Telecom, LLC d/b/a Priority Communications, LLC (Priority), appeals the trial court's denial of its motion for a preliminary injunction against Affordable Telephones, LLC (Affordable), and M. Scott Taylor (collectively Appellees). We affirm.

Facts and Procedural History

[2] In November 2008, Taylor became employed by Midwest Telephone (Midwest). In May 2018, Priority purchased Midwest's assets, and Taylor became employed by Priority. Among Midwest's assets was an Excel spreadsheet pricing tool and a list of Midwest's past and present customers; Taylor never saw this list during his employment with Priority. Before the acquisition, Midwest had approximately 3500 customers, and Priority had approximately 1500 customers. During his first year of employment with Priority, Taylor handled operations matters relating to Midwest, as the two entities were still in a transition period.

[3] In June 2018, Priority sent Taylor an "Employee Confidentiality and Non-Solicitation Agreement" (Agreement) to sign, which he did on June 4. The Agreement reads in relevant part as follows:

> 7. **Non-Solicitation.** During Employee's employment with the Company [i.e., Priority] and for a period of two (2) years after termination of the Parties' employment relationship for whatever reason (the "Restricted Period"), Employee hereby warrants and agrees that neither Employee nor any agent, affiliate, employer,

> or other entity of Employee will solicit or accept work on Employee's own behalf from any person who:
>
> > (a) Is or has been a client of the Company at any time during the Restricted Period;
> >
> > (b) Was a client of the Company at any time while Employee was employed by the Company; or
> >
> > (c) Was a client of the Company at any time twelve (12) months prior to the Effective Date [i.e., June 4, 2018].
>
> During Employee's term with the Company and during the Restricted Period, Employee further agrees not to recommend to any client of the Company to patronize any other operation or business that is competitive with the Company or to solicit any employee of the Company to provide services for any other person or entity.

Ex. Vol. 1 at 7 (PDF pagination) (Plaintiff's Ex. 1) (underlining omitted).

[4] In February 2019, Priority's president emailed a list of 700 customers to Taylor. The list, which was created using Midwest's customer list, represented the top customers by revenue over the last six years and contained only the customer names and a gross revenue figure for each client. In May 2019, Priority transferred Taylor to a sales role with responsibility only for customers that Midwest had brought to the acquisition. On August 4, 2019, Priority terminated Taylor's employment; Taylor retained a copy of the 700-customer list and a copy of the abovementioned Excel spreadsheet. The next day, Taylor formed Affordable.

[5] In November 2019, Priority learned that Taylor was soliciting its customers. In December 2019, Priority filed a complaint against Taylor alleging breach of the Agreement and tortious interference with business relationships and requesting damages and injunctive relief. Not until July 2020, however, did Priority file a motion for preliminary injunction. In August 2020, Priority filed a second motion. On September 3, 2020, the trial court held a hearing on the motion. As of that date, approximately 3200 of Midwest's 3500 customers had not been contacted by Priority in a year, and approximately 2400 customers had not been contacted since 2018. In October 2020, the trial court issued a sixteen-page order denying Priority's motion for preliminary injunction, concluding in relevant part that the Agreement is unreasonably broad and therefore unenforceable. Priority now appeals. Additional facts will be provided below.

Discussion and Decision

[6] "An injunction is an extraordinary equitable remedy, which should be granted only 'in rare instances in which the law and facts are clearly within the moving party's favor.'" *Great Lakes Anesthesia, P.C. v. O'Bryan*, 99 N.E.3d 260, 267 (Ind. Ct. App. 2018) (quoting *Barlow v. Sipes*, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001), *trans. denied*).

> To obtain a preliminary injunction, the moving party has the burden to show by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction.

Clark's Sales & Serv., Inc. v. Smith, 4 N.E.3d 772, 779-80 (Ind. Ct. App. 2014), *trans. denied*.

[7] We review the denial of a motion for preliminary injunction for an abuse of discretion. *Id*. at 779. "When a movant has failed to meet any one of the four requirements for seeking the issuance of a preliminary injunction, the trial court does not abuse its discretion in denying relief." *Great Lakes*, 99 N.E.3d at 268. To the extent our analysis turns on the trial court's interpretation of a purely legal question, we review that matter de novo. *Heraeus Med., LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 152 (Ind. 2019).

[8] "When considering whether to grant a preliminary injunction, the trial court is required to make special findings of fact and conclusions thereon." *Clark's*, 4 N.E.3d at 780; Ind. Trial Rule 65(D). "On appeal, we must determine whether the evidence supports the trial court's findings, and whether the findings support the judgment." *Clark's*, 4 N.E.3d at 780. "We will not disturb the findings or judgment unless they are clearly erroneous. We neither reweigh the evidence nor reassess witness credibility, but consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom." *Id*. (citation omitted).

[9] To establish that a party has a reasonable likelihood of success at trial, the party must establish a prima facie case. *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 874 (Ind. Ct. App. 2016). "The party is not required to show that he is entitled to relief as a matter of law, nor is he

required to prove and plead a case, which would entitle him to relief upon the merits." *Id*. (quoting *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 118 (Ind. Ct. App. 2004)). Here, the trial court concluded that Priority failed to establish that it has a reasonable likelihood of success at trial based on the court's determination that the Agreement is unreasonably broad and therefore unenforceable as a matter of law.

[10] Our supreme court has explained that "[n]oncompetition agreements restrict former employees from using valuable information obtained during their employment—such as trade secrets or confidential client data—to harm their former employers." *Heraeus*, 135 N.E.3d at 152-53.[1] "But because these agreements are in restraint of trade, courts enforce them only if they are reasonable." *Id*. at 153 (citation and quotation marks omitted). "[S]uch reasonableness is a question of law." *Clark's*, 4 N.E.3d at 780. "In arguing the reasonableness of a noncompetition agreement, the employer must first show that it has a legitimate interest to be protected by the agreement." *Id*. "Second, the employer bears the burden to show that the agreement is reasonable in scope as to the time, activities, and geographic area restricted." *Id*. In its order, the trial court concluded that Priority did not show that it has a legitimate interest to be protected by the Agreement or that the scope of the Agreement is

[1] Priority asserts that "[t]here is no existing case law indicating that an agreement not to solicit should be treated as a non-compete agreement." Appellant's Br. at 18. An agreement not to solicit a company's customers is by definition an agreement not to compete against that company.

reasonable. We find the latter conclusion persuasive and therefore need not address the former.

[11] "This Court has held that although present customers are a protectable interest of an employer, a contract prohibiting contact with any past or prospective customers, no matter how much time has elapsed since their patronage ceased, was vague and too broad." *Id*. at 781-82 (citing *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 214 (Ind. Ct. App. 1982)). To reiterate, the Agreement prohibits Taylor from soliciting or accepting work from any person who

> (a) Is or has been a client of the Company at any time during the Restricted Period;
>
> (b) Was a client of the Company at any time while Employee was employed by the Company; or
>
> (c) Was a client of the Company at any time twelve (12) months prior to the Effective Date.

Ex. Vol. 1 at 7. The trial court correctly observed that the Agreement applies to past customers, no matter how much time has elapsed since their patronage ceased, current customers with whom Taylor had no contact (especially due to his exclusive focus on Midwest customers), as well as prospective customers who started working with Priority after Taylor's termination; thus, it puts Taylor "in a situation where he could be violating the non-solicitation provision without even knowing he was doing so." Appealed Order at 14. Accordingly, we agree with the trial court's conclusion that the Agreement is unreasonably broad. *See Clark's*, 4 N.E.3d at 782 (holding that defendant's attempt to protect

an "expansive customer base …. spanning the entire term" of plaintiff's employment was "overly broad and unreasonable").

[12] The trial court further concluded that the Agreement is unable to be salvaged by the "blue pencil doctrine," pursuant to which "a court may excise unreasonable, divisible language from a restrictive covenant—by erasing those terms—until only reasonable portions remain." *Heraeus*, 135 N.E.3d at 153. "The doctrine, however, does not allow a court to rewrite a noncompetition agreement by adding, changing, or rearranging terms." *Id*. The trial court found that "the covenant not to solicit any person who 'is or has been a client' or who 'was' a client cannot be blue-penciled because there is no language that the Court can erase to render it reasonable." Appealed Order at 15. We agree. Because Priority failed to meet at least one of the four requirements for a preliminary injunction, the trial court did not abuse its discretion in denying Priority's motion. Therefore, we affirm.

[13] Affirmed.

Riley, J., and Mathias, J., concur.