

Judgment rendered February 24, 2016.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 50,351-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

DAVID PATTRIDGE AND
GARY GARDNER

Plaintiff-Appellee

Versus

JIMMY A. STARKS, BILLY J.
EDWARDS, GREGORY G.
EDWARDS, VECTOR ENERGY
SOLUTIONS COMPANY, AND
ENDURALL, INC.

Defendant-Appellant

* * * * *

Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 140,082

Honorable John Marion Robinson, Judge

* * * * *

McMICHAEL, MEDLIN, D'ANNA,
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David Pattridge, Gary
Gardner, and Endurall, Inc.

* * * * *

Before DREW, MOORE and GARRETT, JJ.

DREW, J.

Billy Joe Edwards challenges a damage award of \$600,000 against him and in favor of Endurall, Inc., for the violation of a noncompete agreement. For the following reasons, we affirm.

FACTS

The background of this dispute is set forth in *Pattridge v. Starks*, 50,135 (La. App. 2d Cir. 11/18/15), 181 So. 3d 192 (“*Pattridge II*”). Briefly, in 2004, four investors¹ formed a Louisiana company, Endurall, Inc., to manufacture and sell rod guides to the oil and gas industry. The investors all signed a noncompete agreement stating that if any of them were terminated as shareholders, they would not compete against Endurall within 24 months after termination. Appellant Edwards was eventually fired from Endurall as an employee, and after a dissolution fight, he was terminated as a shareholder on July 31, 2013, when the company’s stock was acquired at auction by two of the original investors, David Pattridge and Gary Gardner.²

Edwards then worked for another energy-related business, Skye Petroleum, marketing paraffin products to many of Endurall’s customers. He used some of his share of the proceeds from the Endurall stock auction to help his son Greg Edwards form a new company, DHE, LLC (“DHE”); DHE commenced doing business in March 2014. DHE, whose office was located in Benton, Louisiana, in the same building as the office of Skye Petroleum, competed against Endurall in the manufacture and sale of rod

¹Billy Joe Edwards, Jimmy Starks, David Pattridge, and Gary Gardner.

²This court affirmed the trial court’s rulings concerning the dissolution action in *Pattridge v. Starks*, 49,239 (La. App. 2d Cir. 9/24/14), 149 So. 3d 820.

guides. Several of Endurall's former sales reps and customers switched from Endurall products to DHE products, and Endurall's sales declined.

Endurall, Pattridge, and Gardner sued Edwards in June 2014, alleging that his actions violated the noncompete agreement and damaged Endurall's business. The district court concluded that Edwards had violated the agreement, and in *Pattridge II*, this court affirmed that determination, observing:

In its reasons for ruling, the trial court specifically cited the timing and destinations of Edwards' business trips on behalf of Skye Petroleum and the more than coincidental happenstance that those trips coincided with the opportunity for Edwards to conduct DHE, LLC business. It also took notice of Edwards' admissions that: he was distributing Gary's phone number on behalf of DHE, LLC; he helped obtain the building for DHE, LLC; and, he had an office in that same building. The trial court considered that the money Edwards received from the sale of his stock in Endurall had been pledged to secure the loan for the founding and operation of DHE, LLC.

The district court held a separate trial to determine the damages owed by Edwards to Endurall under La. R.S. 23:921(H).³ At the damages trial, the court heard a variety of testimony concerning Edwards' actions and the effect the premature competition from DHE had on Endurall's sales, and concluded that Endurall was entitled to \$600,000 from Edwards.

Edwards appealed from the ensuing judgment in favor of Endurall, arguing:

- The District Court erred in finding that Edwards' alleged violations of the noncompetition agreement caused damage to plaintiffs.

³H. Any agreement . . . shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived.

- The District Court erred in considering competing activities that took place outside of Louisiana in finding that Edwards violated the noncompetition agreement and that these activities caused damages to plaintiffs.
- The District Court erred in calculating the amount of the damage award to plaintiffs because the award was based on past and future losses which were too speculative and uncertain.
- The District Court erred in awarding damages for the period after the expiration of the noncompetition agreement on July 31, 2015.

DISCUSSION

Assignment of Error 1. The District Court erred in finding that Edwards' alleged violations of the noncompetition agreement caused damage to plaintiffs.

Whether or not a particular act has caused another's damages is a question of fact that must be proven by a preponderance of evidence. *See, e.g., Nichols v. NLU*, 31,120 (La. App. 2d Cir. 2/24/99), 729 So. 2d 733, writ denied, 99-1209 (La. 6/4/99), 744 So. 2d 633.

A court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong, and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). *See also Stobart v. State through Dept. of Transp. & Dev.*, 617 So. 2d 880 (La. 1993). An appellate court must not base its determination on whether it considers the trier of fact's conclusion to be right or wrong, but on whether the fact finder's conclusion was reasonable. *Stobart, supra*. The appellate

court must not reweigh the evidence or substitute its own factual findings because it would have decided the case differently. *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*, 2001-2217 (La. 4/3/02), 816 So. 2d 270. With regard to decisions of law, however, a trial court's ruling is subject to *de novo* review. *Hall v. Folger Coffee Co.*, 2003-1734 (La. 4/14/04), 874 So. 2d 90.

In rendering its decision on damages, the trial judge had the benefit of having presided over the previous trial concerning the enforceability and breach of the noncompete agreement. There, the judge heard, among other things, details about Billy Joe Edwards' travels, purportedly on behalf of Skye Petroleum, that coincided with the loss of Endurall customers in the areas where he traveled. At the damages trial, the judge likewise heard testimony from several witnesses.⁴

David Pattridge testified:

- Before his termination, Billy Joe Edwards was the “sales arm” of Endurall and had relationships with the sales reps and some of the customers.
- After Billy Joe Edwards was fired from Endurall, the sales reps continued to buy from Endurall until the formation of DHE.
- Endurall had lost “a considerable amount of business” since the formation of DHE.
- Upon the formation of DHE, three former Endurall sales reps—Tom Herring, Mike Kelly, and Mike Carr—switched from selling Endurall rod guides to selling DHE rod guides in

⁴Notably, the transcripts of the testimony of three witnesses—David Pattridge, Gary Gardner, and Benjamin Woods—were sealed by the trial court and by agreement of the parties in an effort to protect their proprietary business information. As noted, Pattridge and Gardner were the principals of Endurall, and Benjamin Woods was their CPA expert in business valuation. Likewise, Woods' report was also sealed. Although This court has access to and has carefully reviewed the sealed information, this opinion protects the proprietary information at issue.

the first quarter of 2014.

- These three reps were close to Billy Joe Edwards prior to the formation of DHE.
- Endurall thereafter lost about one-third of its customers and these customers were “relatively in these three reps’ areas”.
- Billy Joe Edwards visited numerous customers of Endurall on several business trips, and these customers thereafter stopped buying from Endurall.

Gary Gardner testified:

- Since the formation of DHE, Endurall lost roughly one-third of its domestic customers and close to half of its domestic revenue.
- Endurall was engaged in a price war with DHE to try to recover some customers after DHE “went into our markets with our sales reps and . . . cut prices. They knew what our prices were and they started slashing prices to beat us.”
- Prior to DHE’s formation, Endurall “never noticed a loss” from then-existing competitors.
- Three former Endurall sales reps—Tom Herring, Mike Kelly, and Mike Carr—all quit as Endurall reps on the same day in March 2014, and Endurall’s sales stopped in their areas.
- These reps left Endurall only upon the formation of DHE; they had originally stayed with Endurall even after Billy Joe Edwards left Endurall.
- Billy Joe Edwards’ financing allowed the formation of DHE.
- Billy Joe Edwards’ business trips to areas where Endurall’s customers and reps were located predated the formation of DHE.

Endurall’s business valuation expert/CPA, Benjamin Woods, testified primarily about the calculation of damages, not about the cause.⁵ He said

⁵Woods explained, “[M]y assignment was not to try to determine the cause for these [sic] loss of customers or to try to understand or identify a specific cause for this event.”

that he based his calculations on a list of lost customers provided to him by Endurall.

Defendant Billy Joe Edwards testified:

- Beginning in 2013, he traveled to Oklahoma, south Arkansas, and Illinois, all places where Endurall had customers.
- The customers he visited “had paraffin issues” and that was the purpose of the visits.
- He gave his son’s phone number to two people.
- On the trip to Illinois, he and the current Endurall rep visited Endurall customers, and Edwards answered “if you say so” when asked if the Illinois Endurall customers now bought rod guides from DHE.
- When a Mississippi customer of Endurall asked Edwards about rod guides, Edwards “handed the phone to Greg.”
- He “might have” read a letter announcing the formation of DHE that Greg sent to potential rod guide customers:

“My father, Billy Joe Edwards, was the co-inventor of the original Endurance Rod Guide made out of UHMW-PE. He started Down Hole Enterprises in the mid 1980s, later changing the name of the company to Endurall, Inc. Billy Joe recently sold his interest in the company and is now working with . . . Skye Petroleum[.]

...

“Having worked with my dad since the beginning with both Down Hole Enterprises and Endurall, I have the knowledge necessary to produce the ULTRA Poly Rod Guide. We will offer all of the standard sizes of guides and be able to custom design and manufacture any size our customers may need.”

Both the defendant and his wife, Judy, testified that they pledged \$500,000 in CDs—money they received from the sale of Endurall’s stock—to a bank so that Greg could obtain a line of credit to start DHE.

Mike Kelly testified:

- He was an owner of Flow Specialties, Inc., a manufacturer’s rep for oilfield products.

- He previously was a rep for Endurall, but now sold DHE rod guides.
- Billy Joe Edwards told Kelly in January 2014 about the formation of DHE, and Kelly first saw a DHE rod guide in the first week of February. On February 14, 2014, he gave Endurall a 30-day notice that he was terminating his sales agreement with Endurall.
- He switched to selling DHE rod guides because he thought DHE's product was going to be better than Endurall's, but at that time, he had never seen a DHE guide in the field.
- He traveled with Billy Joe Edwards to south Arkansas in August and September 2013 and March 2014 to visit customers who also happened to be Endurall customers.
- One of the Endurall customers asked Billy Joe Edwards if he was in the rod guide business, and Billy Joe said, "No, but my son is," and that Endurall customer is now a DHE customer.
- His decision to stop being an Endurall rep was partly due to Gardner and Pattridge's actions of firing Billy Joe Edwards and suing a company that Kelly had invested in.

Gregory Edwards testified:

- He was the owner and sole member of DHE, LLC, which started business on March 17, 2014.
- He financed DHE with \$500,000 in CDs in his mother's name.
- This backing allowed him to buy a Haas turner machine that allowed him to make a better rod guide than Endurall made.
- Billy Joe Edwards referred at least two and perhaps four or five customers to DHE.
- Customers who switched from Endurall rod guides to DHE rod guides did so without ever having seen the DHE guide perform.
- He sells to many customers through sales reps and does not know whether these customers were former Endurall customers.

A portion of the deposition testimony of former Endurall reps Tom

Hearing and Jamie Mims was also introduced into evidence. Herring said he first heard about the formation of DHE in an email from Greg Edwards in January or February 2014, and that he had discussed the company with Billy Joe Edwards who told him, "Greg was going to start making rod guides." Herring said that he decided to switch to selling DHE guides "because Greg was making them, and I thought I'd have a little better shot with his guides. . . . A little bit better made." Herring first saw a DHE rod guide in April 2014, after he terminated his agreement with Endurall and had discussed the technical aspects of the DHE guides with Billy Joe Edwards "a little bit. . . . Once or twice, maybe."

Jamie Mims testified that his first contact with Greg Edwards was by email, and explained that he got Greg's email address from Mike Carr about six months before the date of the deposition.

The trial judge gave his reasons for finding that Billy Joe Edwards' breach of the noncompete agreement caused Endurall damages:

I do find for the reasons stated in plaintiffs' pretrial memorandum⁶ and argued by him at trial that there was sufficient connexity. There was causation proved to the Court's satisfaction between Mr. Edwards' violation of the non-compete and the resulting injury or damages to the plaintiffs.

This court has exhaustively reviewed all the testimony of the witnesses and concludes that the record fully supports the trial judge's finding that Edwards' conduct caused Endurall to lose revenue because his

⁶That memo included citations to the judge's previous finding that Billy Joe Edwards was promoting Greg/DHE, giving Greg's phone number to people and "much more," including the pledge of \$500,000 of proceeds from the sale of Endurall's stock to secure the loan to start DHE.

post-termination contacts with Endurall reps and customers led these reps and customers to leave longstanding relationships with Endurall and switch to DHE products.

Key to this determination is the fact that the reps switched to DHE products *before they had any experience with the DHE products*. In fact, some reps gave notice to Endurall prior to DHE's official startup date of March 17, 2014. We agree with appellees that the defendant's activities and Endurall's ensuing losses were "more than mere coincidences." The letter Greg Edwards sent to prospective customers relied heavily upon the defendant's knowledge and expertise in the rod guide industry to sell DHE guides and did so with his father's knowledge. Finally, DHE was seeded with funds obtained through the pledge of the defendant's assets.

The trial judge, who was very familiar with the case and the parties after two trials, essentially made a credibility call here and disregarded Edwards' testimony in favor of the evidence that his actions and Endurall's losses were related, and we find no reason to disturb the trial court's conclusion.

Assignment of Error 2. The District Court erred in considering competing activities that took place outside of Louisiana in finding that Edwards' violated the noncompetition agreement and that these activities caused damages to plaintiffs.

The appellant's second assignment is related to its first assignment arguing that the trial court erred in finding a causal connection between his conduct and Endurall's losses. The appellant argues that the plaintiffs failed to show that they should be compensated for losses that may have been caused by the defendant's conduct outside the State of Louisiana or the

five-parish area where the trial court intended to apply the noncompete agreement. They urge that Edwards' business trips took him outside Louisiana, and that his conduct in those other states cannot support an award of damages under the Endurall noncompete agreement, which was not enforceable outside of the Louisiana parishes where Endurall did business.

The appellee argues that this court should not consider this issue because Edwards did not raise it in the trial court,⁷ where it might better have been explored and where the trial court could have had a chance to (1) decide the merits of the argument and (2) decide what parts of the defendant's conduct occurred within the noncompete area.

Although we tend to agree with the appellees that this argument was not squarely presented to the trial judge⁸ and the evidence might have been better presented to formulate a decision on the issue had it been raised below, we are also mindful that the plaintiff had the burden of proving causation and damages and that noncompete agreements are not traditionally interpreted expansively in Louisiana jurisprudence.

⁷See, e.g., *Am. Bank & Trust Co. of Shreveport v. Boddie*, 406 So. 2d 694 (La. App. 2d Cir. 1981):

Louisiana appellate courts are authorized by La. C.C.P. Article 2164 to render any judgment "which is just, legal and proper upon the record." However, our jurisprudence has qualified this codal provision with the general rule that a defense not raised and passed upon in the trial court may not be raised for the first time on appeal. *Young v. Warner*, 283 So.2d 547 (La. App. 1st Cir. 1973); *X-L Finance Co. v. Fenske*, 197 So. 2d 182 (La. App. 1st Cir. 1967). Furthermore, Rule 9A (see now U.R.C.A. Rule 1-3) of the Uniform Rules for the Courts of Appeal provides that we "ordinarily will review only issues which were submitted in the trial court ... unless the interest of justice requires otherwise."

⁸The judge did find that Edwards was competing against Endurall in Louisiana; at issue in this assignment of error is the measure of loss attributable to the conduct that was clearly in-state versus what happened outside of the state.

As this court stated in its opinion in *Pattridge II*:

If Edwards had desired to continue work in the rod guide business, the only thing he had to do was respect the narrow scope of the agreement he made with Endurall and either wait out the two-year time period or go work outside the geographical area in which Endurall conducted business. Edwards did neither; he immediately took the money he was paid for his shares of stock and helped his son found a company designed to compete directly with Endurall.

DHE's office was in Benton, Louisiana, in the same building where Billy Joe Edwards worked for Skye Petroleum, allowing Billy Joe easy access to DHE's business operations. The profits that Endurall lost from customers both inside and outside Louisiana would have accrued to Endurall's benefit in Louisiana, and instead those profits were earned by DHE, another Louisiana business supported by Billy Joe Edwards that was located a few miles from Endurall and within the area covered by the noncompete. We agree with the appellees' argument in brief:

First, DHE is located in Bossier Parish and operates there exclusively. All of its design, manufacturing and marketing processes are housed in Bossier Parish. All operations and assets owned by DHE are operating and located in Bossier Parish. DHE does not maintain offices in any other location. All rod guides sold anywhere in the world for DHE are manufactured and shipped from the DHE facility in Bossier Parish. All sales orders for DHE are taken from Bossier Parish and fulfilled from Bossier Parish. Thus, all of Edwards' promotional acts on behalf of DHE were designed to promote and assist a Bossier Parish entity.

Second, Edwards' office space was located inside the same building as DHE, in Bossier Parish, until he was ordered to vacate his office for violating the noncompete covenant. Like DHE, Edwards did not maintain any additional offices in any other location. Third, Edwards' pledge of the \$500,000 in CDs to DHE's lender – which was essential to DHE's creation, occurred in Bossier Parish. Fourth, Gregory sent letters and Edwards made phone calls to Endurall customers and sales representatives from Bossier Parish. Fifth, Edwards planned,

coordinated, and scheduled his trips to Endurall customers from his home or office, both located in Bossier Parish. Edwards also traveled to those locations from Bossier Parish.

Edwards' actions to compete against Endurall were primarily concentrated in Bossier Parish, and this court has already affirmed that Edwards was competing against Endurall in Bossier Parish. The lack of objection at trial means that it is difficult on the present record to distinguish the harm caused by the defendant's actions within the state from the harm caused by his actions outside the state. Accordingly, we decline to limit the damages award to Endurall because Edwards accomplished some of his goal by traveling and acting outside of Louisiana. The genesis of all Edwards' activity was in Bossier Parish.

Assignment of Error 3. The District Court erred in calculating the amount of the damage award to plaintiffs because the award was based on past and future losses which were too speculative and uncertain.

Both Pattridge and Gardner testified at the 2015 damages trial that they believed that DHE's entry into the rod guide market had cost Endurall over \$980,000 in sales. Their expert, Benjamin Woods, testified that Endurall lost \$934,524 in profit from sales lost to DHE. The trial court substantially discounted both of those amounts to an even \$600,000, an amount that appellant argues was still too high.

Appellant first argues that the expert's method of valuing the loss did not conform to the proper legal standard of measuring lost profits but instead relied upon an improper measure of damages. Further, he argues that the expert's forecast assumed that Edwards was responsible for "every sales dollar that Endurall may have lost after the formation of DHE,

regardless of why the sale was lost, and without regard to whether the sales that Endurall allegedly lost were ultimately made to DHE.” Finally, appellant also criticizes the expert valuation on the grounds that it assumed (1) Endurall would have kept, until 2020, the customers it claimed to have lost to DHE, regardless of competition from Billy Joe Edwards after the expiration of the noncompete agreement, (2) the oil and gas industry would remain stabilized through 2020 and Endurall’s sales would likewise be stable, and (3) Endurall’s pricing and overhead would have remained the same through this period.

A violation of a noncompete agreement is a breach of an obligation not to do. La. R.S. 23:921(H). The breach of this obligation “may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived.” *Id.*; see also La. C.C. art. 1995. When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages. La. C.C. art. 1999.

This court stated in *ScenicLand Const. Co., LLC v. St. Francis Med. Ctr., Inc.*, 41,147 (La. App. 2d Cir. 7/26/06), 936 So. 2d 247, 252:

Lost profits are recoverable in an action for breach of contract where the amount can be proved with reasonable certainty. *Al Smith’s Plumbing & Heating Service, Inc. v. River Crest, Inc.*, 365 So.2d 1122 (La. App. 4th Cir. 1978). Loss of profit awards may not rest on speculation or conjecture unless direct evidence is not available to establish this element of damage. *Al Smith’s Plumbing & Heating Service, Inc. v. River Crest, Inc.*, *supra*. Customary or foreseeable profit may be resorted to as a measure of damage where there is no direct evidence of the exact extent of loss. *Al Smith’s Plumbing & Heating Service, Inc. v. River Crest, Inc.*, *supra*; *Ellwest Stereo Theatres, Inc. v. Davilla*, 436 So.2d 1285 (La. App. 4th Cir. 1983), *writ not considered*, 442 So. 2d 454 (La. 1983). Broad latitude is given in proving lost profits because this element of damages is often