Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13697

SUSAN MIELE,
Plaintiff-Appellee,

v.

FOUNDATION MEDICINE, INC.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE DEFENDANT-APPELLANT FOR REVERSAL

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

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Dated: January 30, 2025

CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

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ISSUE PRESENTED

Amicus curiae New England Legal Foundation (NELF) addresses the issue that this Court identified in its amicus announcement of November 27, 2024:

> Whether the Massachusetts Noncompetition Agreement Act, G. L. c. 149, § 24L, applies to a non-solicitation agreement incorporated into a termination agreement, where the termination agreement includes a forfeiture provision in the event that the employee breaches the non-solicitation agreement.

INTEREST OF AMICUS CURIAE

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.[1] NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section

[1] Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the defendant-appellant, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to an interpretation of employment-related statutes that adheres to the text's ordinary meaning, and that draws reasonable inferences from the text to resolve any potential ambiguities. NELF is also committed to the principle of interpreting such statutes consistently with this Court's applicable precedent, to the extent that the Legislature has not indicated an intent to depart from that precedent.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the legal issue set forth in the Court's amicus announcement.

ARGUMENT

I. THE MASSACHUSETTS NONCOMPETITION AGREEMENT ACT DOES NOT APPLY TO A "FORFEITURE FOR SOLICITATION" AGREEMENT.

A. The Act Excludes Nonsolicitation Agreements From The Definition Of A Noncompetition Agreement, And A Forfeiture For Solicitation Agreement Is The Functional Equivalent Of A Nonsolicitation Agreement.

The Massachusetts Noncompetition Agreement Act, G. L. c. 149, § 24L, does not apply to a "forfeiture for solicitation agreement," in which an employee agrees to relinquish post-termination compensation if she encourages other employees to leave the employer. This conclusion holds true whether or not that agreement appears in a termination agreement.[2]

Primarily, the Act excludes nonsolicitation agreements from the definition of a noncompetition agreement. "Noncompetition agreements . . . do not include: (i) covenants not to solicit or hire

[2] Specifically, the Act excludes from the definition of a noncompetition agreement "(ix) noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance[.]" G. L. c. 149, § 24L(a)(6th ¶). However, amicus argues that the Act also excludes forfeiture for solicitation agreements from the definition of a noncompetition agreement. Therefore, in the view of amicus, this case does not implicate the Act's provision excluding noncompetition agreements made in connection with the termination from employment.

employees of the employer[.]" G. L. c. 149, § 24L(a)(6th ¶). Moreover, a forfeiture for solicitation agreement is the functional equivalent of a nonsolicitation agreement. Both agreements impose an "inhibitory effect" on the employee for engaging in the same underlying activity, due to the risk of either losing substantial compensation or facing a lawsuit for breach of contract. "We . . . see no reason to treat differently a forfeiture for competition clause [from a noncompetition agreement]. Each can have an *inhibitory effect* on present and former employees, in much the same way[.]" *Cheney v. Automatic Sprinkler Corp. of Am.*, 377 Mass. 141, 147 n.7 (1979) (subjecting forfeiture for competition agreement to same reasonableness test applicable to noncompetition agreements) (emphasis added).

The *Cheney* Court's equation of noncompetition agreements with forfeiture for competition agreements should do the same for nonsolicitation agreements and forfeiture for solicitation agreements. "[The] same principles apply to both noncompetition and nonsolicitation provisions." *Automile Holdings, LLC v. McGovern*, 483 Mass. 797, 808 (2020) (cleaned up). No doubt the Legislature drafted the Act with an

awareness of this well-established precedent. "The Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of this court[.]" *Matter of Impounded Case*, 493 Mass. 470, 473 (2024) (cleaned up). Therefore, the Act's exclusion of nonsolicitation agreements should apply to forfeiture for solicitation agreements.

B. The Superior Court Misinterpreted The Statutory Phrase "Competitive Activities" To Include The Soliciting Of Employees, In Disregard Of Both The Act's Exclusion Of Nonsolicitation Agreements And This Court's Applicable Precedent.

i. The Superior Court failed to consider that the Act essentially excludes the soliciting of employees from those activities that are competitive with one's employer.

The Superior Court erred when it interpreted the statutory phrase, "competitive activities," which appears in the Act's definition of a forfeiture for competition agreement, G. L. c. 149, § 24L(a)(4th ¶),[3] to include the soliciting or hiring of employees. *See* Addendum to Appellant's Amended Brief 63-64. Based on its erroneous interpretation of that key phrase, the

[3] A forfeiture for competition agreement is "an agreement that . . . imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship if the employee engages in *competitive activities*." G. L. c. 149, § 24L(a)(4th ¶) (emphasis added).

court concluded that a forfeiture for competition agreement includes a forfeiture for solicitation agreement, *id.*, and that both types of agreement are included in the Act's definition of a noncompetition agreement. *See* G. L. c. 149, § 24L(a)(6th ¶) ("Noncompetition agreements include forfeiture for competition agreements[.]").

The lower court erred from the outset when it interpreted "competitive activities" in isolation from its companion phrase, "activities competitive with his or her employer," which appears in the Act's definition of a noncompetition agreement that follows. G. L. c. 149, § 24L(a)(6th ¶).[4] "We do not interpret words in a statute in isolation; rather, we must look to the statutory scheme as a whole so as to produce an *internal consistency* within the statute." *Vita v. New England Baptist Hosp.*, 494 Mass. 824, 834 (2024) (emphasis added).

To achieve internal consistency within the Act, the lower court should have tied its interpretation of

[4] A noncompetition agreement is "an agreement between an employer and an employee . . . under which the employee . . . agrees that he or she will not engage in certain specified activities *competitive with his or her employer* after the employment relationship has ended." G. L. c. 149, § 24L(a)(6th ¶) (emphasis added).

"competitive activities," in the Act's definition of a forfeiture for competition agreement, to the Act's exclusion of the "solicit[ing] or hir[ing] [of] the employees of the employer" from those "activities competitive with his or her employer," in the definition of a noncompetition agreement. "Where the same statutory term is used more than once, the term should be given a *consistent meaning* throughout." *Williams v. Bd. of Appeals of Norwell*, 490 Mass. 684, 694 (2022) (emphasis added).

In particular, the Act defines a noncompetition agreement as an agreement "under which the employee . . . agrees that he or she will not engage in certain specified *activities competitive with* his or her employer after the employment relationship has ended." G. L. c. 149, § 24L(a)(6th ¶) (emphasis added). Since that definition excludes "covenants not to solicit or hire employees of the employer," *id.*, the only reasonable inference to draw is that an employee's soliciting or hiring of other employees is *not* an "activit[y] competitive with his or her employer."

Accordingly, the soliciting or hiring of other employees should also fall outside the virtually identical statutory phrase, "competitive activities,"

which defines a forfeiture for competition agreement. This means that the definition of a forfeiture for competition agreement should be interpreted to exclude forfeiture for solicitation agreements, just as the definition of a noncompetition agreement expressly excludes nonsolicitation agreements.

However, the Superior Court failed to engage with Act's relevant text in this way. As a result, the court failed to harmonize the twin phrases, "competitive activities" and "activities competitive with [one's] employer." In so doing, the court failed to see that the Act should be interpreted to exclude forfeiture for solicitation agreements.

ii. The Superior Court also failed to consider this Court's precedent instructing that an employee competes with her employer when she seeks to work for a competitor.

In its misinterpretation of "competitive activities," the Superior Court also failed to recognize that the Act codifies the *Cheney* Court's long-established principle that a forfeiture for competition agreement is equivalent to a noncompetition agreement, and that both agreements focus on an employee's efforts to work for a competitor. *See* G. L. c. 149, § 24L(a)(6th ¶)

("Noncompetition agreements include forfeiture for competition agreements[.]"). *See also Cheney*, 377 Mass. at 147 n.7 (discussing similarities between these agreements).

In particular, *Cheney* instructs that a noncompetition agreement's purpose is to "restrain[] employees from *seeking employment with competitors*." *Cheney*, 377 Mass. at 147 n.7 (emphasis added). Indeed, the Court's close scrutiny of noncompetition agreements arises "[o]ut of [a] concern for an individual's ability to earn a living[.]" *Automile Holdings*, 483 Mass. at 808. *See also Boulanger v. Dunkin' Donuts Inc.*, 442 Mass. 635, 636 (2004) (noncompetition agreement barred franchisee "from owning or working for a competing business").

Under this clear precedent, a former employee engages in competitive activity when she seeks work with a competing business, or when she establishes a competing business of her own. This has nothing to do with the soliciting or hiring of the employer's employees, or with the employer's concomitant interest in preventing a former employee from depleting its workforce by encouraging employees to leave. Unlike a noncompetition agreement, a forfeiture for

solicitation agreement protects the employer's investment of time and money in the hiring and training of its employees. An employer "undoubtedly has a legitimate interest in retaining its employees whose training represents a business investment of time and expense." *Club Props., Inc. v. Atlanta Offs.-Perimeter, Inc.*, 348 S.E.2d 919, 921 (Ga. App. 1986).

In sum, the Superior Court erred when it interpreted the Act to apply to forfeiture for solicitation agreements. The best reading of the Act's relevant language, when understood within its immediate context and in light of this Court's applicable precedent, should defeat that interpretation.

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court reverse the decision of the Superior Court.

Respectfully submitted,

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Dated: January 30, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word 2010 in 12-point Courier New. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of pages to be counted in this brief is 11.

/s/ Ben Robbins

Ben Robbins

CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this 30th day of January, 2025, I served the within Brief Of Amicus Curiae New England Legal Foundation In Support Of The Defendant-Appellant, in *Miele v. Foundation Medicine, Inc.*, SJC-13697, by causing it to be delivered by eFileMA.com to counsel for the Plaintiff-Appellee, Jeffrey M. Rosin, jrosin@ohaganmeyer.com; and to counsel for the Defendant-Appellant, Dawn Mertineit, dmertineit@seyfarth.com, and Dallin R. Wilson, drwilson@seyfarth.com.

Signed under penalties of perjury.

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