IN THE SUPREME COURT OF GUAM

ISLAND EYE CENTER, INC. dba ISLAND EYE AND RETINA CENTER,
Plaintiff-Appellant,

v.

PETER N. LOMBARD, M.D., ADVANCED EYECARE LLC dba LOMBARD HEALTH, DESIREE NEDEDOG, JOHN and JANE DOES 1 through 20,
Defendants-Appellees.

Supreme Court Case No.: CVA19-014
Superior Court Case No.: CV0026-17

OPINION

Cite as: 2020 Guam 32

Appeal from the Superior Court of Guam
Argued and submitted on May 18, 2020
Via Zoom video conference

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Plaintiff-Appellant Island Eye Center, Inc. dba Island Eye and Retina Center ("Island Eye") appeals from a judgment dismissing and adjudging all claims on the merits. The trial court granted Defendants-Appellees' (collectively, "Defendants") Rule 12(b)(6) motion to dismiss Island Eye's contract claim against Defendant-Appellee Peter N. Lombard, M.D. ("Dr. Lombard") for breach of the non-compete clause as violating 18 GCA § 88105. The trial court later granted Defendants' motion for summary judgment on Island Eye's remaining claims. We affirm the trial court's grant of Defendants' motion to dismiss and grant of summary judgment for Defendants on Island Eye's trade-secret and non-solicitation claims.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Dr. Lombard is an ophthalmologist who entered into an employment agreement with Island Eye as a part-time surgeon. The parties signed an employment contract in July 2010 and an addendum to the contract in August 2010. Dr. Lombard worked at Island Eye once or twice a week for a few hours. At the heart of this dispute is the parties' employment contract and, specifically, the non-compete, non-solicitation, and trade-secret clauses.[1]

[1] The employment contract clauses at issue read:

> NON-COMPETE: By agreeing to receive compensation for his work as per above, the Surgeon, agrees to refrain from entering into a business of a similar nature, (any form of ophthalmology, optical, or optometry practice), as an employee, independent contractor, owner, part owner or investor on the island of Guam or the Marianas Islands for 66 months after ending his employment at Island Eye Center. There is an exception to this clause for any military duties. Island Eye Center and the Surgeon both find this non-compete clause to be reasonable and necessary to protect the long-term[,] near permanent relationships that Island Eye Center has built with its many (more than 30,000) patient clients. . . . .
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> . . . .
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> NON-SOLICITATION: In the event that at some future time, the Surgeon enters into the practice of Ophthalmology or other eye care services on Guam separate from Island Eye Center, he agrees

[3] The addendum changed the non-compete term from 66 to 30 months. In addition, the parties agreed Dr. Lombard may provide two weeks of clinic coverage at St. Lucy's Eye Clinic ("St. Lucy's") in a manner that did not interfere with his duties at Island Eye. In November 2011, the parties signed an agreement extending Dr. Lombard's employment period "up to at the latest February 28, 2013." Record on Appeal ("RA"), tab 16 (First Am. Compl., Mar. 20, 2017), Ex. A at 14 (Mem. Understanding, Nov. 14, 2011).

[4] On February 8, 2012, Dr. Lombard sent Dr. Anthony Smith, Island Eye's CEO and Director, an email stating, "Sometime [sic] the next few months might be a good time for me to stop working with at [sic] Island Eye." RA, tab 107 (Decl. Smith, Feb. 15, 2019), Ex. B (Email from Dr. Lombard to Dr. Smith, Feb. 8, 2012). Dr. Lombard performed his last clinic date at Island Eye on May 12, 2012. He received his last payment from Island Eye on September 25, 2012. The parties dispute whether Dr. Lombard was still under contract up to February 28, 2013.

[5] On January 31, 2013, Dr. Lombard executed and recorded with the Department of Revenue and Taxation, Articles of Organization of Limited Liability Company and Limited Liability Company Operating Agreement for Advanced Eyecare, LLC. RA, tab 107 (Decl. Smith, Feb. 15, 2019) at Ex. D (Articles of Org. of LLC & LLC Operating Agreement, Jan. 31, 2013). Dr. Lombard is the sole member of Advanced Eyecare, LLC, which does business as Lombard Health. On February 15, 2013, Dr. Lombard began working at St. Lucy's.

> to refrain from direct solicitation of Island Eye Center patients or staff. This includes phone calls, direct mail, or other person-to-person communication. This restriction does not expire.
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> . . . .
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> TRADE SECRETS: The Surgeon agrees that all Island Eye Center patient lists, paperwork, and other information or methods generally regarded as "trade secrets" will be held in confidence and will not be shared with outside parties.

RA, tab 16 (First Am. Compl.), Ex. A at 6, 8-9 (Mem. Understanding/Contract ("Contract"), Aug. 9, 2010).

[6] Lombard Health opened for business in the spring of 2015. Around April 28, 2015, Dr. Lombard hired Defendant-Appellee Desiree Nededog. Nededog worked at Island Eye for ten years and was the LASIK supervisor when she left in April 2015. Lombard Health hired four more Island Eye employees.

[7] Island Eye filed an amended complaint against Dr. Lombard, Advanced Eyecare LLC, Desiree Nededog, and John and Jane Does 1 20, alleging misappropriation of trade secrets, breach of contract, and other related claims. The trial court dismissed Island Eye's breach of contract claim based on the non-compete clause as an unlawful restraint of trade in violation of 18 GCA § 88105. The trial court granted Defendants' motion for summary judgment on Island Eye's remaining claims. Island Eye timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over appeals from final judgments rendered by the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-223 (2020)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[9] "Review of a dismissal for failure to state a claim is *de novo*." *Core Tech Int'l Corp. v. Hanil Eng'g & Constr. Co.*, 2010 Guam 13 ¶ 16. We review a grant of summary judgment *de novo*. *Gov't of Guam v. Gutierrez ex rel. Estate of Torres*, 2015 Guam 8 ¶ 11. Issues of statutory interpretation are also reviewed *de novo*. *Cristobal v. Siegel*, 2014 Guam 16 ¶ 9.

IV. ANALYSIS

[10] As an initial matter, we dispose of Island Eye's claim that the trial court committed "cumulative" or "compound" error by allowing Defendants to file a longer summary judgment reply brief and not striking the supporting declarations. *See* Appellant's Reply Br. at 16 (Feb. 26,

2020). Trial courts possess inherent powers to administer justice and "manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). Trial courts also possess considerable discretion to carry out that power. *See Blake v. Wilson*, 962 So. 2d 705, 710 (Miss. Ct. App. 2007); *see also Dean v. Colgate-Palmolive Co.*, 772 F. App'x 561, 562 (9th Cir. 2019) (Mem.) (describing trial court's discretion as "broad"). The standard of review for the trial court's exercise of discretionary power to control and manage its cases is abuse of discretion. *See Dietz*, 136 S. Ct. at 1895. Under this standard, we must determine whether the decision of the trial court was "based on an erroneous conclusion of law or whether the 'record contains no evidence on which the [trial court] could have rationally based the decision.'" *Lujan v. Lujan*, 2002 Guam 11 ¶ 7 (quoting *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14 ¶ 4). The trial court granted Defendants leave to file a summary judgment reply brief with five extra pages, reasoning that this was a "large, complex case" and their brief discussed the five remaining causes of action. RA, tab 144 at 2-3 (Dec. & Order, June 21, 2019). Because the decision was rationally based on the exigencies of the case, the trial court did not abuse its discretion.

[11] Island Eye fashions its appeal in two parts but raises three distinct issues. First, Island Eye appeals the dismissal of its non-compete claim, arguing the trial court erred by adopting California law. Second, Island Eye appeals the grant of summary judgment against its non-solicitation claim, again arguing the trial court erred by adopting California law. Third, Island Eye appeals summary judgment granted against its trade-secret claim, arguing the trial court impermissibly assumed facts and drew inferences for Defendants, the moving party.

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A. The Trial Court Did Not Err by Dismissing Island Eye's Claim that Lombard Breached the Non-Compete Clause

[12] In Guam, "[e]very contract, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided [as statutory exceptions], is to that extent void." 18 GCA § 88105 (2005). This is the first time we have been asked to interpret our restraint-of-trade provision. Our statute is derived from California Civil Code section 1673, since replaced by California Business and Professions Code section 16600. Section 16600 is virtually identical to 18 GCA § 88105.[2] "When Guam statutes are based on nearly identical California statutes, California case law is persuasive, absent any compelling reason to deviate from California's interpretation." *Banes v. Superior Court (Banes)*, 2012 Guam 11 ¶ 11.

[13] In interpreting its restraint-of-trade statute, California courts recognize strong policy considerations for employee mobility. *E.g.*, *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290-92 (Cal. 2008). The general rule at common law is "restraints on the practice of a profession, trade, or business were valid, if reasonable. In contrast, however, California has settled public policy in favor of open competition." *Hill Med. Corp. v. Wycoff*, 103 Cal. Rptr. 2d 779, 784 (Ct. App. 2001) (internal citation omitted). Section 16600 "[is] an expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." *Id.* (quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. Rptr. 2d 573, 577 (1994)). California courts interpret post-employment covenants not to compete as impermissible restraints of trade which violate section 16600. *See, e.g.*, *Edwards*, 189 P.3d at 292

[2] Section 16600 reads: "Except as provided [by statutory exception], every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600 (West, Westlaw current through Ch. 372 of 2020 Reg. Sess.). California adopted three exceptions to its restraint-of-trade statute for the sale of a business, dissolution of a partnership, or dissolution of a limited liability company. *Id.* §§ 16601-16602.5. Guam enacted substantially similar statutory exceptions. *See* 18 GCA §§ 88106-88107 (2005). No exception applies here.

(rejecting argument that the non-compete clause was valid because it was only a limited restraint of trade). The *Edwards* court found that an eighteen-month bar on performing professional services to former clients restricted the employee's ability to practice his profession and was therefore invalid. *Id.* at 290. In so ruling, the court emphasized that the restraint-of-trade statute "represents a strong public policy of the state which should not be diluted by judicial fiat." *Id.* at 293 (quoting *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1042 (N.D. Cal. 1990)).

[14] Island Eye contends the trial court erred by relying on California case law to find the non-compete clause was void and an unenforceable restraint of trade in violation of 18 GCA § 88105. Island Eye acknowledges 18 GCA § 88105 is nearly identical to California's section 16600 but claims Guam law is derived from a portion of California law that only favors employees whereas California has enacted a complex statutory scheme that also protects an employer's trade secrets and guards against unfair competition. Island Eye argues, under the entirety of California law, it would have statutory remedies even without contractual covenants not to compete. Island Eye therefore asks us to deviate from California case law when interpreting 18 GCA § 88105. "We review issues of statutory interpretation *de novo*." *Cristobal*, 2014 Guam 16 ¶ 9. Our starting point for interpreting a statute is its plain language. *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6.

[15] Title 18, Chapter 88 of the Guam Code Annotated is titled "Unlawful Contracts." Section 88105 states that contracts that restrain trade are void. 18 GCA § 88105. The next two sections in the chapter set forth exceptions for the sale of good will and dissolution of a partnership.[3] 18 GCA §§ 88106-88107 (2005).

[3] Section 88106, titled "Exception: Sale of Good Will," reads:

> One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

18 GCA § 88106. Section 88107, titled "Exception: Partnership Agreement," reads:

[16] Guam's statutory scheme for unlawful contracts begins as a broad general prohibition referring to *every* contract in which *anyone* is restrained from exercising a lawful profession, trade, or business of *any* kind as void. 18 GCA § 88105 (emphasis added). This language stands in stark contrast to the statute's narrowly drafted exceptions referring to "similar business within a specified district," "like business," "within the same city or town," or "within a specified part thereof." 18 GCA §§ 88106-88107. The restraint-of-trade provisions indicate the legislature knew how to draft limiting language and had it intended to draw section 88105 more narrowly, it could have done so. The legislature instead enacted a statute that speaks in sweeping terms against all contracts that restrain trade. Therefore, we hold that section 88105 evidences public policy for employee mobility and every citizen's right to pursue lawful employment or enterprise of his or her choice. Because our restraint-of-trade statute derives from a California statute and is similarly an expression of public policy for employee mobility, the trial court did not err by relying on California case law.

[17] We now turn to the trial court's dismissal of Island Eye's non-compete claim. We review a Rule 12(b)(6) dismissal *de novo*. *Core Tech*, 2010 Guam 13 ¶ 16.

[18] The non-compete clause in the parties' contract applies after Dr. Lombard's part-time employment with Island Eye ends. Under the expansive scope of the non-compete clause, Dr. Lombard is prohibited not only from practicing his specialized profession of ophthalmology but also owning or investing in an optometry practice. RA, tab 16 (First Am. Compl.), Ex. A at 6 (Contract) (barring Dr. Lombard from practicing "any form of ophthalmology, optical, or optometry practice[] as an employee, independent contractor, owner, part owner or investor"). The

> Partners may, upon or in anticipation of a dissolution of a partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.

18 GCA § 88107.

terms of the non-compete clause apply not only in Guam but also in the Mariana Islands. Whereas the invalidated non-compete clause in *Edwards* was partial and for 18 months, here the non-compete clause is effectively a complete bar to Lombard's ability to engage in his profession for 30 months after he ceases to be a part-time surgeon at Island Eye. These post-employment terms are undoubtedly a restraint of trade in violation of 18 GCA § 88105 and are to that extent void.[4]

[19] Island Eye also argues that the non-compete clause is necessary to protect its trade secrets because employers in Guam do not have the same statutory protections as employers in California. We are not persuaded by this argument because the non-compete clause here is not aimed at protecting trade secrets or confidential information. Other clauses in the employment contract cover those interests. Rather, the non-compete clause focuses exclusively on eliminating Dr. Lombard's ability to compete with Island Eye as an ophthalmologist in the region. And common law claims based on legal duties and covenants an employee owes its employer are available to address wrongs suffered by Guam employers. *See supra* note 4; *infra* Part IV(B)(1). For these reasons, the trial court did not err by dismissing Island Eye's claim against Dr. Lombard for breaching the non-compete clause.

B. Defendants Were Entitled to Summary Judgment on Island Eye's Claim that Defendants Breached the Non-Solicitation Clause

[20] The trial court concluded that the non-solicitation clause was null and void and adverse to settled policy for open competition and employee mobility. The trial court concluded the issue of

[4] Island Eye appeals dismissal of its non-compete claim solely based on the trial court's application of California law. In the fact section of its opening brief, Island Eye seemingly argues without analysis or citing to case law that Dr. Lombard breached the non-compete clause in two ways. First, allegedly while under contract with Island Eye, Dr. Lombard directly competed with his employer by recording and registering Advanced Eyecare LLC, dba Lombard Health, with the Department of Revenue and Taxation. Appellant's Br. at 6 (Nov. 6, 2019). Second, allegedly while under contract with Island Eye, Dr. Lombard worked more hours than permitted for St. Lucy's. *Id.* at 8. We decline to analyze these claims of breach of the non-compete clause based on theories of unfair competition and direct competition because Island Eye did not properly brief them on appeal. *See Rinehart v. Rinehart*, 2000 Guam 14 ¶ 23 ("In several cases, we have held that if a party mentions a matter but then fails to make a complete legal argument on the issue, then we will refuse to analyze the matter.").

solicitation was moot because even if Defendants solicited Island Eye employees, the solicitation was lawful. Island Eye concedes that employee non-solicitation clauses are typically invalidated under California law as unlawful restraints of trade. Appellant's Br. at 29-30 (Nov. 6, 2019). Because of Island Eye's concession, the parties' arguments on appeal are limited to whether non-solicitation clauses facially violate 18 GCA § 88105. Island Eye argues the trial court erred by relying on California law to grant summary judgment. Appellant's Br. at 2. A grant of summary judgment is reviewed *de novo. Gutierrez ex rel. Estate of Torres*, 2015 Guam 8 ¶ 11.

1. The trial court did not err by relying on California law

[21] Island Eye argues employee non-solicitation clauses are necessary because employers in Guam do not have statutory protections like employers in California. Our restraint-of-trade statute derives from California's statute, and we determined above that our statute similarly evidences a policy for employee mobility. *See supra* Part IV(A). We also stated that Guam employers may pursue common law claims and breach-of-covenant claims absent a statutory cause of action. *Id.* "As a general principle, one who unjustifiably interferes with an advantageous business relationship to another's damage may be held liable therefor. The product is bottled under a variety of labels, including unfair competition, interference with advantageous relations, contract interference, and inducing breach of contract." *Diodes, Inc. v. Franzen*, 67 Cal. Rptr. 19, 25 (Ct. App. 1968).

[22] Island Eye correctly notes that breach of a non-solicitation clause may be the basis for an unfair competition claim—i.e., that Defendants breached a legal duty by soliciting Island Eye's employees. "[I]f either the defecting employee or the competitor uses unfair or deceptive means to effectuate new employment, or either of them is guilty of some concomitant, unconscionable conduct, the injured former employer has a cause of action to recover for the detriment he has

thereby suffered." *Id.* at 26; *see also Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1337 (9th Cir. 1980) (finding solicitation of at-will employee not improper, but cause of action exists if concomitant underlying breach of legal duty or unlawful act occurred). We are unpersuaded of the need to deviate from California law merely because Guam has not enacted statutory causes of action. Employers can plead a viable claim absent the statutory protections enacted in California or even a contractual covenant not to solicit based on facts of unfair solicitation of its employees. *See Diodes*, 67 Cal. Rptr. at 25-26. Therefore, the trial court did not err by relying on California law as persuasive authority to interpret the non-solicitation clause. We now turn to the trial court's grant of summary judgment.

2. Defendants are entitled to summary judgment

[23] Under the facts and arguments on appeal, we do not analyze whether non-solicitation agreements facially violate section 88105. The exact issue in this case—whether employee non-solicitation clauses facially violate the restraint-of-trade statute[5]—has not been decided by the Supreme Court of California, and there is disagreement amongst the lower courts. Some courts viewed agreements not to solicit a former employer's employees as prohibiting a form of competition rather than a complete bar against competition, *see Loral Corp. v. Moyes*, 219 Cal. Rptr. 836, 843-44 (Ct. App. 1985) (upholding non-interference clause as valid because employees merely lost ability to be solicited first by defendant), or as an unlawful restraint on competition and employee mobility, *see AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 239 Cal. Rptr. 3d. 577, 587-88 (Ct. App. 2018) (concluding employee non-solicitation clause violates restraint-of-trade statute).

[5] For the purposes of this opinion, we distinguish between covenants not to solicit a former employer's employees and covenants not to solicit a former employer's clients or customers.

[24] We decline to adopt a bright-line rule when the intricacies of the issue are not before the court on appeal. However, we affirm the trial court's grant of summary judgment against Island Eye because the non-solicitation clause in the parties' contract is overbroad by any standard, and there is no evidence on the record of solicitation. *See Hart v. Hart*, 2008 Guam 11 ¶ 15 ("[T]his court 'may affirm the judgment of a lower court on any ground supported by the record.'" (quoting *Ceasar v. QBE Ins. (Int'l), Ltd.*, 2001 Guam 6 ¶ 8)).

[25] The trial court found "the indefinite duration of the Non-Solicitation Clause is particularly averse to the concept of employee mobility." RA, tab 147 at 22 (Dec. & Order, June 24, 2019). We agree. A restrictive covenant not to solicit a competitor's employees that *never* expires stifles competition. Various jurisdictions find restrictive employment covenants void and unenforceable when they do not contain a temporal limit. *See, e.g.*, *Jorgensen v. Coppedge*, 181 P.3d 450, 454 (Idaho 2008) (holding restrictive employment covenant void because it contained no time limitation); *Schneller v. Hayes*, 28 P.2d 273, 275 (Wash. 1934) (holding restrictive employment covenant unenforceable because unlimited as to time); *Johnstone v. Tom's Amusement Co.*, 491 S.E.2d 394, 396 & n.1 (Ga. Ct. App. 1997) (finding invalid a non-solicitation provision with no time limit). The parties' employee non-solicitation agreement is overbroad[6] and violates section 88105 because it is perpetual in length.

[26] Even if the parties' non-solicitation clause survives a section 88105 analysis, Island Eye fails to establish a disputed material fact of solicitation. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Guam R. Civ. P. 56(c); *see also Wilkinson v. Jones*, 2004 Guam 14 ¶ 7 (per curiam) ("A fact is material when it 'is

[6] Another issue not before the court on appeal is whether "blue-penciling" the parties' contract is permissible.

relevant to an element of a claim or defense and [its] existence might affect the outcome of the suit.'" (alteration in original) (quoting *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7 (per curiam))). Island Eye alleges Defendants solicited ten of its employees. Appellant's Br. at 3. When viewing the evidence in the light most favorable to Island Eye, however, there is nothing in the record to support this allegation. Island Eye offers deposition testimony of Sally Menor, an Island Eye employee who was allegedly solicited by Defendants. The deposition testimony, however, does not establish a disputed material fact of solicitation. Rather than suggest solicitation from Defendants towards the employee, the evidence indicates that on multiple occasions Menor expressed an interest in working for Lombard Health. Further, Island Eye mistakenly believes it is entitled to the inference of solicitation based on Dr. Lombard's express desire for experienced employees. Appellant's Br. at 13 (citing Ex. MM to Lombard Deposition ("I will need PPL and experience!")). Island Eye contends Dr. Lombard's desire for experienced employees, coupled with the fact that Defendants hired five former Island Eye employees, equate to a disputed material fact of solicitation. But the evidence on the record establishes that Defendants merely discussed employment at Lombard Health with Island Eye employees after the employees made first contact.[7] Without more, Island Eye cannot establish a disputed material fact of solicitation.

[27] For these reasons, we uphold the trial court's grant of summary judgment on different grounds. *See Hart*, 2008 Guam 11 ¶ 15. We express no opinion on the facial validity of the non-solicitation clauses. The employee non-solicitation clause in the parties' contract is overbroad and

[7] Because Island Eye's appeal is limited to the purported error in applying California law to interpret the non-solicitation clause, the parties did not brief or cite to case law for the definition of solicitation. We believe it obvious, however, that Defendants cannot breach the non-solicitation clause by discussing employment opportunities with an Island Eye employee who contacts them first. To find otherwise would allow a contract clause to limit a non-party, at-will employee's ability to contact a potential employer to discuss potential employment. Such a finding runs afoul of our restraint-of-trade statute and is likely void under other theories as well.

impermissibly restrains trade in violation of section 88105. Even if the non-solicitation clause survives a section 88105 analysis—facially or as applied—Island Eye fails to establish a disputed material fact of solicitation. Therefore, the trial court did not err by granting summary judgment.

C. The Trial Court Did Not Err by Granting Summary Judgment for Defendants on Island Eye's Misappropriation of Trade Secrets Claim

1. Background on trade secret protection

[28] At common law, trade-secret misappropriation is a branch of unfair competition. *See Balboa Ins. Co. v. Trans Glob. Equities*, 267 Cal. Rptr. 787, 795 (Ct. App. 1990). Before the widespread enactment of state statutes based on the Uniform Trade Secrets Act and its 1985 amendments ("UTSA"),[8] trade-secret claims "were decided under common law doctrines mirroring the Restatement First, Torts." "Litigating Misappropriation of Trade Secret", 127 Am. Jur. *Trials* 283 (2012). "For over forty years after its publication in 1939, the *Restatement (First) of Torts* 'was almost universally cited by state courts, and in effect became the bedrock of modern trade secret law.'" David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 Gonzaga L. Rev. 57, 78 (2011) (citation omitted).

[29] Liability for the disclosure or use of another's trade secret stems from the more general principle of the privilege to compete, which "includes a privilege to adopt [another's] business methods, ideas or processes . . . . Were it otherwise, the first person in the field with a new process or idea would have a monopoly which would tend to prevent competition." Restatement (First) of Torts § 757 cmt. a (Am. Law Inst. 1939). The privilege to compete, however, is not without limits.

[8] Various sources state different numbers of jurisdictions that have adopted the UTSA in whole or in part. The consensus, however, is that the vast majority of jurisdictions have adopted a UTSA analogue. *See* David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 Gonzaga L. Rev. 57, 75 (2011) (citing forty-six states as of 2010 that have adopted some form of the UTSA); Trade Secrets Act, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?communitykey=3a2538fb-e030-4e2d-a9e2-90373dc05792&tab=groupdetails (last visited Dec. 29, 2020) (mapping UTSA adoption in forty-eight states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands).

Id. A defendant cannot obtain a competitive advantage through a breach of confidence or unjustly enrich himself or herself through bad faith actions. *Id.* Thus, the propriety of the defendant's conduct is often the center of trade-secret-protection claims.

[30] While the majority of jurisdictions have adopted a UTSA analogue, *see supra* note 8, Guam has not. Another notable jurisdiction that has not adopted a state trade-secret statutory right of action is New York, which instead adjudicates trade-secret claims based on principles in section 757 of the Restatement (First) of Torts. *E.g., Integrated Cash Mgmt. Servs., Inc. v. Digit. Transactions, Inc.*, 920 F.2d 171, 173 (2d Cir. 1990); *Ashland Mgmt. Inc. v. Janien,* 624 N.E.2d 1007, 1012-13 (N.Y. 1993). New York courts have adopted the Restatement (First) of Torts' definition of trade secrets and the six factors listed in section 757, comment b. *Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 783 N.Y.S.2d 758, 770-71 (Sup. Ct. 2004). The factors help determine the existence of trade secrets. *Id.* A precise, categorical definition of a trade secret is not feasible as the unique circumstances of each case dictate whether an alleged trade secret is afforded the legal designation of trade secret. *See Ashland Mgmt.*, 624 N.E.2d at 1012 ("There is no generally accepted definition of a trade secret . . . ."); *Futurecraft Corp. v. Clary Corp.*, 23 Cal. Rptr. 198, 211 (Ct. App. 1962) (stating that the definitional problem with trade secret is exact definition is not possible); Restatement (Third) of Unfair Competition § 39 cmt. d (Am. Law Inst. 1995) ("It is not possible to state precise criteria for determining the existence of a trade secret. The status of information claimed as a trade secret must be ascertained through a comparative evaluation of all the relevant factors, including the value, secrecy, and definiteness of the information as well as the nature of the defendant's misconduct."). Regardless of whether a

jurisdiction adopted a UTSA analogue or relies on Restatement principles, the definition of a trade secret under either approach is broad.[9]

2. Summary judgment standard

[31] Island Eye contends the trial court ignored disputed material facts and impermissibly drew inferences against Island Eye as the non-moving party to summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c); *see Iizuka Corp.*, 1997 Guam 10 ¶ 7. In addition,

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citations omitted).

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[9] The UTSA defines a trade secret as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Unif. Trade Secrets Act § 1(4) (Unif. Law Comm'n 1985). The Restatement provides the following definition:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .
>
> . . . Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement (First) of Torts § 757 cmt. b (Am. Law Inst. 1939).

[32] "In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7. If, however, the movant "can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations in the [pleadings]" without "at least some significant probative evidence tending to support the [pleadings]." *Edwards v. Pac. Fin. Corp.*, 2000 Guam 27 ¶ 7. No genuine issue of material fact exists when there is a complete failure of proof concerning an essential element of the non-movant's case. *Guam Sanko Transp., Inc. v. Pac. Modair Corp.*, 2012 Guam 2 ¶ 8 (citing *Celotex*, 477 U.S. at 323).

3. Trade-secret-misappropriation claims

[33] This is the first time an appeal of a common law trade-secret-misappropriation claim has reached this court. We must begin by establishing the foundation—a definition and the elements—of a civil trade-secret claim.

Our criminal code defines trade secrets as:

> [T]he whole or any portion of [sic] phase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and is not generally available to the public, and which gives one who uses it an advantage over actual or potential competitors who do not know of or use the trade secret . . . .

9 GCA § 43.10(f) (2005). This definition is substantially similar to the Restatement's definition and comparably broad like the UTSA's statutory definition. Therefore, we hold that the definition of trade secrets in 9 GCA § 43.10(f) is the definition of trade secrets for civil trade-secret-misappropriation claims. We are additionally persuaded to adopt the six factors listed in the Restatement (First) of Torts, section 757, comment b to aid in determining whether a trade secret exists. The relevant factors are:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement (First) of Torts § 757 cmt. b. We stress that the Restatement factors are a nonexclusive list; they are relevant but not dispositive of whether a trade secret exists.

[34] The trial court relied on *Agency Solutions.Com, LLC v. TriZetto Grp., Inc.*, 819 F. Supp. 2d 1001, 1015 (E.D. Cal. 2011), for the plaintiff's *prima facie* burden for trade-secret misappropriation. The dispute in *Agency Solutions.Com*, however, takes place within the context of California's UTSA ("CUTSA"), California Civil Code section 3426 *et seq.* Before adopting the CUTSA, California followed the Restatement (First) of Torts approach, and a plaintiff had to plead:

> facts showing (1) the existence of subject matter which is capable of protection as a trade secret; (2) the secret was disclosed to the defendant, or to a person for whose conduct a defendant is liable, under circumstances giving rise to a contractual or other legally imposed obligation on the part of the disclosee not to use or disclose the secret to the detriment of the discloser; and (3) if the defendant is an employee or former employee of the plaintiff or if the defendant is charged with having received the secret from an employee or former employee, the facts alleged must also show that the public policy in favor of the protection of the complainant's interest in maintaining the secret outweighs the interest of the employee in using his knowledge to support himself in other employment.

Diodes, 67 Cal. Rptr. at 22-23.

[35] We are persuaded to adopt a standard for misappropriation of trade secrets consistent with the Restatement (First) of Torts as our statutory definition of trade secrets is nearly identical to the Restatement's definition. It is also more consistent to reject rather than select a standard borrowed from a statutory scheme that we have not adopted, as would be the case if we adopted the CUTSA standard. Therefore, we hold that a plaintiff's *prima facie* burden for a civil trade–secrets-misappropriation claim is the three-element *Diodes* test.

[36] The trial court's analysis of Island Eye's purported trade secrets demonstrates another aspect of these disputes that would benefit from discourse here. A plaintiff seeking trade-secret protection "must identify the trade secrets and carry the burden of showing that they exist." *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164 (9th Cir. 1998) (quoting *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 522 (9th Cir. 1993)). Furthermore, "[t]he plaintiff 'should describe the subject matter of the trade secret with *sufficient particularity* to separate it from matters of general knowledge in the trade or of special knowledge of those persons . . . skilled in the trade.'" *Id.* at 1164-65 (second alteration in original) (quoting *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 707 F. Supp. 1170, 1177 (C.D. Cal. 1989)). The plaintiff must clearly identify what it claims deserves the legal designation of trade secret rather than relying on vague conclusory statements.

[37] The legal designation of trade secrets depends on the unique factors and circumstances of each case. *Compare Gonzales v. Zamora*, 791 S.W.2d 258, 265-66 (Tex. App. 1990) (holding compilation of commonly known information a trade secret), *and Tan-Line Studios, Inc. v. Bradley*, Civ.A. No. 84-5925, 1986 WL 3764, at *8 (E.D. Pa. Mar. 25, 1986), *aff'd sub nom. Paul v. Tanning, Health, & Fitness Equip. Co.*, 808 F.2d 1517 (Table) (3d Cir. 1986), *aff'd sub nom. Tan-Line Sun Studios, Inc. v. Paul*, 808 F.2d 1518 (Table) (3d Cir. 1986) (holding compilation of individual pieces of general knowledge a trade secret), *with Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d. 1183, 1198 (S.D. Cal 2008) (holding compilation of publicly available and generally known industry information not a trade secret), *and Hutchison v. KFC Corp.*, 883 F. Supp. 517, 520-21 (D. Nev. 1993) (holding generally known and readily ascertainable process not a trade secret). By adopting a broad definition of trade secrets and a multifactor analysis to aid in determining whether a trade secret exists, we recognize the complex inquiry required to designate

something as a trade secret. Common sense dictates that a plaintiff must describe the subject of the purported trade secret with sufficient particularity to satisfy the first element of the *Diodes* test.

[38] With these background principles in place, we turn to Island Eye's appeal of the grant of summary judgment against its trade-secret claim. We review the grant of summary judgment *de novo*. *Gutierrez ex rel. Estate of Torres*, 2015 Guam 8 ¶ 11.

4. Island Eye's trade-secret claim does not survive summary judgment because it failed to establish the element of misappropriation

[39] The trial court concluded that even if trade secrets existed, Island Eye failed to establish that Defendants acquired, disclosed, or used its trade secrets. We agree. When viewed in the light most favorable to Island Eye, the record indicates that Island Eye could not identify any of its purported trade secrets that Defendants appropriated while still employed at Island Eye and used to establish Lombard Health. RA, tab 112 (Decl. Wolff, Mar. 12, 2019), Ex. A at 2-4 (Dep. Anthony J. Smith, M.D., Dec. 6, 2018). The record indicates that Island Eye could identify none of its purported trade secrets that Defendants used at Lombard Health or disclosed to others. *Id.* at 11 (Dep. Smith). Defendants also deny ever acquiring, disclosing, or using any Island Eye property, including trade secrets, after they stopped working at Island Eye. Furthermore, the record indicates that Island Eye could not identify any of its purported trade secrets that its former employees who later worked at Lombard Health disclosed to Defendants. *Id.* at 5-6 (Dep. Smith).

[40] With no evidence on the record to establish misappropriation, Island Eye nonetheless argues that Defendants wrongfully obtained its purported trade secrets by hiring its former employees "who had trade secrets in their head[s]". *Id.* at 3 (Dep. Smith). For example, Island Eye contends that surgeon Dr. Charles Flowers "trained Defendant Desiree Nededog . . . to use and apply [alleged trade-secret] checklists and protocols for the estimated 150 number of LASIK procedures," RA, tab 109 (Decl. Counsel re Decl. Flowers, Feb. 15, 2019), Ex. 1 at 1 (Decl.

Flowers, Feb. 7, 2019), and Defendants wrongfully acquired trade secrets like the LASIK assistance checklist by hiring Nededog because she knew the contents of the checklist from using it to perform her duties at Island Eye. Island Eye contends that Nededog will inevitably use or disclose Island Eye's trade-secret checklist in her new employment at Lombard Health. Island Eye argues the trial court erred by following California's minority rule and rejecting the inevitable disclosure doctrine to prove misappropriation. Appellant's Br. at 23-24. Island Eye cites *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995), for the proposition that "a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets." *Id.* at 1269.

[41] *PepsiCo* is credited with introducing the inevitable disclosure doctrine into trade-secret litigation. Island Eye correctly notes that many jurisdictions allow plaintiffs to use the inevitable disclosure doctrine for claims of threatened misappropriation. Island Eye, however, fails to brief the intricacies of the inevitable disclosure doctrine. Even if a jurisdiction accepts the doctrine, there is no presumption for its application. *See Triumph Packaging Grp. v. Ward*, 834 F. Supp. 2d 796, 809 (N.D. Ill. 2011) ("Courts consider [three] factors in determining whether disclosure of trade secrets is inevitable . . . ."). Furthermore, "the mere fact that a person assumed a similar position at a competitor does not, without more, make it 'inevitable that he will use or disclose . . . trade secret information' so as to 'demonstrate irreparable injury.'" *PepsiCo*, 54 F.3d at 1269 (alteration in original) (quoting *AMP Inc. v. Fleischhacker*, 823 F.2d 1199, 1207 (7th Cir. 1987)). The plaintiff "must demonstrate a 'high probability' that the former employee will use [the trade secrets]." *Triumph Packaging*, 834 F. Supp. 2d at 809 (quoting *Saban v. Caremark Rx, L.L.C.*, 780 F. Supp. 2d 700, 734 (N.D. Ill. 2011)).

[42] Policy reasons cut against adopting the inevitable disclosure doctrine. *Id.* "[B]road application would be an effective bar against employees taking similar positions with competitive entities." *Id.* (citations omitted). Thus, even a district court that must follow 7th Circuit *PepsiCo* precedent "is cautious in its application of this doctrine." *Id.* California courts similarly reject the inevitable disclosure doctrine in part due to policy concerns. By allowing circumstantial evidence to create an inference of the use of trade secrets, the doctrine "is not merely an injunction against the use of trade secrets, but an injunction restricting employment" by transforming employee access to trade secrets into a "de facto covenant not to compete." *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 292 (Ct. App. 2002) (citation omitted).

[43] *PepsiCo* itself factually differs from this appeal. The defendant, Redmond, was an upper-level executive at PepsiCo. He was enjoined from employment at Quaker because he would inevitably use trade secrets and other confidential information in his new position to PepsiCo's disadvantage. At the time of the lawsuit, Quaker and PepsiCo were engaged in "fierce beverage-industry competition," specifically "sports drinks" and "new age drinks." *PepsiCo*, 54 F.3d at 1263-64. At PepsiCo, Redmond developed strategies, financial plans, and the marketing and manufacturing of new products. *Id.* at 1265-66. PepsiCo argued:

> Having shown Redmond's intimate knowledge of [PepsiCo's] plans for 1995, . . . Redmond would inevitably disclose that information to Quaker in his new position, at which he would have substantial input as to Gatorade and Snapple pricing, costs, margins, distribution systems, products, packaging and marketing, and could give Quaker an unfair advantage in its upcoming skirmishes with PepsiCo.

Id. at 1266. The circumstances that led to the creation of the inevitable disclosure doctrine are nonexistent here. The former Island Eye employees hired by Lombard Health were at-will employees. There is evidence on the record that Lombard Health hired a former Island Eye employee as front desk staff. The former Island Eye employees hired by Lombard Health are not

medical personnel analogous to an upper-level corporate executive. The information they purportedly possess is equally at odds with the information at issue in *PepsiCo*.

[44] Island Eye understandably wishes to retain the benefit of the time and resources it invested in developing written procedures, checklists, and other business-related documents. Island Eye also invested resources in the development and training of its staff. The problem with labeling the employment of these at-will former Island Eye employees a "misappropriation of a trade secret" is that the employee is now virtually shackled by acquiring knowledge through repetition and review of written instructions. The employee is restrained and barred from advancing further in the industry where, because of increased expertise, he or she is a more competent, experienced, and productive employee. Thus, society and specifically patients seeking eye care on Guam suffer. Trade-secret protection should be a shield, not a sword used by employers to retain its employees by threat of rendering them substantially unemployable in their field of experience or prevent workers from pursuing their livelihoods when they leave their current positions. For all these reasons, we reject the inevitable disclosure doctrine to establish a claim of trade-secret misappropriation.

[45] Island Eye argues it was blindsided because the trial court went beyond the motion for summary judgment and impermissibly determined the nonexistence of trade secrets. The motion for summary judgment, however, encompassed the existence of trade secrets. Defendants argued the information in the three-ring binder were not trade secrets before arguing that even if Island Eye had trade secrets, Defendants never misappropriated, possessed, used, or attempted to use any trade secrets. RA, tab 105 at 9 (Mem. Supp. Summ. J., Jan. 11, 2019). The trial court did not err by questioning the existence of trade secrets to determine whether any trade secret had been misappropriated. Similarly, the trial court did not err by questioning Island Eye's conclusory

designations of trade secrets. The trial court's grant of summary judgment, however, turned on Island Eye's failure to establish the element of misappropriation, not the nonexistence of trade secrets. If Island Eye was blindsided by the trial court's order granting summary judgment, it could have moved for reconsideration.

[46] The trial court's determination—that Island Eye failed to establish disclosure or use of trade secrets—defeats the second element of the *Diodes* test. There is nothing in the record to cause us to depart from this finding. The trial court did not impermissibly draw inferences or view the facts in an unfavorable light towards Island Eye when it determined Island Eye failed to establish the essential element of misappropriation. Although the trial court used a different test to enter summary judgment, we may affirm the trial court's judgment "on any ground supported by the record"—i.e., that Island Eye failed to establish the misappropriation element of the *Diodes* test. *See Hart*, 2008 Guam 11 ¶ 15 (quoting *Ceasar*, 2001 Guam 6 ¶ 8). Therefore, the trial court did not err by granting summary judgment against Island Eye on its trade-secrets claim.

V. CONCLUSION

[47] We **AFFIRM** the trial court's grant of Defendants' motion to dismiss and **AFFIRM** the grant of summary judgment for Defendants on Island Eye's non-solicitation and trade-secret claims.

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
F. PHILIP CARBULLIDO
Chief Justice