IN THE COURT OF APPEALS OF IOWA

No. 0-645 / 10-0412
Filed November 24, 2010

COTTINGHAM & BUTLER INSURANCE SERVICES, INC.,
Plaintiff-Appellee,

vs.

MICHAEL G. JACOWAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The defendant appeals from the district court's order entering judgment in favor of the plaintiff and against him. **AFFIRMED.**

Les V. Reddick and Todd L. Stevenson of Kane, Norby & Reddick, P.C., Dubuque, for appellant.

Stephen J. Juergens and William N. Toomey of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Heard by Vogel, P.J., and Vaitheswaran, J., and Huitink, S.J. *

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Michael Jacoway appeals from the district court's order entering judgment in favor of Cottingham & Butler Insurance Services, Inc. and against Jacoway in the amount of $73,593.45. He argues (1) that the district court abused its discretion in denying his protective order regarding discovery and then sanctioning him for failing to comply with discovery; (2) the district court erred in denying his motion for summary judgment; and (3) the district court erred in assessing damages against him. Because Jacoway refused to participate in discovery, in violation of two separate court orders, the district court did not abuse its discretion in denying Jacoway's request for a protective order or in entering sanctions. Next, we find that Jacoway's argument regarding the denial of his motion for summary judgment is moot. Finally, we agree with the district court that the liquidated damages provision was permitted under Tennessee law, and therefore, the district court did not err in awarding damages.

I. Background Facts and Proceedings.

Cottingham & Butler Insurance Services, Inc. (C&B) is an insurance brokerage firm headquartered in Dubuque, Iowa. In April 2006, C&B hired Michael Jacoway as a vice president and Jacoway was to run C&B's office in Chattanooga, Tennessee. Subsequently, the parties entered into an employment agreement, which contained non-compete and non-solicitation clauses, as well as providing for liquidated damages upon the breach of either of those clauses.[1] The contract also provided that Jacoway consented to the

[1] The relevant portions of the contract stated,

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8. Non-Competition. Employee covenants and agrees that during Employee's employment with Employer, and continuing for a period of two (2) years after the termination of such employment, whatever the reason for the termination, Employee shall not, directly or indirectly (whether as an owner, partner, shareholder, employee or otherwise), for Employee or on behalf of or in conjunction with any other individual, entity, organization, etc., do any of the following activities with respect to the life/pension business, insurance business, risk management business, utilization review business, administration or self-insured programs, or benefit business performed by Employer or any product sold or service performed by Employer at any time during Employee's employment with Employer ("Restricted Business"):

(a) Engage or attempt to engage in the solicitation, sale, marketing, promotion or business in the Restricted Business to or for any person, firm or company within the radius of twenty-five (25) miles of any county in which the Employer maintains an office at the time of the execution of this Agreement or at the time of Employee's separation of employment from Employer, for whatever reason.

(b) Become the employee or agent of any client or customer of the Employer, in any position in which the Employee performs or would perform duties in the Restricted Business.

9. Non-Solicitation. For a period of two (2) years after the termination of employment with the Employer, whatever the cause of termination, the Employee will not solicit the life/pension business, insurance business, risk management business, utilization review business, the business of administration of self-funded programs, or benefit business performed by Employer from or accept such business of or from persons, firms, or corporations who were customers or clients of the Employer, wherever located, at the time of Employee's termination of employment, wherever located.

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11. Miscellaneous.

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11.2. Remedies. Employee acknowledges that a breach or threatened breach by Employee of any provision of this Agreement will subject Employer to loss which [cannot] be adequately or solely measured by rules of law. If Employee breaches or intends to breach any of the covenants or agreements set forth in this Agreement, Employer shall possess in addition to all of the remedies provided by law, the right to obtain injunctive relief against Employee without the posting of bond.

Further, if Employee violates Paragraphs 7, 8, 9, or 10 of this Agreement and such violation causes Employer to lose a customer/client or prospective customer/client or other loss of business, the Employer shall be entitled to liquidated damages therefore in an amount equal to 2.25 (two and one-quarter) times the average annual gross remuneration received by the Employer from said customer/client for the most recent two (2) calendar years preceding termination of Employee's employment, or the most recent year preceding termination of employment, whichever is greater, or, in the case of a prospective customer/client, 2.25 (two and one-quarter) times the gross remuneration realized in the initial twelve

jurisdiction of the Iowa courts, any legal action concerning the agreement shall be filed in Dubuque County, Iowa, and Tennessee law governed the agreement.

On October 9, 2007, C&B terminated Jacoway's employment. At that time, C&B's clients included Savannah Transport and Down's Transportation Services, Inc. After his termination, Jacoway and several other individuals formed Truck Insurance Group, L.L.C. located in Jasper, Tennessee. Subsequently, Truck Insurance Group provided insurance coverage for Savannah Transport and Down's Transportation Services.

On February 27, 2008, C&B filed a petition alleging that Jacoway breached and continued to breach the non-compete and non-solicitation clauses of the employment agreement and seeking liquidated damages calculated pursuant to the contract.[2] The petition was later amended to specify that Jacoway breached and continued to breach the non-solicitation clause by soliciting and accepting business from Savannah Transport and Down's Transportation Services. On April 15, 2008, Jacoway filed a pre-answer motion

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> (12) month period of such prospective customer/client being served by any one or more persons or entities receiving such remuneration as a result of Employee's breach. The phrase "prospective customer/client" as used in this Paragraph means any person, firm, or corporation whom Employee, either in conjunction with one or more other employees or individually, solicited or contacted on behalf of Employer, participated in soliciting or contacting on behalf of the Employer, or knew had been solicited or contacted by the Employer, at the time of Employee's termination of employment or at any time within two (2) years preceding the termination of Employee's employment with Employer.
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> Employee shall pay such liquidated damages to Employer within five (5) business days after written demand for such damages. Thereafter, such liquidated damages shall bear interest at the maximum lawful rate.

[2] Count two of the petition sought reimbursement from Jacoway for over-payment of bonuses in the amount of $37,200, and count three of the amended petition sought damages for Jacoway's failure to collect premiums due from Savannah Transport for August and September 2007 in the amount of $29,913. The district court did not award damages under either of these counts, and C&B did not appeal.

to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, and forum non conveniens. *See* Iowa R. Civ. P. 1.421(1). Following a hearing on June 6, 2008, the district court denied Jacoway's motion. On July 9, 2008, C&B filed an application for a temporary and permanent injunction, requesting that Jacoway be enjoined from violating the non-compete and non-solicitation clauses of the employment agreement. Subsequently, Jacoway filed an answer and a response resisting the application for injunction.

C&B served Jacoway with twenty-three written interrogatories on July 22, 2008, and a request for production of documents on July 23, 2008. Jacoway sought an extension to respond to the discovery requests until October 1, 2008, to which C&B agreed. After not responding to the discovery requests by the agreed upon date, C&B sent a letter to Jacoway dated October 8, 2008, but did not receive a response. On October 14, 2008, C&B filed a motion to compel, asserting that Jacoway was unresponsive to C&B's discovery requests and C&B had made a good faith effort to resolve the matter without court intervention. Jacoway resisted the motion to compel, asserting that the parties had been engaged in negotiations to resolve the matter and that he would serve C&B with the responses no later than October 31. Nevertheless, Jacoway failed to respond to the discovery requests until November 3, 2008. C&B considered the responses to lack substantive information and to be wholly inadequate. On November 13, 2008, C&B amended its motion to compel and requested sanctions, asserting that Jacoway's responses were untimely and were deficient in violation of the Iowa Rules of Civil Procedure 1.509(1) and 1.512(2)(*b*), and C&B had communicated with Jacoway by a letter dated November 12 in a good

faith attempt to resolve the discovery dispute. *See* Iowa R. Civ. P. 1.517. A hearing on C&B's motion to compel was held on November 25, 2008.

In an order filed December 4, 2008, at 9:51 a.m., the district court found that C&B sought to receive information through the discovery process by filing and serving a request for interrogatory answers and a request for production of documents, and Jacoway did not file a response as of the date agreed upon between the parties, October 1, 2008. The district court further found that the answers provided by Jacoway were vague and unresponsive, and that his activities as a member of the L.L.C. were an "employment situation" and subject to the rules of discovery. The district court compelled Jacoway to respond in full and in good faith to the interrogatory requests numbered two through eight and ten through twenty-three, and to the production requests numbered one through twenty-six by December 5, at 4:30 p.m. If Jacoway was noncompliant with the order, he would be subject to sanctions. Jacoway did not comply with the order, and never responded to the interrogatory or production requests.

On December 8, 2008, a hearing was held on C&B's request for a temporary and permanent injunction. In its subsequent order of January 26, 2009, the district court found that Truck Insurance Group was a direct competitor of C&B, and had solicited business from Savannah Transport and Down's Transportation in violation of the employment agreement between C&B and Jacoway. Further, the court found that C&B would suffer permanent damage to its business, which would be irreparable, the potential damages were not quantifiable, and there was no adequate remedy at law. Therefore, the district

court enjoined Jacoway from soliciting business that was in violation of paragraph nine of the employment agreement.

On January 22, 2009, C&B filed a motion for sanctions asserting that Jacoway had failed to respond to its interrogatory and production requests and C&B had made a good faith effort to resolve the issue by email communications on December 13 and 24, 2008, but had received no response. Jacoway filed a resistance to C&B's request for sanctions, asserting that the court lacked personal jurisdiction over Truck Insurance Group. Following a hearing on March 18, 2009, the district court found,

> It is uncontested that the Defendant is in violation of the order of the court dated December 3, 2008. Plaintiff's Motion for Sanctions is granted. The parties informed the Court that they are scheduled to take the deposition of the Defendant on March 27, 2009. The Court may have a better perspective as to the appropriate sanctions after that date.

On March 24, 2009, Jacoway moved for a protective order, requesting that a deposition of Jacoway scheduled for March 27 be done by telephone or video conference. *See* Iowa R. Civ. P. 1.504. C&B resisted the motion. Following a hearing on March 25, 2009, the district court denied Jacoway's motion for a protective order and subsequently filed a written order confirming its ruling on April 1, 2009. However, the district court gave the defendant the option of appearing for his deposition the week of March 30, 2009,[3] and set the hearing on sanctions for April 7, 2009. Jacoway did not appear for the deposition.

The hearing on sanctions was continued to April 23, 2009. The district court filed its order on May 11, 2009, and found,

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[3] This date was originally stated as the week of April 6, but was corrected in a nunc pro tunc order.

> Plaintiff previously filed a motion to compel the Defendant to respond to interrogatory requests 1 through 26. The motion to compel was granted and the Defendant was given until December 5, 2008, to do so. The Defendant has failed to do so. It is also uncontested that the Defendant failed to submit to deposition examination in Dubuque County contrary to prior court order.

The court ordered the following sanctions: (1) the temporary injunction was made permanent; (2) the defendant was found to be in default; (3) Jacoway was ordered to pay C&B's attorney fees in relation to the motions to compel and for sanctions in the amount of $4200; and (4) a hearing on the amount of monetary damages was to be held.

On October 9, 2009, Jacoway filed a motion for partial summary judgment on C&B's claim that Jacoway solicited business from Downs Transportation Services.[4] *See* Iowa R. Civil P. 1.981. On November 9, 2009, C&B moved to strike Jacoway's motion for summary judgment asserting that the district court had found Jacoway was in default, liable on all issues of liability, and ordered a hearing be held on the issues of monetary damages, which was scheduled for December 4, 2009.

A trial was held on January 26, 2010, on Jacoway's motion for partial summary judgment, C&B's motion to strike the motion for partial summary judgment, and the amount of monetary damages. The district court denied Jacoway's motion for partial summary judgment as a default was already entered on the petition, but permitted Jacoway to participate as to the issue of damages. On February 5, 2010, the district court found that the employment agreement contained a non-compete and non-solicitation clause, as well as a remedy in the

[4] The motion also addressed counts two and three, which are not at issue on appeal.

form of liquidated damages upon violation, and it had been proven that Jacoway violated those clauses. The court further found that under Tennessee law, liquidated damages are enforceable if the contract provision is a reasonable estimate of the damages that would occur from a breach, and the liquidated damages provision in this case met this requirement. C&B sought liquidated damages for lost business in the amount of $52,627.50 for Savannah Transport and $20,965.95 for Down's Transportation, calculated under the formula set forth in the contract. Therefore, the district court, finding the amounts to have been accurately calculated, entered judgment in favor of C&B and against Jacoway in the amount of $73,593.45. Jacoway appeals.

II. Discovery.

A. Protective Order.

Jacoway asserts that the district court abused its discretion in denying his motion for a protective order. We review the district court's decisions regarding discovery for an abuse of discretion. *See Comes v. Microsoft Corp.*, 775 N.W.2d 302, 305 (Iowa 2009). Iowa Rule of Civil Procedure 1.504 addresses the availability of protective order during discovery in civil litigation. Upon a showing of good cause, the district court

> a. May make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
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> (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place.
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> (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

Iowa R. Civ. P. 1.504; *see also* Iowa R. Civ. P. 1.701. Although the district court has wide discretion to enter a protective order, one is not entered lightly. *Comes*, 775 N.W.2d at 305. In order to establish the required good cause for a protective order, the movant must set forth "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Id.*

A party is required to submit to a deposition examination in the county where the action is pending, unless the court orders otherwise. Iowa R. Civ. P. 1.701(5)(*b*). Jacoway filed a motion for a protective order on March 24, 2009, requesting that the district court order his deposition be taken by telephone or video conference, asserting that he was a resident of Tennessee and the costs associated with him traveling to Dubuque would be significant and prohibitive. C&B resisted, asserting that Jacoway was given notice of the deposition and had more than adequate time to make travel arrangements, the costs of travel were neither significant nor prohibitive, and that they desired to observe Jacoway in person to better evaluate his credibility, demeanor, and effectiveness as a witness in anticipation of trial.

Before the employment agreement was entered into, Jacoway traveled to Dubuque County to negotiate the terms. He consented to the jurisdiction of the Iowa courts, with venue in Dubuque County for any litigation. Jacoway's motion for protective order simply stated that the costs of travel would be "significant and prohibitive," but did not set forth any facts to support that conclusion. Further, at the time he made his motion, Jacoway had not complied with C&B's interrogatory and production requests, and was in violation of the district court's December 4 order regarding discovery. C&B set forth a legitimate reason for requesting an

in-person deposition—to allow C&B to make credibility assessments and evaluate Jacoway's effectiveness as a witness, should the issues go to trial. We find the district court did not abuse its discretion in denying Jacoway's motion for a protective order.

B. Sanctions.

Jacoway next asserts that the district court abused its discretion by imposing sanctions against him for failing to comply with discovery requests. We review the district court's imposition of discovery sanctions for an abuse of discretion. *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). However, a court's discretion narrows when the drastic sanctions of default or dismissal are imposed pursuant to Iowa Rule of Civil Procedure 1.517. *Id.*

> Before the district court may impose either sanction, it must find that a refusal to comply was the result of willfulness, fault, or bad faith. Usually such a sanction is limited to those situations when a party has violated a district court's order. The rule reflects the "proper balance between the conflicting policies of the need to prevent delays and the sound public policy of deciding cases on their merits."

Id. (citations omitted).

Jacoway specifically contends that he raised legitimate objections to the discovery requests, namely that C&B sought information from Truck Insurance Group, which was not a party to the case and not subject to personal jurisdiction in Iowa, as well as the fact that the information that was sought was confidential and proprietary to Truck Insurance Group. Jacoway further contends that because he raised these objections, he acted in "good faith" and there was no willfulness, fault, or bad faith in his failure to comply.

C&B asserts that Jacoway has not preserved this issue for appeal. C&B served Jacoway with interrogatories on July 22, 2008, and the request for production of documents on July 23, 2008. *See* Iowa R. Civ. P. 1.501 (providing that parties may obtain discovery by written interrogatories and production of documents, among other methods). A party served with written interrogatories or production of documents must fully answer each interrogatory and provide a written response to the production of documents or object, and serve the answers or any objection on the opposing party within thirty days. Iowa Rs. Civ. P. 1.509, 1.512.

Jacoway did not respond to the discovery requests by August 21 and 22, 2008, that is within thirty days, but ultimately the parties agreed that Jacoway would have until October 1 to respond. After Jacoway failed to meet this extended deadline, C&B filed a motion to compel. Jacoway responded on November 3, 2008, but gave only cursory and incomplete responses, which is treated as a failure to answer. *See* Iowa R. Civ. P. 1.517 ("[A]n evasive or incomplete answer is to be treated as a failure to answer."). On December 4, 2008 at 9:51 a.m., the district court ordered Jacoway to respond in full and good faith to the interrogatories and production of documents by December 5, 2008 at 4:30 p.m. Jacoway never responded in any manner. Because Jacoway did not adequately or timely respond or object, he has waived any objections and not preserved this issue for our review. *See Schapp v. Chicago & N.W.R. Co.*, 155 N.W.2d 531, 533 (Iowa 1968) (stating that a party who fails to make an objection, waives that objection and is required to fully answer the discovery requests). Further, the failure to appear for a deposition, to serve interrogatory answers,

and to serve a written response to a production of documents, may not be excused based upon objections unless the party had applied for a protective order based upon its objections. Iowa R. Civ. P. 1.517(4). Although Jacoway moved for a protective order, he only requested that he be permitted to submit to a deposition by telephone or video conferencing and did not raise any other objections.

Jacoway's nearly complete failure to participate in discovery also affects the issues he may appeal. In his November 3, 2008, response to the interrogatories, Jacoway failed to provide any substantive information other than his name, his address, and that he was not employed but owned "a membership interest in a Tennessee limited liability company." Jacoway never responded in a valid manner to the interrogatories or production of documents, and never submitted to a deposition. On appeal, he argues that he raised legitimate objections to discovery requests regarding "his employer Truck Insurance Group," while taking a contrary position that he is not an employee but a minority owner of Truck Insurance Group. Because Jacoway failed to participate in discovery, there is no record on which to evaluate this argument, and the facts he now asserts on appeal. We agree with C&B that Jacoway failed to make timely objections to the discovery requests. For that reason he cannot now challenge the order regarding sanctions based upon those untimely objections. Jacoway has not preserved this issue for appeal.

In addition, we note that Jacoway's argument is not applicable to discovery as a whole. For instance, interrogatory numbers six and seven requested that Jacoway identify all exhibits he expected to use and witnesses he

expected to have testify at trial, to which Jacoway provided an evasive answer in his November 3 response and does not now identify an applicable objection. Moreover, there was ample evidence Jacoway's "refusal to comply was the result of willfulness, fault, or bad faith."[5] C&B served Jacoway with the interrogatories and production of documents in July 2008. Jacoway did not respond until November 3, 2008, after which the district court found the responses were insufficient. In an order filed December 4, 2008, the district court ordered Jacoway to respond in full and good faith to the interrogatories and production of documents by the end of the business day on December 5, 2008. Jacoway did not do so nor did he make any attempt to comply. Subsequently, C&B communicated with Jacoway by email in an attempt to determine if Jacoway would comply with the court order, but Jacoway did not respond to those communications. In an order dated March 25, 2009, the district court ordered Jacoway to submit to a deposition, either on the scheduled day or the following week. Again, Jacoway did not do so. Throughout the proceedings, Jacoway has not complied with any discovery request, either providing insufficient answers or failing to wholly respond, as well as violating two court orders (filed December 4,

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[5] Jacoway also asserts that the district court erred in not making a written finding that his refusal to comply was the result of willfulness, fault, or bad faith. In its December 3, 2008 order, the district court found that Jacoway's responses were "vague and unresponsive" and that Jacoway was "playing semantics," and ordered Jacoway to respond "in full and in good faith." In its March 18 order, the district court found that it was not contested that Jacoway was in violation of the December 3, 2008 court order and granted C&B's motion for sanctions, but set a hearing after Jacoway's scheduled deposition to determine the precise sanctions. In its May 11, 2009 order, the district court found, "It is also uncontested that the Defendant failed to submit to deposition examination in Dubuque County contrary to prior court order." Therefore, the district court entered sanctions. However, this issue was not raised before the district court and therefore, not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

2008, and April 1, 2009). *See Wagner v. Miller*, 555 N.W.2d 246, 249 (Iowa Ct. App. 1996) ("Dismissal is a discovery sanction generally used when a party has violated a trial court's order."). Therefore, we find the district court did not abuse its discretion regarding the discovery requests and by imposing sanctions against Jacoway.

III. Partial Summary Judgment.

Jacoway next argues that the district court erred in denying his October 9, 2009 motion for summary judgment. Our review is for correction of errors at law. Iowa R. App. P. 6.907; *City of Johnston v. Christenson*, 718 N.W.2d 290, 296 (Iowa 2006). Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

Jacoway specifically argues that the district court should have granted his motion for summary judgment because there was no issue of material fact that he solicited business from Down's Transportation, but rather another agent of Truck Insurance Group solicited the business. C&B responds that Jacoway was previously found in default on May 6, 2009, and therefore cannot subsequently challenge his liability in a motion for summary judgment. Further, C&B argues that there was an issue of material fact, and the evidence at trial demonstrated that "Jacoway was personally involved in obtaining the Down's Transportation account and personally profited from such account." We agree.

Jacoway was found to be in default on May 6, 2009, which was a finding of liability and the only remaining issue was the amount of damages. *See Hallett Const. Co. v. Iowa State Highway Comm'n*, 154 N.W.2d 71, 74 (Iowa 1967)

(explaining that following a default, "all the plaintiff's material allegations are taken as true and the determination of the amount of damages to be awarded is all that remains to be done"). At no time did Jacoway move to set aside the default. *See* Iowa R. Civ. P. 1.977. Thereafter, Jacoway could not challenge the finding that he breached the employment agreement, but could only participate in a trial on the remaining question of damages. *See Hallett Const. Co.*, 154 N.W.2d at 74. Under this same logic, Jacoway could not refuse to participate in discovery and then claim there was no issue of material fact because he asserted by affidavit that he had "no involvement in procuring or writing any insurance coverage for Down's Transportation at any time." Further, as C&B points out, evidence introduced at the trial on damages demonstrated that Jacoway did participate in soliciting Down's Transportation.

We also note that although the district court obviously did not rely on the trial on damages and subsequent judgment as a basis for denying Jacoway's motion for summary judgment, we may do so. "[W]e are obliged to affirm an appeal where any proper basis appears in the record for a trial court's judgment, even though it is not one upon which the court based its holding." *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826 (Iowa 1994). An erroneous denial of a motion for summary judgment is harmless error and rendered moot by the following trial and judgment. *See id.* (indicating that "an erroneous denial of summary judgment [is] rendered harmless by a subsequent judgment" and that the issue of whether a defendant's motion for summary judgment was improperly denied is rendered moot where the case has already been tried and verdict

entered in favor of the plaintiff). Therefore, regardless if there was error, it was rendered harmless, and the issue is moot.

IV. Liquidated Damages.

Finally, Jacoway challenges the damages awarded. Jacoway first asserts that C&B did not suffer any damages because he did not solicit the business of Savannah Transport and did not "write the account" for Down's Transportation Company.[6] As discussed above, Jacoway is attempting to challenge his liability, which he is not permitted to do following the entry of the unchallenged default.

Jacoway next asserts that the liquidated damages provision of the employment agreement is an unenforceable penalty under Tennessee law. Both the parties agree that Tennessee law applies and paragraph eleven is a liquidated damages provision. *See Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 96 (Tenn. 1999) (defining "liquidated damages" as a "sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur"). Under Tennessee law,

> The fundamental purpose of liquidated damages is to provide a means of compensation in the event of a breach where damages would be indeterminable or otherwise difficult to prove. By stipulating in the contract to the damages that might reasonably arise from a breach, the parties essentially estimate the amount of potential damages likely to be sustained by the nonbreaching party. "If the [contract] provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages." However, if the stipulated amount is unreasonable in relation to

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[6] Jacoway claims he should not be liable because the employment agreement only prohibited him from soliciting or accepting business from C&B's customers, but did not prohibit Truck Insurance Group from doing so. The contract did not identify Truck Insurance Group by name because the business entity had not been formed at that time. Jacoway was identified in the agreement as the "employee"; he cannot escape liability under the contract by later acting in the name of Truck Insurance Group.

> those potential or estimated damages, then it will be treated as a penalty.
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> We, therefore, adopt a prospective approach for addressing the recovery of liquidated damages. Under this approach, courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages. However, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

Id. at 98, 100–101.

We examine the record to determine the intentions of C&B and Jacoway at the time they entered into the contract, namely whether the liquidated sum was a reasonable estimate of potential damages and whether the parties considered actual damages to be indeterminable or difficult to measure upon a breach. The president and chief operating officer of C&B, David Becker, testified,

> The reasons we put liquidated damages in is that when you're in the insurance brokerage business and you—revenue from clients comes really from the renewals that come year-in and year-out for any given client, and when someone takes a client from you, the actual damages are really difficult to determine because that client could be your client for the next 30 years, in which case the damages are huge, or the client could leave you in the next six months, in which case the damages are small, so instead of trying to do an inquiry into every individual client, we try to put in a liquidated damages clause that both sides understand is a fair and reasonable estimation of what accounts would be worth in [the] aggregate if a bunch left, and the reason we picked 2.25 is that we have a valuation done of our company every year by a third-party appraiser. That valuation [came] in at roughly 2.25 times our revenue, and so if we lose a bunch of revenue, roughly speaking that translates into 2.25 times what the value is on that account in

> our appraisal. So it's a reasonable estimation of the value of the lost profits that go with losing an account.

Jacoway did not present any evidence to refute this testimony that this was the parties' intent at the time the contract was entered into. We agree with the district court that the liquidated sum was a reasonable estimate of potential damages and actual damages were indeterminable and difficult to measure at the time C&B and Jacoway entered into the employment agreement, and as a result, the liquidated damages clause was enforceable.

Additionally, the evidence demonstrated that Jacoway left C&B in October 2007, and at that time both Savannah Transport and Down's Transportation were clients of C&B. Shortly thereafter, Jacoway formed Truck Insurance Group, which then provided insurance for Savannah Transport and Down's Transportation. In spite of the fact that Jacoway claims he did not know that Truck Insurance Group provided insurance for Down's Transportation "until after the fact," the evidence demonstrated otherwise, namely that Jacoway submitted Down's Transportation's application for insurance and the check for its payment. Therefore, we find substantial evidence supports the district court's award of liquidated damages.

AFFIRMED.