1999 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2402

1999 SENATE STANDING COMMITTEE MINUTES

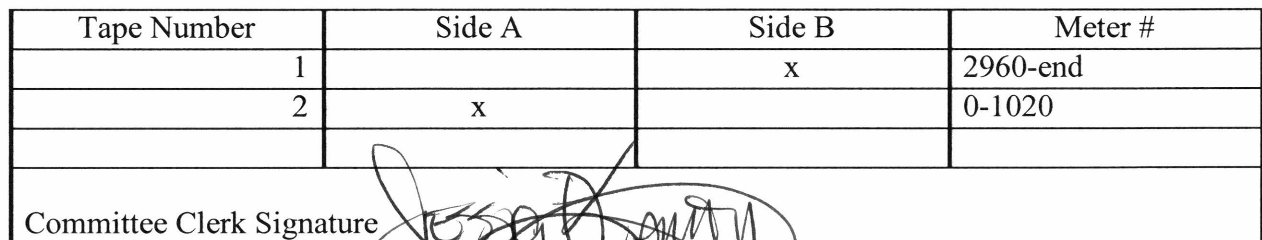
BILL/RESOLUTION NO. SB2402

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 1, 1999

Tape Number	Side A	Side B	Meter #
1		x	2960-end
2	x		0-1020
Committee Clerk Signature			



Minutes:

Senator Mutch opened the hearing on SB2402. All senators were present.

Senator Flakkol introduced SB2402. Senator Klein asked him if this bill went against free enterprise. Senator Fisher said that it didn't because it made this optional and not mandatory.

Senator Fischer testified in support of SB2402. His testimony is included. Senator Mutch asked him if they could somehow confine this to a more specific area.

Representative Thoreson testified in support of SB2402

Sandy Tabor, Executive director of the North Dakota State Barr Association, testified in a neutral position on SB2402. She said that they were concerned because they felt that this bill would impact the ability of a client to keep his or her accountant, or engineer, etc.

John Risch, Legislative Director of the United Transportation Union, testified in opposition to SB2402. They felt that it legalize the use of non compete clauses.

Bruce Levi testified in opposition to SB2402. His testimony is included.

Senator Mutch closed the hearing on SB2402.

Committee discussion tool place on FEBRUARY 3, 1999.

Senator Krebsbach motioned to amend SB2402. Senator Thompson seconded her motion. The motion carried with a 5-0-2 vote.

Senator Krebsbach motioned for a do not pass with amendments committee recommendation on SB2402. Senator Thompson seconded her motion. The motion carried with a 5-0-2 vote.

Senator Thompson will carry the bill.

North Dakota Medical Association
North Dakota Medical Group Management Association

February 1, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2402

Page 2, after line 2, insert:

"4. Subsection 3 does not apply to a contract in which a physician or other health care provider is a party and in which the physician or other provider agrees to provide health care or related services under that contract.

Renumber accordingly

Date: 2/3/99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2402

Senate INDUSTRY, BUSINESS AND LABOR COMMITTEE Committee

☐ Subcommittee on ______________________
or
☐ Conference Committee

Legislative Council Amendment Number ______________________

Action Taken AMEND. (LEVI : ON TAPE)

Motion Made By KREBSBACH Seconded By THOMPSON

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Sand	X				
Senator Klein	X				
Senator Krebsbach	X				
Senator Heitkamp	—				
Senator Mathern	—				
Senator Thompson	X				

Total (Yes) 5 No 0

Absent 2

Floor Assignment ______________________

If the vote is on an amendment, briefly indicate intent:

Date: 2/3/99
Roll Call Vote #: 2 SR24 2034

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2402

Senate INDUSTRY, BUSINESS AND LABOR COMMITTEE Committee

☐ Subcommittee on ______
or
☐ Conference Committee

Legislative Council Amendment Number ______

Action Taken Do Not Pass As Amended

Motion Made By Krebsbach Seconded By Thompson

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Sand	X				
Senator Klein	X				
Senator Krebsbach	X				
Senator Heitkamp	—				
Senator Mathern	—				
Senator Thompson	X				

Total (Yes) 5 No 0

Absent 2

Floor Assignment Thompson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2402: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (5 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2402 was placed on the Sixth order on the calendar.

Page 1, line 17, remove "or at any time"

Page 1, line 18, remove "during employment"

Page 2, after line 2, insert:

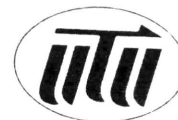
"4. Subsection 3 does not apply to a contract in which a physician or other health care provider is a party and in which the physician or other provider agrees to provide health care or related services under that contract."

Renumber accordingly

1999 TESTIMONY

SB 2402

united transportation union



JOHN RISCH
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Testimony of John Risch
Before the Senate Industry Business and Labor
In Opposition to of
Senate Bill 2402
February 1, 1999

Mr. Chairman and members of the committee, my name is John Risch. I am the North Dakota Legislative Director of the United Transportation Union. The UTU is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen and yardmasters.

We oppose SB 2402 because it would legalize the use of noncompete clauses in employment and business contracts.

A noncompete clause is a nasty bit of fine print inserted into an employment or business contract that prohibits the signer from doing the same or similar work in the same market if he parts company with his employer or partner.

So if you're a salesman, a carpenter, a printer, a surgeon, or any employee who is covered by a noncompete agreement and you quit **or are even fired,** you would be prohibited from doing similar work within 50 miles for up to two years. The noncompete agreement would prohibit you from starting your own business or even accepting a better job from one of your employer's competitors.

SB 2402 should be rejected because it would allow existing businesses to unfairly compete in the free market. Noncompete clauses stifle the creation of new businesses and unjustly trap blue collar, white collar and professional workers in jobs they may wish to leave.

Most would agree that the creation of new businesses and the jobs that come with them have a positive impact on our state's economy. These new entrepreneurs are, for the most part, people who did similar work for someone else and are pursuing the American dream of owning their own business.

Noncompete clauses would put the kibosh to much of that by prohibiting people from starting up a competing business with their former employer.

One person who comes to mind is a friend who operates a heating and cooling business. My friend didn't start out as a business owner. He used to do heating and cooling work for someone else, and for whatever reason, set out on his own. Now my friend has his own business, is doing quite well, and has several employees. If he had been subjected to a noncompete clause, he would never have been able to start his own business unless he moved out of the area or spent two years doing some other line of work.

Doing other work was not an option for my friend, and it isn't an option for most folks. People usually have only one profession. So the bill would essentially lock people into their present jobs unless they choose to move, adding to our problem of outward migration.

The worst effect of the bill would be that an existing employer could essentially keep his employees in a form of involuntary servitude. Because employees could not go to work for someone else, the current employer could keep their wages and fringe benefits lower than what the market would ordinarily produce.

Union members will be protected if the law passes because we have trained representatives to negotiate legitimate labor agreements, free of noncompete clauses.

That's not the case for most employees who are required to sign an assortment of papers when they get a new job. If this bill passes noncompete clauses might become just one more piece of paper that must be signed as a condition of employment for employees across the state.

Even if a new employee is made thoroughly aware of a noncompete clause at the time of hiring, most new employees are just happy to get the job and are likely to sign most anything.

Noncompete clauses are illegal in North Dakota for good reason.

Our state's employer-employee relationships are governed by something called the Employment at Will Doctrine. Which is a legal precedent that essentially means that "because you can quit your job at anytime you can also be fired at any time." This bill would undermine that doctrine, allowing an employer to trap his employee in their job. Worse than that, if an employer were to fire an employee they could be prohibited from practicing his one and only trade in his or her home town.

It is difficult to overstate the problems this bill would create if passed, so we urge a "DO NOT PASS" recommendation from this committee.

saved:2402

SB 2402
Senator Tom Fischer

Mr. Chairman, members of the Senate Industry , Business and Labor Committee.

For the record my name is Tom Fischer, state senator from district 46,south Fargo.

I am here today in support of Senate bill 2402

This bill allows an employer and employee to enter into a non-compete contract.This contract would be executed at the time of employment and would pertain to access to confidential company information that has been created or will be created while the employee is with the company.

This amendment would also allow for a non-compete clause to be in place for two years after the employment has been terminated. I think it gives an employer/employee relationship a better understanding from the beginning and to offer protection to the employer of confidential material that may have taken years to develop.

Mr. Chairman, members of the committee, I hope you will support Senate bill 2402 and I thank you for your time this morning.

Bruce Levi
North Dakota Medical Association
North Dakota Medical Group Management Association

February 1, 1999

Testimony in Opposition to Senate Bill No. 2402

Senate Bill No. 2402 would amend §9-08-06 to create a new exception to the general law in our state that prohibits contract provisions that restrain the exercise of a lawful profession. We call contract provisions like these "covenants not to compete," which essentially prohibit an employee from competing with their employer after employment is terminated.

A similar bill was introduced in the 1995 Legislative Assembly, and was defeated. The North Dakota Medical Association opposed the 1995 bill and today we oppose SB No. 2402.

The freedom to compete is a part of the fabric of North Dakota. Its interesting to note that the opening clause of § 9-08-06 was enacted as § 833 of the Dakota Territory Civil Code of 1865 and later codified as § 959 of the Dakota Territory Civil Code of 1877. See *Werlinger v. Mutual Service Casualty Insurance Company*, 496 N.W.2d 26 (N.D. 1993) for a discussion of the history of § 9-08-06. In the medical profession, covenants not to compete are considered unethical if they disrupt the continuity of care for patients and potentially deprive the public of medical services. The Code of Ethics of the American Medical Association states:

> E-9.02 Restrictive Covenants and the Practice of Medicine.
> Covenants not to compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment, partnership or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician. Issued prior to April 1977; Updated June 1997.

It also appears that this legislation may violate the spirit of Article I, §7, of the North Dakota Constitution, which states:

> Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall

be deemed guilty of a misdemeanor.

This bill would severely curtail an employee's opportunities. For example:

1. Assume that a Bismarck lawyer was employed as an associate in a competing law firm, that the lawyer had signed such an agreement, and that the lawyer was unhappy with the employer's ethics. Another law firm could not employ that lawyer — or even offer a partnership to that lawyer — unless the lawyer quit the competing law firm and remained idle for up to two years or moved away for up to two years.

2. Assume that a physician or other health care provider, who signed such an agreement, was employed at a local hospital and received a much better offer from a competing hospital. The physician or other provider could not accept the offer, nor could the hospital recruit that physician.

The examples could go on and on. But, whether we are discussing lawyers, doctors, nurses, or any other profession, occupation, or trade, the result is the same: this bill could severely limit the employment opportunities of employees in every profession, trade, or occupation.

A North Dakota Supreme Court decision, *Spectrum Emergency Care, Inc. v. St. Joseph's Hospital and Health Center*, 479 N.W.2d 848 (N.D. 1992), accompanies this testimony and illustrates what might occur if "covenants not to compete" are enforceable. The case involved contracts between Spectrum, a company supplying emergency room physicians to hospitals, and the physicians it employed to supply to the hospital. If this bill would have become law prior to this case, the defendant physicians would have been forced to continue working for Spectrum, or would have been forced to leave Dickinson to find employment elsewhere.

The proponents of the bill may respond that an employee may refuse to sign such an agreement. That could be a reasonable argument if the parties had similar or equal bargaining power. However, employers and employees are seldom negotiating on a level playing field.

Accordingly, the North Dakota Medical Association and the North Dakota Medical Group Management Association urge this committee to submit a "do not pass" recommendation on this bill.

479 N.W.2d 848 SPECTRUM EMERGENCY CARE, INC. V. ST. JOSEPH'S HOSP (S. Ct. 1992)

Spectrum Emergency Care, Inc., a Missouri Corporation, Plaintiff and Appellant
vs.
St. Joseph's Hospital and Health Center, f/k/a St. Joseph's Hospital, and Robert L. Cusic, M.D., Sheldon Swenson, M.D., Defendants and Appellees

Civil No. 910030
SUPREME COURT OF NORTH DAKOTA
479 N.W.2d 848
January 14, 1992; As Corrected January 21, 1992

Appeal from the District Court of Stark County, Southwest Judicial District, the Honorable Maurice R. Hunke, Judge.

COUNSEL

Pringle & Herigstad, PC, P.O. Box 1000, Minot, ND 58702-1000, for plaintiff and appellant; argued by Carol K. Larson.
Howe, Hardy, Galloway & Maus, PC, P.O. Box 370, Dickinson, ND 58602, for defendant and appellee St. Joseph's Hospital and Health Center, f/k/a St. Joseph's Hospital; argued by Michael J. Maus.
Anderson & Anderson, P.O. Box 2574, Bismarck, ND 58502, for defendants and appellees Robert L. Cusic, M.D., and Sheldon Swenson, M.D.; argued by Sonna M. Anderson.

JUDGES

Ralph J. Erickstad, C.J., Vernon R. Pederson, S.J., Douglas Heen, S.J.

OPINION

ERICKSTAD, Chief Justice, on reassignment.

Spectrum Emergency Care, Inc., (Spectrum) appeals from a judgment of the District Court for Stark County which held that the restrictive covenants of its contracts with St. Joseph's Hospital and Health Center (Hospital) and certain physicians were void under section 9-08-06, N.D.C.C. We affirm.

Spectrum supplies emergency room physicians to hospitals to provide emergency medical care. Since 1979 and until January 1, 1990, Spectrum had a contract with the Hospital to provide emergency room physicians. Originally, the contract was for weekend emergency room coverage; however, sometime during 1986 the contract was modified so that full-time emergency coverage was provided by Spectrum. The agreement between Spectrum and the Hospital was self-renewing and provided for a 90-day notice period prior to termination. This agreement contained the following clause:

"During the term of this Agreement, any renewals or extensions thereof, and for a period of one year (12) months thereafter, Hospital agrees it will not directly or indirectly enter into any agreement covering the same or similar services as are provided for herein with any person with whom it came into a business or professional relationship as a result of this Agreement."

Spectrum also had separate Independent Contractor Physician Agreements with Robert L. Cusic, M.D., Sheldon Swenson, M.D., and Paul Swisher, M.D.[1] These agreements stated:

"8. Corporation and Physician recognize that during Physician's association with Corporation, Physician has been and will continue to be brought into contact with Corporation's confidential methods of operation and trade secrets, including know-how, data and other information about Corporation's operations and business of a confidential nature; that such information gives to the relationship a special and unique value. Therefore, Physician agrees that during the term of this contractual relationship with Corporation and for a period of one (1) year thereafter, Physician will not in any manner, directly or indirectly: (a) disclose or divulge to any person, entity, firm or company whatsoever, or use for his own benefit or the benefit of any other person, entity, firm or company, directly or indirectly in competition with Corporation any knowledge, information, business methods, techniques or data of Corporation; (b) solicit, divert, take away or interfere with any of the accounts, trade, business patronage, employees or contractual arrangements of Corporation; (c) compete with Corporation at Hospital or enter into any contractual arrangements for the provision of emergency department physician coverage with any hospital where Physician has been scheduled by Corporation. As used herein, the term 'Corporation' shall include Spectrum Emergency Care, Inc. and its affiliates.

"Notwithstanding the above, if the agreement between Corporation and Hospital is terminated through no fault of Physician's, and through no direct or indirect negotiation with Hospital Board, Administration, or Medical Staff, then the terms and provisions of this paragraph '8' shall be null and void.

"Physician shall, upon termination of the contractual relationship between Physician and Corporation, return to Corporation all books, records and notes and all other information and documents applicable to Corporation, its accounts and the manner of conducting its business

"It is the intention of the parties to restrict the activities of the Physician only to the

extent necessary for the protection of the legitimate business interests of Corporation and nothing herein shall be such as to prevent Physician from earning a livelihood."

In order to fulfill its contract with the Hospital, Spectrum entered Employment Agreements with Robert L. Cusic to serve as Medical Director, and Sheldon Swenson to serve as Assistant Medical Director at the Hospital. These agreements did not vary in any significant manner from the previously quoted agreements.

The undisputed facts are that on September 2, 1989, physicians Cusic and Swenson met with the CEO of the Hospital, John Studsrud. During this meeting, they informed Studsrud that they would not renew their contracts with Spectrum as they were unhappy with Spectrum and were seeking other employment. On September 11, 1989, these persons held another meeting at which a change in format of the emergency room was discussed. On September 13, 1989, the Hospital notified Spectrum that it would not renew its contract with Spectrum. Cusic and Swenson negotiated and signed new employment agreements with the Hospital prior to the termination of their agreements with Spectrum. The new agreements between the Hospital and the physicians were to take effect at the end of the Spectrum contracts and were to be effective for four years.

Spectrum claims that the Hospital, Cusic, and Swenson breached their agreements with it when they entered into new agreements while still under contract with it. Spectrum's complaint asserted that the physicians and the Hospital violated their respective agreements with it by making agreements with each other. Spectrum requested injunctive relief and monetary damages.

Spectrum apparently concedes that the provision for a one-year restriction on the physicians activities after the termination of the contract is not valid. However, Spectrum asserts the interim restraint in the contracts is valid and binding upon both the Hospital and the physicians.

Although the trial court determined that neither the physicians nor the Hospital breached any of their respective contractual obligations to Spectrum, we, for purposes of this opinion, assume that a technical breach occurred. We, nevertheless, affirm the judgment for the reasons hereinafter explained.

The physicians and the Hospital rely on section 9-08-06 of the North Dakota Century Code to defend their actions. It reads: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind **is to that extent void**. . . . [Emphasis added.]" Thus, our inquiry must focus on what specific actions the defendants have engaged in and whether or not such conduct is protected under the statute.

As previously stated, on September 2, 1989, the physicians informed the Hospital of their intention of leaving the Spectrum program. This precipitated negotiations between the physicians and the Hospital for employment contracts, with employment by the Hospital of the physicians to begin at the end of the Spectrum contracts. In this sense, the parties were preparing for the time when they would no longer be under contract with Spectrum.

First, we consider whether or not section 9-08-06, N.D.C.C., protects the actions of the

physicians. There can be no doubt that section 9-08-06, N.D.C.C., makes void the provision which attempts to prohibit the physicians from being employed by the Hospital at the end of the contract period with Spectrum. Spectrum concedes this point. Thus, the issue narrows to whether or not section 9-08-06, N.D.C.C., protects a person's ability to negotiate and contract for future employment while under a contract which attempts to prohibit such conduct. We conclude that it provides such protection. The ability to negotiate and contract for future employment is central to one's ability to exercise a lawful profession, trade, or business.

We note that there was no evidence that the physicians engaged in conduct prohibited by their contract other than that which was necessary in seeking prospective employment. The trial court as a matter of fact found that "there was no evidence that the Hospital solicited or encouraged Drs. Cusic and Swenson to decide not to renew their agreement with Spectrum, and there was no evidence that the physicians solicited or encouraged the Hospital to decide not to renew its agreement with Spectrum." That finding is interesting, but it is not crucial to our disposition of this case. It is important to note that Spectrum was notified of the parties' intentions and given the opportunity to try to change the minds of the physicians and the Hospital CEO in a meeting which took place in early November, approximately one month before the physicians signed the contract with the Hospital.

Spectrum erroneously relies upon **Igoe v. Atlas Ready-Mix, Inc.,** 134 N.W.2d 511 (N.D. 1965), and **Hawkins Chemical, Inc. v. McNea,** 321 N.W.2d 918 (N.D. 1982). Both of these cases involve sales of businesses. These decisions are distinguishable as they involve restrictions imposed on one who had sold a business and thus are decided under the exceptions contained under section 9-08-06, N.D.C.C., rather than the part of that section which makes contracts which restrain a lawful profession void. The conduct herein attempted to be restrained does not come within the exceptions.[2]

Spectrum places great reliance on our ruling in **Biever, Drees & Nordell v. Coutts,** 305 N.W.2d 33 (N.D. 1981). In **Coutts**, we upheld a temporary injunction restraining the defendant from performing accounting services for certain clients of his former employer when the defendant had solicited his former employer's clients while still employed by them in contemplation of leaving and starting his own business. **Coutts** is distinguishable even without considering section 9-08-06, N.D.C.C.

Initially, we note that **Coutts** did not involve a restrictive covenant and the application of section 9-08-06, N.D.C.C.[3] **Coutts** is more properly characterized as involving equitable protection against unfair competition. In **Coutts**, the conduct in question went well beyond that which is central or necessary to one's ability to exercise a profession, trade, or business. In **Coutts**, the employee, without the knowledge of his employer, solicited for himself **the business** of his employer's clients. In this case, Spectrum was made aware of the parties' intent not to renew their respective contracts months in advance of the end of their contracts, and in fact, Spectrum made an effort to have the physicians reconsider their decisions. Thus, unlike the plaintiff in **Coutts**, Spectrum was not placed on unequal footing, nor unfairly disadvantaged. In this case, the physicians did not negotiate or contract to be the "equivalent" of Spectrum. They merely

contracted to engage in their "lawful profession."

In fact, in **Coutts** our Court relied on **Sanitary Farm Dairies, Inc. v. Wolf,** 261 Minn. 166, 112 N.W.2d 42 (Minn. 1961), a decision of the Minnesota Supreme Court. There is no indication in **Sanitary Farm Dairies** that Minnesota had a statute equivalent to section 9-08-06, N.D.C.C.; at least there is no reference to such a statute in **Sanitary Farm Dairies.** Our limited research does not indicate that there is such a statute in Minnesota today or that there was one when **Sanitary Farm Dairies** was decided. As **Sanitary Farm Dairies** does not involve the issue of the application of a statute equivalent to section 9-08-06, N.D.C.C., that opinion is of little aid to us in this case. Therefore, **Coutts** cannot be controlling in this case.

We thus conclude that the contracts between the physicians and Spectrum to the extent they restrain the physicians from negotiating for and securing future employment, are void under section 9-08-06, N.D.C.C.

Next we consider whether or not section 9-08-06, N.D.C.C., protects the actions of the Hospital. Spectrum cites **Dickinson County Memorial Hospital v. Northern Professional Emergency Physicians,** 141 Mich. App. 552, 367 N.W.2d 833 (Mich.App. 1984), for the proposition that a statute similar to section 9-08-06, N.D.C.C., is not applicable to restrictive covenants which restrain one as an employer as distinguished from an employee. We do not agree that there should be any distinction.

Initially, we note that to enforce the contract's restrictions against the Hospital would permit Spectrum to accomplish indirectly what it would be illegal to do directly. Statutes should not be interpreted to allow persons to do indirectly something that the statute directly prohibits. **See Resolution Trust v. Dickinson Econo-Storage,** 474 N.W.2d 50, 52 (N.D. 1991).

The policies of restraint against contracts which restrict the free exercise of a lawful profession or business behind section 9-08-06, N.D.C.C., would be frustrated by such an interpretation.

Statutes must be interpreted in furtherance of their purposes. **See Aanenson v. Bastien,** 438 N.W.2d 151, 153 (N.D. 1989); **Larson v. Wells County Water Resource Board,** 385 N.W.2d 480 (N.D. 1986). Parties to a contract cannot waive rights which are protected by statutes that promote public policies. **See Borsheim v. Owan**, 467 N.W.2d 95, 98 (N.D. 1991). (Vendees under anti-deficiency statutes could not waive their procedural rights because it would be against the public policy advanced by the statute.)[4] Thus, we conclude that section 9-08-06, N.D.C.C., contemplates prohibiting restraints on a person's exercise of a lawful profession, trade, or business as an employer as well as an employee.

The issue is whether or not the Hospital's actions were protected under section 9-08-06, N.D.C.C. As noted earlier, there was no evidence that the Hospital did any more than negotiate with prospective employees and thereafter reach employment agreements to be effective at the end of the contract with Spectrum. There was no evidence that the Hospital and Spectrum were on unequal footing. There was no evidence that the Hospital would be acquiring any "trade

secret" of Spectrum's or any other such advantage.[5] As with the case of the physicians, the attempted restraint against the Hospital does not come within any exception of section 9-08-06, N.D.C.C. We thus conclude that, to the extent the contract between the Hospital and Spectrum restrains the action taken by the Hospital in this case, it is void.

For the aforementioned reasons, the judgment of the district court is affirmed.

/s/ Ralph J. Erickstad, C.J.

/s/ Vernon R. Pederson, S.J.

/s/ Douglas Heen, S.J.

HEEN, S.J., and PEDERSON, S.J., sitting in place of LEVINE, J., and MESCHKE, J., disqualified.

Justice H.F. Gierke, a member of the Court when this case was heard, resigned effective November 20, 1991, to accept appointment to the United States Court of Military Appeals and did not participate in this decision.

DISPOSITION

AFFIRMED.

CONCURRENCE

VANDEWALLE, Justice, concurring specially.

The trial court found "there was no evidence that the Hospital solicited or encouraged Drs. Cusic and Swenson to decide not to renew their agreement with Spectrum, and there was no evidence that the physicians solicited or encouraged the Hospital to decide not to renew its agreement with Spectrum." Notwithstanding the majority's dismissal of that finding as "interesting, but . . . not crucial to our disposition of this case," that finding is the basis upon which I concur in the result reached by the majority opinion.

I am concerned that the majority opinion may be construed to hold that section 9-08-06, NDCC, absolves employees of any loyalty to their employer. There are other provisions which are of equal import in the employer-employee relationship. Chapter 34-02, NDCC, sets forth the obligations of employer and employee. Employers assume certain obligations as a result of the relationship. So do employees. For example, section 34-02-07 requires that one who is employed at his own request to do that which is more for his own advantage than for that of his employer must use great care and diligence to protect the interests of the employer; and section 34-02-14 requires that an employee who has any business to transact on his own account similar to that entrusted to him by his employer must always give the employer the preference. I construe those sections to require loyalty to the employer and to require that the employee not impair the employer's business for the benefit of the employee.

I agree that this court's decision in **Biever, Drees & Nordell v. Coutts,** 305 N.W.2d 33 (N.D. 1981) is distinguishable, not because section 9-08-06 was not discussed in that opinion as footnote 3 of the majority appears to hold,[1] but because the facts and the issue framed from those facts was substantially different than with which we are here faced. As the majority opinion notes **Coutts** was a case "involving equitable protection against unfair competition." Thus, in **Coutts**, we framed the issue as "Did Coutts owe any obligation to the firm not to solicit its clients while he was employed by the firm and did he, in violation of that obligation, attempt to gain something, i.e., the clients of the firm?" **Coutts, supra**, at 35. Relying in part on section 3-04-05-01[2] of the North Dakota Administrative Code, the accountants Code of Professional Ethics, we concluded that the accounting firm "had a right to expect that [Coutts] would not solicit clients of the firm for himself while he was employed by the firm." **Coutts, supra**, at 36.

Here the trial court found there was no solicitation to not renew the contract with Spectrum by either the physicians or the hospital and no contract negotiations between the hospital and the physicians until after the physicians determined to leave Spectrum's employment at the end of their contract period.

Insofar as the contract prohibits negotiations for future employment after the physicians determined not to renew the contract, I agree it violates section 9-08-06, NDCC. We need not and should not decide any issues other then those found by the findings of the trial court.

/S/Gerald W. VandeWalle

OPINION FOOTNOTES

1 Summary judgment of dismissal of the complaint was granted as to Dr. Paul Swisher by consent of counsel. He was dismissed from this action on December 17, 1990.

2 "**9-08-06. In restraint of business void – Exceptions.** Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except:

1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part of either, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

2. Partners, upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city where the partnership business has been transacted, or within a specified part thereof."

3 In **Coutts**, neither of the parties raised section 9-08-06, N.D.C.C., as an issue in their briefs, it was not discussed in our opinion and it was not raised in the petition for rehearing. Under such circumstances, **Coutts** cannot be said to be controlling in this case.

4 **See Szabo Food Service, Inc. v. Cook County,** 160 Ill. App. 3d 845, 513 N.E.2d 875 (Ill.App. 1 Dist. 1987, 112 Ill. Dec. 266). A restrictive covenant will only be enforced if its impact on the public is reasonable. **Id.** at 877.

5 **See Hospital Consultants, Inc. v. Potyka**, 531 S.W.2d 657 (Tex.Civ.App. 1975). Case involved no statute but refused to enforce a restrictive covenant between doctors and a placement corporation which

protected no interests and would only serve to prevent competition and was, therefore, not reasonable. **Id.** at 663.

CONCURRENCE FOOTNOTES

1 I do not believe the lack of reference to a given statute or judicial decision in an opinion requires a conclusion that such an opinion lacks precedent in a future case in which such a statute or decision is raised or discussed. To conclude otherwise makes judicial precedent unduly fragile.

2 Chapter 3-04-05, North Dakota Administrative Code, was repealed effective November 1, 1982.