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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

GROW COMPANY, INC., Plaintiff–Appellant/Cross–Respondent,
v.
Dilip CHOKSHI and Pharmachem Laboratories, Inc., Defendants–Respondents/Cross–Appellants.

Argued Feb. 7, 2012. | Decided March 7, 2012.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C–280–05.

Attorneys and Law Firms

Dennis F. Gleason argued the cause for appellant/cross-respondent (Carella, Byrne, Cecchi, Olstein, Brody & Agnello, attorneys; Carl R. Woodward, III, and Mr. Gleason, of counsel; Mr. Woodward, Mr. Gleason and Vincenzo M. Mogavero, on the brief).

Richard L. Ravin argued the cause for respondents/cross-appellants (Hartman & Winnicki, attorneys; Mr. Ravin, of counsel; Mr. Ravin, Richard E. Kummer and Shifra Herzberg, on the brief).

Before Judges CARCHMAN, FISHER and BAXTER.

Opinion

***1** The opinion of the court was delivered by

FISHER, J.A.D.

In this appeal, we review the Chancery judge's disposition of numerous factual disputes following a nonjury trial, as well as the judge's subsequent ruling on defendants' counsel fee claim. Applying our deferential standard of review, we find no reason to intervene and affirm in all respects.

Because this case was previously before us, there is no need to repeat what was thoroughly discussed about the nature and specifics of the parties' competing claims on that earlier occasion. *See Grow Co., Inc. v. Chokshi,* 403 *N.J.Super.* 443 (App.Div.2008). We need only briefly summarize for present purposes that plaintiff Grow Company, Inc., a health food manufacturer, commenced this suit against a former employee, defendant Dilip Chokshi, and a competitor, defendant Pharmachem Laboratories, Inc., alleging misappropriation of its trade secrets aided through Chokshi's breach of a confidentiality agreement he had entered into with plaintiff in 1982 while in plaintiff's employ.

Defendants counterclaimed, asserting that plaintiff's suit was barred by the terms of a 2001 settlement agreement, which ended a suit filed by plaintiff against Chokshi and Bio–Foods, Ltd., another competitor. The 2001 settlement agreement contained plaintiff's covenant not to sue and stipulated that a breach of that covenant would authorize an award of counsel fees to the parties to that suit and other generally defined persons or entities. As a result, defendants—believing plaintiff had commenced this suit in violation of the 2001 settlement agreement—sought attorneys' fees. Defendants also demanded a judgment declaring the 1982 confidentiality agreement invalid.

The earlier appeal in this case was prompted by the prior Chancery judge's grant of a partial summary judgment, in which the judge: found plaintiff's claims were barred by the 2001 settlement agreement; dismissed the claim for a declaratory judgment concerning the 1982 confidentiality agreement; and concluded that plaintiff's breach of the 2001 settlement agreement permitted an award of counsel fees to Chokshi but not to Pharmachem. The judge did not, however, proceed to quantify the counsel fees he believed were due but instead dismissed that claim without prejudice and expressly authorized that claim's renewal in a later suit unhampered by the entire controversy doctrine. *Id.* at 454. Believing finality had been achieved in this manner, the parties appealed. We found, however, that the dismissal without prejudice only created the illusion of finality and concluded that the appeal was premature. *Id.* at 461–62. Notwithstanding our criticism of the manner in which the case came before us, we determined that the interests of justice were better served by a review of the interlocutory rulings questioned in the appeal, *id.* at 462–63, and, with one exception,[1] vacated the summary disposition of the parties' claims, *id.* at 479.

1 We found no merit in plaintiff's contention "that Chokshi was required to actually expend counsel fees in order to obtain an award of fees pursuant to the settlement agreement." *Grow Co., Inc., supra,* 403 *N.J.Super.* at 479. That ruling constituted the law of the case and was binding on the parties, and we reject plaintiff's further attempts to argue we were previously in error. On the other hand, our determination that the other issues were not ripe for summary judgment did not trigger application of the law of the case doctrine. *See Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 *N.J.Super.* 349, 356–57 (App.Div.2004) (recognizing that the denial of summary judgment "is not subject to the law of the case doctrine because it decides nothing and merely reserves issues for future disposition"), *aff'd,* 184 *N.J.* 415 (2005), *cert. denied,* 546 *U.S.* 1092, 126 *S.Ct.* 1042, 163 *L. Ed.*2d 857 (2006).

***2** Following our remand, a trial before a different Chancery judge took place over the course of fifteen days in October and November 2009. In a thorough written opinion, the Chancery judge found: the 1982 confidentiality agreement was void and unenforceable; plaintiff failed to prove that Chokshi disclosed any of plaintiff's trade secrets to Pharmachem nothwithstanding its efforts to ensure the confidentiality of its manufacturing processes; and Pharmachem was entitled to counsel fees as a result of plaintiff's breach of the 2001 settlement agreement—even though Pharmachem was not a party to the suit that resulted in the 2001 settlement agreement—because the parties to that agreement had broadly defined the class of persons and entities entitled to benefit from its terms.

Chokshi and Pharmachem thereafter applied for an award of counsel fees, based not only on the contractual stipulation in the 2001 settlement agreement, but also on the frivolous litigation statute, *N.J.S.A.* 2A:15–59.1. The Chancery judge rejected the argument that plaintiff violated the frivolous litigation statute and further determined that defendants were not entitled to an award of counsel fees for all their efforts in this case. Instead the judge found three areas in which counsel fees could be awarded.

First, the judge found it was appropriate to award fees for work expended "prior to the appeal [that] was necessary on the issue of whether the 2001 settlement agreement was a general release." Second, the judge found defendants were entitled to an award of reasonable fees in "establishing the efficacy of the 2001 settlement agreement from the time of the filing of the verified complaint up until the point where the plaintiff abandoned that position on appeal." And, third, the judge found defendants were entitled to fees and expenses related to defeating the assertion that Pharmachem was not entitled to relief pursuant to the 2001 settlement agreement.

Recognizing the scope of this undertaking in light of the case's age and the extraordinary amount of time expended by counsel that required analysis, the Chancery judge appointed an expert to make recommendations on defendants' counsel fee claim. The expert reviewed the voluminous materials submitted and drew conclusions regarding the reasonableness of the hourly rates charged and the reasonableness of the amount of time expended as limited by the judge's rulings as to the scope of the award (hereafter "the award categories"). Specifically, the expert approached the matter by way of a three-step process.

The expert first reviewed counsel's invoices and assigned each entry a task code, following which he aggregated the hours expended by task code and ascertained the cost of each task by multiplying those hours by the reasonable hourly rates of the timekeepers. In accomplishing this, the expert expressed satisfaction, based on his review, that counsel's documentation was prepared with "considerable care and diligence."

***3** In the second step, the expert isolated the portions of the total fees identified for each coded task in the first step in light of the award categories identified by the judge. This required, as the expert explained, "a review of thousands of pages of written or transcribed documents developed or created through the course of the litigation, and a determination of what portion of each document, if any, related to any of" the categories identified by the judge as permitting an award. The expert "tagged" each page that related to one of the award categories and then mathematically ascertained the percentage of compensable work among the entire body of work, which he described in his report in the following way:

> Th[e] total number of tagged pages served as the numerator of a fraction for which the denominator was the total number of pages of that document. The fraction was converted into a percentage, which, in accordance with the methodology, represented the percentage of the document's total pages that were related in any way to the [a]ward [c]ate-gories.

In the third step, the expert took the percentage for each document and applied it to the aggregate time and fees for each specific coded task, a process better explained by way of the example the expert provided:

> In the case of [defendants'] Answer to Verified Complaint, [d]efendants' counsel determined that 13 of 28 pages of the Answer contained statements related to one or more of the [a]ward [c]ategories, which repre-sented 46.43% of the Answer's pages. The $8,625 aggregate legal fees charged with respect to the Answer as determined [in step

> one] ($6,835 by Chokshi counsel ... and $1,800 by Pharmachem counsel ...) was then multiplied by 46.43% per [step two] to arrive at the amount of $4,004.46, which [d]efendants present as recoverable legal fees for this [ ] coded task.

Based on this methodology, the expert recommended that the trial court award defendants $1,015,000 as reimbursement of their fees and costs incurred through May 31, 2010, an amount consisting of $865,000 in attorneys' fees and $150,000 in expenses. Putting this recommendation into context, the expert observed that the $865,000 in attorneys' fees reflected a 37% reduction of the adjusted fee amount sought by defendants, and less than 31% of the total fees paid by defendants through May 31, 2010. The expert viewed this adjustment as compensating "for the imperfect nature of the determinations made by the methodology and more accurately reflects the findings" of the judge. In addition, the expert examined defendants' claim of $63,115.46 for fees and expenses and recommended a ten percent reduction to $57,000.

The parties filed their responses to the expert's report and, on July 7, 2010, the Chancery judge heard additional argument and ruled on the application. She first commented on the report's comprehensiveness and accepted the recommendation that defendants be awarded $150,000 in expenses through May 31, 2010. As for the fees, the judge made the following comments:

> ***4** [I]n spite of [defense counsel's] indication that he was conservative, which I accept, but nonetheless it was an approximation and it had certain potentials for overestimating the time or the cost put in....
>
> The fact that a certain number of pages are generated by a certain issue doesn't necessarily translate to ... how many hours that issue takes.

The judge also stated that others could have performed the necessary tasks in less time than defense counsel:

> I will say, because it's important to my decision here, that if you know the term "you leave no stone unturned," [defense counsel] leaves no pebble unturned. He is the most thorough, comprehensive litigator that I think I've ever run across.
>
> So with that context and that background, if this case took 15 days, I would say it would have taken some fewer days with virtually any other lawyer, because [defense counsel] is so thorough as to make it sometimes difficult because he doesn't like to abandon positions or points. [Y]our average lawyer would say, I have five points, I'll pick my top three and press those. [Defense counsel] will come up with ten points and won't abandon a single one of them. So that takes a little bit longer and it's a different style and it's a perfectly fine acceptable style, however, I don't think it's approp-riate to assess that level of lawyering, if you want to call it that, against the other side.

Concluding that the fifteen-day trial "could have been done in 12 days" but for defense counsel's "thoroughness," the judge reduced the expert's recommendation of $865,000 another 20% to $692,000. The judge also reduced the fee award sought for time incurred in seeking fees and expenses up until that time by 20% instead of the 10% recommended by the expert; she awarded $50,492 for that aspect.

The judge later considered an application for subsequent work incurred by defendants in seeking fees and ultimately determined they were entitled to a total of $999,186; $474,593 to Chokshi and $524,593 to Pharmachem.

Plaintiff appealed, and defendants cross-appealed. In its appeal, plaintiff presents the following arguments:

I. BECAUSE PHARMACHEM FAILED TO DEMONSTRATE THAT IT WAS A RELEASEE WITHIN THE AMBIGUOUS LANGUAGE OF THE SETTLEMENT AGREEMENT, IT WAS ERROR FOR THE TRIAL COURT TO CONCLUDE THAT PHARMACHEM HAD THE SAME RIGHTS AS CHOKSHI.

II. BECAUSE THE *GROW I* COURT APPEARS TO HAVE OVERLOOKED CERTAIN LAW AND FACTS REGARDING CHOKSHI'S ELIGIBILITY FOR ATTORNEYS' FEES, THE ISSUE SHOULD BE RECONSIDERED.

III. THE 1982 CONFIDENTIALITY AGREEMENT BETWEEN GROW AND CHOKSHI PROPERLY PROTECTS GROW TRADE SECRETS, AND DOES NOT UNREASONABLY RESTRICT COMPETITION; EVEN IF IT DID, THE TRIAL COURT SHOULD HAVE STRICKEN ONLY THE OFFENDING LANGUAGE AND NOT THE ENTIRE AGREEMENT.

IV. THE TRIAL COURT'S FAILURE TO APPLY THE LODESTAR ANALYSIS IN THE DETERMINATION OF ATTORNEYS' FEES IS CONTRARY TO LAW AND THE USE AND APPLICATION OF ITS SUBSTITUTE ANALYSIS IS CLEARLY ERRONEOUS.

***5** Defendants argue in their cross-appeal:

I. THE TRIAL COURT ERRED BY LIMITING RECOVERY OF DEFENDANTS' ATTORNEYS' FEES AND EXPENSES TO THE AWARD CATEGORIES BECAUSE IT CONSTRUED THE RELEASE TOO NARROWLY AND BECAUSE GROW NEVER HAD ANY POST–RELEASE CLAIMS.

II. DEFENDANTS ARE ENTITLED TO ALL THEIR ATTORNEYS' FEES AND EXPENSES AS DAMAGES FOR GROW'S BREACH OF THE COVENANT NOT TO SUE AND THE GENERAL RELEASE WITHIN THE RELEASE CONTRACT, INDEPENDENT OF THE ATTORNEYS' FEES PROVISION IN THE COVENANT NOT TO SUE.

III. DEFENDANTS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES PURSUANT TO THE FRIVOLOUS LITIGATION STATUTE.

IV. GROW'S UTTER FAILURE TO PROVE ITS CASE IS RELEVANT ON THE ISSUE OF WHETHER GROW IS LIABLE FOR BREACH OF THE RELEASE CONTRACT AND FRIVOLOUS LITIGATION.

V. GROW'S BAD FAITH CONDUCT.

VI. THE TRIAL COURT ERRED BY REDUCING [THE] AMOUNT REQUESTED BY DEFENDANTS PURSUANT TO AWARD CATEGORIES.

VII. DEFENDANTS' FEES ARE REASONABLE.

VIII. CHOKSHI IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND EXPENSES IRRESPECTIVE OF PHARMACHEM PAYING SAID FEES AND EXPENSES UNDER THE LAW OF THE CASE AND ON THE MERITS.

IX. PHARMACHEM IS A RELEASEE UNDER THE PLAIN TERMS OF THE RELEASE.

X. THE 1982 CONFIDENTIALITY AGREEMENT IS UNENFORCEABLE AS OVERLY BROAD AND AN UNREASONABLE RESTRAINT ON COMPETITION AND SHOULD NOT BE BLUE PENCILED.

In addressing these arguments,[2] many of which have insufficient merit to warrant discussion in a written opinion, *R.* 2:11–3(e)(1)(E), we limit our discussion to three main topics: (1) the Chancery judge's construction of the 2001 settlement agreement to include Pharmachem as a beneficiary; (2) the judge's determination that the 1982 confidentiality agreement was unenforceable; and (3) the counsel fee award.

2 For brevity's sake, we have omitted, in the parties' point headings quoted above, their many subparts.

I

Plaintiff argues that the judge's determination that Pharmachem is entitled to relief based on the 2001 settlement agreement is inconsistent with our ruling in the earlier appeal and not supported by the evidence. We disagree.

The 2001 settlement agreement contains plaintiff's release of "all claims *against Releasees* which Grow ever had, now has or hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to and including the date of Grow's execution of this Agreement" (emphasis added). The parties to that agreement were plaintiff, Chokshi and Bio–Foods, but the term "releasees" was defined to include more than just the parties; that is, a clause in the agreement indirectly defines "releasees" in the following way:

> WHEREAS, Bio–Foods as well as its present and former officers, directors, share-holders, executives, servants, employees and counsel, and each of its and their past, present and future parent and subsidiary corporations, divisions, affiliates, part-ners, joint ventures, predecessors, success-sors, assigns and insurers, and any other person, firm or corporation with whom any of them is now or may hereafter be affiliated, including the individual people named as co-defendants to the lawsuit (hereinafter collectively referred to as "Releasees") have disclaimed liability to Grow and categorically deny Grow's claims[.]

***6** In addition, the 2001 settlement agreement contains plaintiff's release of "all claims and rights which Grow has asserted or may have asserted based upon anything which has happened up to the date" of the agreement, including "any and all" claims "which Grow has asserted or could have asserted against Releasees in the [Bio–Foods] [l]awsuit or any other suit ... relating to or connected with the facts alleged therein or revealed in the discovery regarding ... alleged breach of contract ... [or] misappropriation of trade secrets." The broad scope of the term "beneficiaries" is further demonstrated by the parties' stipulation in the 2001 settlement agreement that they "as well as anyone who succeeds to their rights and responsibilities, such as their heirs, executors, personal legal representatives, assigns and successors" would be bound and that the agreement had been "made for the parties' benefit and all who succeed to their rights, including personal and legal representatives, assigns and successors ."

The agreement also broadly defined the scope of the released claims:

> This General Release applies to all claims against Releasees which Grow ever had, now has or hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to and including the day of the date of Grow's execution of this Agreement. This General Release specifically includes any and all claims up to and including the date of execution of this Agreement, *whether or not now known or suspected to exist by Grow and whether or not specifically or particularly described herein.*
>
> [Emphasis added.]

The breach of the covenant not to sue entitled the releasees to recover "all their attorney's fees, expenses and costs of suit incurred in connection therewith."

In reversing the partial summary judgment that defined the 2001 settlement agreement's scope in the earlier appeal, we concluded that the term "releasees" was "certainly expansive." *Grow Co., Inc., supra,* 403 *N.J.Super.* at 474. But we also recognized that the term had been defined inconsistently in these provisions and, as a result, recognized the matter should be examined in light of available extrinsic evidence. *Ibid.* Pharmachem insisted then, and continues to maintain, that it is a releasee because it is Chokshi's "assign" or "affiliate." On this particular argument, we previously commented:

> We have no doubt that these are plausible interpretations of the breadth of the settlement agreement, as are others. But they are not the only plausible inter-pretations. In reversing the partial summary judgment on this point, we do not mean to suggest that, after an airing of the parties' contentions regarding the meaning of the settlement agreement, the factfinder could not draw those conclusions.
>
> [*Id.* at 474–75.]

Viewing the 2001 settlement agreement in this regard as susceptible to multiple interpretations, we found the matter could not be decided summarily and remanded. *Id.* at 476.

***7** After having conducted the trial, as our prior disposition required, the Chancery judge found the scope of the term "releasees" had not been negotiated or discussed by the parties. Consequently, the judge was required to examine the plain text of the agreement. She concluded that Pharmachem was a qualified releasee because it was Chokshi's assign, successor or affiliate.

The polestar in construing a contract is the intention of the parties. *Kearny PBA Local No. 21 v. Town of Kearny,* 81 *N.J.* 208, 221 (1979). Those intentions may be "revealed by the language used," *Homann v. Torchinsky,* 296 *N.J.Super.* 326, 334 (App.Div..), *certif. denied,* 149 *N.J.* 141 (1997), and by extrinsic evidence, *Casriel v. King,* 2 *N.J.* 45, 50–51 (1949). In the prior appeal, we concluded that the settlement agreement's language was ambiguous and suggested consideration of extrinsic evidence to determine its meaning. *Grow Co., Inc., supra,* 403 *N.J.Super.* at 476.

The judge found that the parties' extrinsic evidence was unenlightening because the relevant witnesses uniformly testified that the parties never discussed the scope of the term "releasees" during their negotiations. The judge therefore relied primarily on the agreement's text that certainly supported the conclusion that Pharmachem was subsumed in its broad provisions.[3] This conclusion is well-supported by the manner in which releases are generally viewed. *See Bilotti v. Accurate Forming Corp.,* 39 *N .J.* 184, 204 (1963) (recognizing that a general release is not necessarily "restricted by its terms to particular claims or demands, [and] ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties").

3 Plaintiff's argument that the judge was precluded from relying on an interpretation of the contractual language based solely on the agreement's language because we had found that language ambiguous misconstrues the fact that we were then reviewing a summary judgment. Moreover, we did not foreclose the possibility that extrinsic evidence or other surrounding circumstances would not be helpful or that a determination of the agreement's meaning might ultimately turn on the judge's interpretation of the words themselves.

The judge's interpretation of the settlement agreement was plausible and reasonable.

II

Plaintiff argues that the Chancery judge erred in invalidating the 1982 confidentiality agreement and, alternatively, asserts that the judge should have "blue-penciled" any offending portions rather than striking the entire agreement. We reject this contention.

Chokshi executed the 1982 agreement as a condition of continued employment with plaintiff. Among other things, the agreement provided that Chokshi would not

> *at any time, either during the period of his employment ... or at any time thereafter* in any fashion, form or manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever *any information of any kind, nature or description concerning any matters affecting or relating to the business of [Grow]* ... or any other information of, about or concerning the business of [Grow] ... *without regard to whether any or all of the ... matters would be deemed confidential, material or important* [.]
>
> [Emphasis added.]

The judge found this agreement was impermissibly broad in terms of what plaintiff sought to restrict and that it lacked any reasonable limitations as to time and geography. In the judge's view, rather than protect plaintiff's business interests, the agreement sought to prevent Chokshi from working in his chosen profession.

***8** A court's interpretation of a contract is subject to de novo review. *Fastenberg v. Prudential Ins. Co. of Am.,* 309 *N.J.Super.* 415, 420 (App.Div.1998). Factual findings on such questions as whether plaintiff had a protectable business interest, however, are entitled to deference. *See Raven v. A. Klein & Co., Inc.,* 195 *N.J.Super.* 209, 215 (App.Div.1984).

Protectable business interests include trade secrets, confidential business information and customer relationships. *Whitmyer Bros., Inc. v. Doyle,* 58 *N.J.* 25, 33, 38 (1971). A trade secret, however, does not necessarily have to be patentable to be protectable; a trade secret "may consist of a formula, process, device or compilation which one uses in his business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Sun Dial Corp. v. Rideout,* 16 *N.J.* 252, 257 (1954). "[M]atters of general knowledge within the industry may not be classified as trade secrets or confidential information entitled to protection," and "routine or trivial differences in practices and methods [do not] suffice to support restraint of the employee's competition." *Whitmyer, supra,* 58 *N.J.* at 33–34.

The primary flaw of the 1982 agreement, as the Chancery judge recognized, was that it contained no limitations as to time, area and scope of activity. *Id.* at 35–36 (restrictions that appear to be primarily directed at lessening competition are not enforceable). Notwithstanding this defect, plaintiff contends that the agreement is enforceable because it has not, to date, actually restricted Chokshi's ability to work.[4] Regardless of the agreement's lack of a prior impact on Chokshi's career, plaintiff could not reasonably dispute the severely limiting effect the agreement would have on Chokshi's future ability to work, because the agreement attempts to prevent him from using "any information of any kind, nature or description concerning any matters affecting or relating to" plaintiff's business, regardless of whether or not it is confidential. *See* *Coskey's Television & Radio Sales and Serv., Inc ., v. Foti,* 253 *N.J.Super.* 626, 637 (App.Div.1992) (holding that "[a]n employer may not prevent an employee from using the general skills in an industry which have been built up over the employee's tenure with the employer"). The broad sweep of the agreement prevents Chokshi from reporting any of the alleged questionable marketing tactics he observed plaintiff use, such as misrepresenting its products, and in that respect, is injurious to the public interest. These circumstances support the judge's finding that the agreement was too broad and unreasonable to enforce.

4 This consequence, however, is likely a product of plaintiff's failure to recollect that the 1982 agreement existed. The record reveals that plaintiff hastily amended its complaint to include claims arising from the 1982 agreement soon after it discovered the document in its files.

Plaintiff alternatively asserts that the court should have "blue-penciled" any offending portions rather than striking the entire agreement. The concept of blue-penciling was first addressed in *Solari Indus., Inc. v. Malady,* 55 *N.J.* 571 (1970). There, the Court abandoned the established tradition of voiding unreasonably broad noncompetitive provisions in favor of a rule that would permit "the total or partial enforcement of noncompetitive agreements to the extent reasonable under the circumstances." *Id .* at 585. We reject this argument for two reasons. First, plaintiff never properly raised it in the trial court. *See* *Nieder v. Royal Indem. Ins. Co.,* 62 *N.J.* 229, 234–35 (1973); *Docteroff v. Barra Corp. of Am.,* 282 *N.J.Super.* 230, 237 (App.Div.1995). The record shows that plaintiff may have indirectly referenced the concept of blue-penciling by quoting *Solari* in a footnote in its reply brief in the earlier appeal and in opposing defendants' earlier summary judgment motion. That is not sufficient. *Almog v. Israel Travel Advisory Serv., Inc.,* 298 *N.J.Super.* 145, 155 (App.Div.1997), *appeal dismissed,* 152 *N.J.* 361, *cert. denied,* 525 *U.S.* 817, 119 *S.Ct.* 55, 142 *L. Ed.*2d 42 (1998). And, in responding to defendants' argument that the issue was not properly presented, plaintiff has not referred us to any testimony or argument during the course of the trial relating to its blue-pencil theory. The argument was not properly preserved for appellate review.

***9** Second, even assuming the 1982 agreement sought only to protect legitimate interests, plaintiff does not explain how the broad and ambiguous provisions of the 1982 confidentiality agreement could be rehabilitated without substantially rewriting the agreement. For instance, plaintiff speaks generally about the need to protect its "formulations and manufacturing processes" but is unclear in identifying the specific formulations and processes to which it refers. Moreover, from the outset, plaintiff could have included reasonable restrictions in the 1982 agreement. Instead of crafting a narrow agreement that would protect its interests, plaintiff adopted a broad agreement with virtually no restrictions. "When an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive noncompetitive covenant he is in no just position to seek, and should not receive, equitable relief from the courts." *Solari, supra,* 55 *N.J.* at 576.

The Chancery judge's determination that the 1982 confidentiality agreement is unenforceable is entitled to our deference.

III

Plaintiff challenges the attorneys' fee award because, in its view: (a) the court's methodology for fixing a reasonable fee deviated from the requirements of *Rendine v. Pantzer,* 141 *N.J.* 292 (1995); (b) the award was excessive; (c) the judge erred in accepting the expert's recommendations regarding defendants' expenses; and (d) the judge failed to "meaningfully" allocate the attorneys' fees award between defendants. We find insufficient merit in these arguments to warrant discussion in a written opinion, *R.* 2:11–3(e)(1)(E), adding only the following comments regarding the first of the four subparts described above and, specifically, the methodology employed in determining the reasonableness of the fees awarded.

To be sure, because the judge found that only certain aspects of the legal work performed on behalf of defendants were compensable, ferreting from defendants' entire body of work only those tasks related to compensable work was daunting. The judge appointed an expert to engage in this process in the first instance. That approach, although not always ideal, had the salutary effect here of providing a cohesive understanding of the work performed in each award category in a quick and efficient manner. Although one aspect of the methodology utilized by the expert is unusual-attributing a percentage for certain tasks by adopting a mathematical formula based upon the length of each written product-we have no cause to second guess this method as a fair approach toward illuminating the quest for a reasonable fee. Indeed, contrary to plaintiff's forceful contentions, the record demonstrates the judge did not blindly accept the expert's recommendations.

Instead, the judge recognized that the expert had provided a "very rough estimate" of the recoverable fees. The judge then considered that estimate in light of the feel of the case developed from having presided over the lengthy trial. We noted above the judge's comments regarding the length of the trial and how the extreme thoroughness of defense counsel had prolonged the matter beyond what was reasonably compensable. As a result, the judge deeply discounted the results reached by the expert.

***10** Trial courts have considerable latitude in resolving fee applications, and a reviewing court will not set aside an award of attorneys' fees except "on the rarest occasions, and then only because of a clear abuse of discretion." *Rendine, supra,* 141 *N.J.* at 317. We have intervened, for example, when a court's determination "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." *Masone v. Levine,* 382 *N.J.Super.* 181, 193 (App.Div.2005); *see also Flagg v. Essex Cnty. Prosecutor,* 171 *N.J.* 561, 571 (2002). Plaintiff has not presented an ample reason for our intervention here.

New Jersey generally follows the so-called "American rule," which requires that each party pay its own legal costs. *Rendine, supra,* 141 *N.J.* at 322. Nonetheless, fees may be shifted when permitted by statute, court rule or contract. *Packard–Bamberger & Co. v. Collier,* 167 *N.J.* 427, 440 (2001). Regardless of the source authorizing fee shifting, the same reasonableness test governs. *Litton Indus., Inc. v. IMO Indus., Inc.,* 200 *N.J.* 372, 386 (2009).
When fee shifting is permissible—as here, by contract—a court must ascertain the "lodestar," that is, the "number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate." *Ibid.* To compute the lodestar, courts must first determine the reasonableness of the hourly rates charged by the successful party's attorney in comparison to rates " 'for similar services by lawyers of reasonably comparable skill, experience and reputation' " in the community. *Rendine, supra,* 141 *N.J.* at 337 (quoting *Rode v. Dellarciprete,* 892 *F.*2d 1177, 1183 (3d Cir.1990)). After evaluating the hourly rate, the court must then determine the reasonableness of the hours expended on the case. *Furst v. Einstein Moomjy, Inc.,* 182 *N.J.* 1, 22 (2004). "Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires a consideration of what is reasonable under the circumstances," and should be informed by the degree of success achieved by the prevailing party. *Id.* at 22–23. The award need not necessarily be proportionate to the damages recovered. *Id.* at 23.

The methodology utilized and recommended by the expert and adopted by the Chancery judge is consistent with these principles. Indeed, when viewed within this framework, step one of the methodology identified the components comprising the lodestar. The remaining steps were designed to ensure that defendants were compensated for only those fees necessary to achieve the final result and only those compensable within the areas defined by the judge. *See Litton, supra,* 200 *N.J.* at 387 (recognizing that "when a party has succeeded on only some of its claims for relief, the trial court should reduce the lodestar to account for the limited success").

***11** Moreover, the Chancery judge was fully cognizant of the methodology's imperfections, acknowledging the page count of a work product is not a precise indicator of the time reasonably expended in producing a document:

> The fact that a certain number of pages are generated by a certain issue doesn't necessarily translate to ... how many hours that issue takes. We all know that in a summary judgment motion ... most lawyers have ... one button to push which gives them all the law.... On the other hand, lawyers can spend many many hours and come to the conclusion that something does not apply.... So the number of pages is just one very rough estimate of the amount of work that's done.

Using the page-count approach as an estimate, the judge made a substantial downward adjustment based on her own feel of the case.

We agree that the methodology was not perfect but it was the best approach available absent a tedious and painstaking evidentiary hearing designed to examine every task for which defendants sought compensation that may very well have taken more time than the actual trial on the merits. In the final analysis, in rejecting plaintiff's criticisms of the methodology, we rely on the spirit of our Supreme Court's declaration that "there is no precise formula ... [and that t]he ultimate goal is to approve a reasonable attorney's fee that is not excessive." *Litton, supra,* 200 *N.J.* at 388. *See also Walker v. Guiffre,* ––– *N.J.* ––––, –––– (2012). We are satisfied that the Chancery judge's reliance on the expert's thorough and thoughtful approach—tempered by her own additional deductions based upon having sat through the trial—ultimately produced a reasonable fee award.

IV

All of plaintiff's other arguments are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E). What we have said about plaintiff's appeal is dispositive of many of the issues raised by defendants in their cross-appeal, and we find all of defendants' other arguments to be without sufficient merit to warrant discussion in a written opinion. *Ibid.*

Affirmed.

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