IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RICHARD L. POWELL,

Plaintiff/Counter-Defendant/
Appellee,

V.

McDONNELL INSURANCE, INC.,

Defendant/Counter-Plaintiff/
Appellant.

Shelby Equity No. 101234-2
C.A. No. 02A01-9608-CH-00176

Hon. Floyd Peete, Chancellor

ERNEST G. KELLY, JR., Memphis, Attorney for Plaintiff/Counter-Defendant/Appellee.

EUGENE J. PODESTA, JR., Baker, Donelson, Bearman & Caldwell, Memphis, Attorney for Defendant/Counter-Plaintiff/Appellant.

MODIFIED IN PART AND REVERSED IN PART

Opinion filed:

TOMLIN, Sr. J.,

Richard L. Powell (hereafter "Powell") filed suit in the Chancery Court of Shelby County seeking a declaratory judgment and alleging breach of contract and damages for the wrongful termination of his employment contract by Defendant, McDonnell Insurance Company (hereafter "McDonnell"). McDonnell filed an answer and counter-claim. In its counter-claim McDonnell asserted that Powell had breached a covenant not to compete in his employment contract with McDonnell and that as a result of this breach McDonnell was entitled to injunctive relief, money damages and attorney fees. Following a bench trial, the chancellor entered an order of reference to the Master requesting his findings on specific issues. Following the issuance of the Master's Report, and the filing of exceptions thereto by both parties, the chancellor adopted the report of the Master with certain exceptions. The court held that while the restrictive covenant in the employment agreement between the parties was valid and enforceable, the duration of the restrictive covenant

should be limited to one year. The chancellor awarded judgment against Powell in the amount of $141,000.00 as damages for his breach of a one year restrictive covenant, while allowing Powell a credit against the judgment in the amount of one-half of the balance in a reserve account. The court also awarded McDonnell one-third of the amount of attorney fees requested, along with prejudgment interest. Both parties offer issues for review on appeal.

On appeal McDonnell has presented the following issues for our consideration: Whether the trial court erred: (1) in limiting the covenant not to compete to a one year period rather than enforcing the two year period provided in the employment agreement; (2) in reducing the profit margin used to calculate the damages due to McDonnell as a result of Powell's breach; (3) in awarding Powell one-half the proceeds of the balance in the reserve account; and (4) in failing to award McDonnell the full amount of attorney fees requested.

Powell presents the following issues on appeal: Whether the trial court erred in: (1) awarding McDonnell damages for one year and basing such an award on the speculative report of McDonnell's expert witness; (2) increasing the award of damages based upon the post-hearing affidavit of McDonnell's expert witness; (3) awarding prejudgment interest to McDonnell; and (4) failing to award Powell the full amount of his earned insurance commissions up to the end of the 30-day termination period at the appropriate percentage rate. For the reasons hereinafter stated, we modify and reverse the trial court's findings.

Most of the relevant facts are not in dispute. McDonnell is a general insurance agency, operating in Memphis. At the time of this litigation Lewis McDonnell served as the agency's president. Powell joined McDonnell as a commission salesman in 1980, at which time he entered into an employment agreement (hereafter "1980 Agreement") that included among its provisions a covenant not to compete and a requirement that either party could terminate the employment relationship by giving 30 days notice. The pertinent provisions

of the 1980 Agreement are as follows:

> 2. This contract and agreement shall be for an original term of Three (3) years unless sooner terminated by either party giving to the other 30 days written notice of his intention to terminate the agreement on a specific date. Unless so terminated, the contract shall automatically renew itself.
> 9. EMPLOYEE [Powell] agrees that he will not within a period of three (3) years following the date of his voluntary termination of employment with the CORPORATION, [McDonnell] or his retirement therefrom, or within two years if discharged by the CORPORATION, directly or indirectly, by or for himself, or as the agent of another, or through all others as his agent:
> (a) Divulge the names of the corporation's policy holders and accounts to any other person, firm or corporation;
> (b) In any way seek to induce, bring about, promote, facilitate, or encourage the discontinuance of or in any way solicit for or in behalf of himself or others, or in any way quote rates, accept, receive, write, bind, broker, or transfer any renewal or replacement of any of the insurance business, policies, risk or accounts, written, issued, covered, obtained (whether through the efforts of the salesman or not) or carried by the CORPORATION.
> (c) In the event it shall become necessary for the CORPORATION to enforce any of the provisions of this non-competition clause by suit or action in any court against agent, agent agrees that he shall and will pay to the corporation, in addition to any damages, costs and disbursements provided by law, a reasonable attorney's fee and all other expenses of litigation.

In 1988 Powell signed a new employment agreement (hereafter the "1988 Agreement") with McDonnell that incorporated many of the terms of the 1980 Agreement, including those set forth above. The 1988 Agreement included a provision dealing with the establishment of a reserve account for bad debts, by which a certain percentage of Powell's earned sales commissions were placed in a separate account so as to offset any outstanding insurance premiums that Powell's clients failed to pay. This provision in essence meant that Powell would create a sinking fund to guarantee the payment of his clients' insurance premiums to the agency. Thus if a client failed to timely pay an insurance premium, funds from the reserve account would be used to pay the premium. At the time of Powell's termination there was an outstanding credit balance in his reserve account.

During the course of his employment by McDonnell, Powell became a

profitable salesman. However, after the execution of the 1988 Agreement it appears that the parties became involved in a dispute regarding McDonnell's decision to levy "service charges" against the reserve account. The record reflects that after McDonnell was forced to pay off several large debts in the form of unpaid premiums as a result of Powell's clients failing to make timely payment of the same, McDonnell proceeded to levy "service charges" against the balances in Powell's reserve account. The service charges were collected from the interest generated on the funds in the reserve account. Powell contended that this practice was unauthorized by the 1988 Agreement. The issue of these "service charges" spurred a growing dissatisfaction with management among several McDonnell employees, including Powell.

In January 1992, in an attempt to resolve the disagreements over this issue, Lewis McDonnell submitted a revised employment contract to Powell, (hereafter "the 1992 Agreement"), which contained two provisions not previously found in the 1980 and 1988 agreements. The first of these provisions expanded the language relating to the reserve account provision to include "interest and late charges." This language sought to clearly establish that McDonnell had the right to deduct service charges from the reserve accounts. The second provision included a new non-compete clause which not only retained the restrictions set forth in the two earlier agreements, but also required an absolute bar of employment in any competing insurance business within Shelby County for the first six months following the termination of the employment agreement.

As of February 1992, Powell began informing competing insurance agencies of his desire to leave McDonnell. Shortly thereafter Lewis McDonnell informed Powell that his continued employment with McDonnell was contingent upon his execution of the new employment agreement no later than March 5, 1992. McDonnell further communicated to Powell that his refusal to sign the new agreement would be treated as his resignation from the company. Powell refused to sign the new agreement.

Some two weeks later on March 19, 1992, Lewis McDonnell advised Powell that his *de facto* resignation had been accepted and tendered a check to Powell for the next month's salary. In this regard Powell contends to this court that the 1988 Agreement entitled him to a 30 day notice of termination, during which time he was entitled to receive commission checks based on sales closed by him prior to his termination. McDonnell contends on the other hand, that by providing Powell with an extra month's salary it satisfied the 30 day notice requirement.

It is undisputed by either party that following the date of the notice of termination to Powell, he began to actively court clients whom he first developed as an agent of McDonnell. McDonnell received over sixty agent of record letters from Powell's former clients, informing McDonnell that their insurance relationship was thereby canceled. The first of these letters was dated March 20, 1992, the day following the notification to Powell of his termination. In addition, a large percentage of Powell's customers refused to renew their accounts with McDonnell following Powell's termination.

Shortly after his termination Powell filed this suit against McDonnell in which he sought damages for his alleged wrongful termination along with a declaratory judgment as to his right to compete against McDonnell under the 1988 Agreement. Throughout the ensuing litigation, it was Powell's contention that he had been wrongfully terminated by McDonnell and that this invalidated the covenant not to compete. Powell also contended that McDonnell failed to follow the compensation terms set out in the 1988 Agreement.

In its counter-claim, McDonnell contended that Powell breached the restrictive covenant in the 1988 Agreement, thereby entitling it to money damages, reasonable attorney fees and costs. Following a bench trial, the chancellor ruled preliminarily that he was upholding the covenant not to compete, but was reducing its effective period from two years, as provided in the 1988 Agreement, to one year. The chancellor refused to award Powell any

commission income received from his pre-termination sales during the thirty day period following the notice of termination to Powell on March 19, 1992. He also found Powell liable for the amount of any uncollected insurance premiums up to the amount then existing in his reserve account.

The chancellor thereafter entered an order of reference to the Master, calling on the Master to determine the appropriate measure of damages that might be due McDonnell for the breach of both a one year and a two year covenant not to compete. The Master was also directed to resolve any controversy surrounding the distribution of the reserve account proceeds and to determine the proper amount of attorney fees and expenses to be paid to McDonnell.

In his report the Master found that McDonnell had suffered a loss in the amount of $180,000 for Powell's breach of the 1988 Agreement if the restrictive covenant were given a life of one year and that if given a life of two years, McDonnell's damages for a breach of such a covenant not to compete would amount to $225,000. The Master also found that neither party owed any amount to the other regarding the reserve account. Finally, the Master awarded McDonnell 60% of the attorney fees and expenses requested.

Both parties filed exceptions to the Master's report. Thereafter the chancellor adopted the Master's report with the following exceptions:

> (1) The damages awarded McDonnell should be calculated by using a lower profit margin than that employed by the Special Master, thus reducing the one year damage award to $141,000.
> (2) The parties should equally split the balance in the reserve account as of April, 1992, which amounted to $33,184.41.
> (3) The attorney's fees awarded to McDonnell were reduced from 60% to one-third, the amount initially requested by McDonnell.

This appeal followed.

I. The Covenant Not to Compete.

On appeal McDonnell contends that the chancellor was in error in limiting the enforcement of the restrictive covenant to a one year period as opposed to

the two year period the parties had agreed upon. The chancellor upheld the restrictions in the employment agreement as reasonable and valid, rejecting Powell's contention that McDonnell forced his resignation by requiring him to enter into a new employment agreement with provisions that he contended were unreasonable and oppressive.

Before addressing the issue raised by McDonnell, we must first consider the contention by Powell as to the invalidity of this restrictive covenant. While it is often stated that such covenants are not favored in law as being in restraint of trade, nonetheless the courts of this state as well as others have never failed to uphold such covenants where the restrictions contained therein are found to be reasonable. Dabora, Inc. v. Klyne, 884 S.W.2d 475 (Tenn. App. 1994). Our courts have frequently recognized that employers have a definable and protectable interest in preventing former employees from competing against them for the customers that the employer helped to establish. In Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984), our supreme court recognized the enforceability of restrictive covenants where the employee closely associated with or had repeated contact with the employer's customers so that the customer tended to associate the employer's business with the employee.

The restrictive covenant sought to be relied upon by McDonnell was contained in both the 1980 and 1988 agreements freely signed by the parties. The record reflects that covenants not to compete are common in the insurance business and were standard practice at most, if not all of the insurance agencies in the Memphis community. Agreements in restraint of trade, such as covenants restricting competition, are not invalid *per se* and will be enforced, provided they are deemed reasonable under the particular circumstances. Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966). In acknowledging a similar protectable interest, the eastern section of this court in Federated Mut. Implement & Hardware Ins. Co. v. Anderson, 351 S.W.2d 411, 415 (Tenn. App. 1961), stated:

> A business is built upon the confidence of its customers and the employee gains acquaintances and sells the customers by using the good will of the employer. The employer's dealings with its customers through the employee gives the employee confidential knowledge that should not be divulged or used for his own benefit. It is by reason of this personal, if not confidential, relationship which the parties sustain that contracts to protect the employer by restriction of subsequent employment within reasonable limits of time and of space are permitted and sanctioned, and equity will enjoin the employee from competing in violation of his covenant.

The record in this case is clear that insurance agencies encourage their salesmen to develop personal relationships with their customers. McDonnell and other similar agencies invest sizable amounts of resources to enable salesmen such as Powell to develop such relationships. This investment by the agency includes not only the resources of the agency itself, but the additional expense of automobile and entertainment allowances, which sometimes include even country club dues. All of these agency expenditures are for the sole purpose of permitting and encouraging agents or salesmen to develop these customers as friends. In this case, utilizing McDonnell's resources and his own skills, Powell developed personal relationships with many of McDonnell's customers. Upon leaving McDonnell Powell had a competitive advantage to vie for these customers' business, an advantage developed at McDonnell's expense. The restrictions in this agreement with which we are dealing have as their goal the protection of McDonnell's legitimate interest and to us appear reasonable in all respects.

In contending that the chancellor should completely disregard the viability of this restrictive covenant, Powell cites Central Adjustment Bureau v. Ingram, 678 S.W.2d 28 (Tenn. 1984). The supreme court in Ingram acknowledges that an at-will employee can be discharged for any reason without breaching a contract, but that a discharge which is "arbitrary, capricious or in bad faith" is a type of discharge that could have a bearing on the enforceability of a noncompetitive covenant. There is nothing in this record to establish that

McDonnell acted in any way toward Powell in an arbitrary, capricious or bad faith manner. Both parties had executed an employment contract that provided that either party had the option of terminating the relationship upon giving thirty days notice. While still an employee of McDonnell, Powell had openly and frequently declared the unenforceability of his existing employment contract. Even prior to the termination of his employment, Powell was negotiating for office space and with other McDonnell employees was seeking to create a competing insurance agency, as well as notifying his customers of his intent to leave McDonnell and take these customers with him. In addition, Powell's conduct after his termination reinforced his inappropriate conduct prior to termination. The evidence does not preponderate against the chancellor's ruling that this restrictive covenant was enforceable.

Having found the restrictive covenant enforceable, we next turn to the chancellor's finding that the restrictive covenant should be enforceable for only one year rather than the two years as called for in the employment agreement. We note first of all that this restrictive covenant continued for three years in the event Powell voluntarily terminated the employment relationship. McDonnell never sought to enforce the restrictive covenant for three years, and presented proof of damages only for breach covering a one year or a two year period. We also note that the chancellor failed to make any specific findings of fact pertinent to his ruling that the covenant not to compete should only be enforced for a one year period. Under these circumstances there is no presumption of correctness and our review as to this issue on appeal is *de novo*.

The record reflects that a substantial amount of the insurance business that Powell wrote while employed by McDonnell, and thus most of the business that he took from McDonnell in breach of his contract, was annually renewable insurance business. The one year ruling of the chancellor has the effect of giving McDonnell the benefit of only one business cycle to be compensated for the competitive advantage that Powell gained at the expense of McDonnell.

This court has already noted and quoted from the case of Federated Mut. Implement & Hardware Ins. Co. v. Anderson, *supra*, wherein a two year restrictive covenant against an insurance agent was enforced when the agent, following termination, immediately opened his own general insurance agency in the same city where he had previously been employed.

Neither party disputed the substantial support that McDonnell provided to Powell in developing Powell's insurance business as their employee. McDonnell provided Powell with an agency infrastructure, including support personnel who managed the day-to-day communications with clients and insurance carriers, along with annual advertising and a marketing budget to promote the agency in the Memphis market. In addition, McDonnell saw to it that Powell had access to the various insurance carriers and underwriters for whom they wrote insurance for their clients.

Lewis McDonnell testified that the services mentioned above as well as others were provided to facilitate the growth of personal relationships between the agency's employees and its customers. In the past, both this court and our supreme court have upheld a two year covenant not to compete as a reasonable restriction in cases involving insurance agents. *See* Federated Mut. Implement & Hardware Ins. Co. v. Johnson, 382 S.W.2d 214 (Tenn. 1964), Federated Mut. Implement & Hardware Ins. Co. v. Anderson, *supra*.

In Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin, 765 S.W.2d 743 (Tenn. App. 1987), this court upheld a three year restrictive covenant in regard to a former employee of a certified public accountant partnership. It is important to note that in Bowlin the restrictive covenant involved was quite similar to that in the case under consideration in that it did not prevent the employee from practicing his livelihood in the same geographical area as before, but rather prohibited him from soliciting business from any client of the partnership or for working for any such client as a bookkeeper. This court noted that:

> "this omission [of a territorial limitation] leaves Bowlin great freedom to practice his profession in the same area as the Partnership. Rather than being limited by geographic boundaries, he is only prohibited from soliciting the business of and working for a specific group of persons, the Partnership's clients, for a period of three years after his termination of employment. . . .The covenant therefore is not unreasonable, nor does it place an impossible burden on Bowlin."
> Id. at 745-46.

Considering the substantial percentage of Powell's business which was annually renewable, we are of the opinion that the enforcement of such a provision for one year only would not give McDonnell an adequate time to develop a relationship with its clients previously serviced by Powell. A two year restrictive covenant would allow McDonnell a larger window of opportunity in which to cultivate a relationship with its clients similar to that previously had by Powell. Accordingly, we reverse the chancellor's ruling in limiting the restrictive covenant to a one year period, and hold that a two year restrictive covenant would more likely "level the playing field" for McDonnell.

II. The Damages Issue.

Both parties have challenged on appeal the judgment of the chancellor pertaining to damages, wherein he awarded McDonnell $141,000, based upon a one year restrictive covenant. McDonnell here contends that the chancellor erred, along with the Master, in reducing the profit margin ratio employed by McDonnell's expert witness.

As noted, the chancellor referred to the Master for a finding of fact as to the appropriate measure of damages due McDonnell as a result of Powell's breach of the employment agreement. McDonnell offered Mr. Alexander Ivy as an expert witness as to this issue. Ivy's qualifications were never challenged by Powell. The record reflects that Ivy is an accredited senior appraiser, a chartered financial analyst (CFA), a certified public accountant (CPA), and a certified financial planner (CFP) who showed substantial experience in the fields of business evaluation and the calculation of lost profits. Ivy proceeded to

analyze the historical revenues generated by Powell prior to his departure from McDonnell and then made certain assumptions regarding the number of clients that McDonnell would have retained following Powell's departure had Powell not breached the employment agreement by actively soliciting McDonnell's clients to leave and come over to him. Ivy predicted the future revenue streams that these clients would have generated for McDonnell over the next seven years, from which he calculated the present value of these cash flows. Ivy arrived at McDonnell's lost profits by deducting from these future cash flows the variable costs associated with the generation of the lost revenue, excluding McDonnell's fixed costs.

It was Powell's contention that Ivy's exclusion of McDonnell's fixed costs was in error. On this point Ivy testified that from the predicted revenue stream the only relevant expenses that should be deducted in arriving at lost profits were the variable costs directly associated with the generation of the revenue itself. Ivy stated that the pertinent variable costs were Powell's compensation, historically pegged at 40% of the revenues he generated, along with one-half the salary paid to his assistant who handled many of the administrative duties performed in maintaining an insurance sales practice. From this Ivy ascertained that Powell's historic variable costs amounted to 44.3% of the commission revenue. Therefore, 55.7% of Powell's future revenue stream amounted to McDonnell's lost profits and thus would constitute damages to be awarded. He concluded that McDonnell suffered damages in the amount $246,000 for a breach of a one year restrictive covenant not to compete and $305,000 for a breach of a two year restrictive covenant.

The Master adopted Ivy's calculations and underlying assumptions with the exception of the gross profit margin determination. He reduced the percentage of lost profit generated by Powell from 55.7% to 40% without any covenant; thereby reducing McDonnell's damages for breach of a one year covenant to $180,000.

The chancellor also adopted without modification the Master's findings regarding the damage calculations as performed by Ivy, with the exception that he lowered the profit margin determination from 40% to 27.6%.

Under the law of this state McDonnell is entitled to be placed in the same position it would have been in had the contract been performed. Wilhite v. Brownsville Concrete Co., 798 S.W.2d 772 (Tenn. App. 1990). Profits that McDonnell would have realized had Powell honored his agreement not to compete must be based upon certain assumptions. It cannot be established conclusively what would have happened had Powell honored the restrictive covenant because he did not do so. Uncertain and speculative damages are prohibited only when the existence of damages is uncertain, not when the amount of damages is uncertain. Moore Constr. Co. v. Clarksville Dept. of Elec., 707 S.W.2d 1, 15 (Tenn. App. 1985). All that is required is proof with a reasonable degree of certainty. Id.

We cannot determine from this record the reasoning behind the Master's and subsequently the chancellor's decision to reduce the profit margin determination, as they both failed to make any findings in this regard. The Master found that McDonnell's lost profits should not be limited to those profits lost for the one-year period commencing March 19, 1992. The Master "disagreed" with the profit margin assumptions of both McDonnell and Powell. As to McDonnell, the Master opined that a 55.7% profit margin was "too restrictive" in that Ivy assumed that these restrictions related to Powell's employment—a concept that he approved—only included Powell's commission and one-half the salary of the employee of McDonnell who assisted Powell. The Master noted no others, and Powell offered no proof of any.

Ivy's assumption to exclude fixed costs in arriving at lost profits is not a new one. In Whorley v. Tennessee Centennial Exposition Co., 62 S.W.2d 346 (Tenn. Ch. App. 1901) the court, in awarding Plaintiff lost profits as damages incurred for the violation of a contract that had given Plaintiff exclusive right to sell

tobacco at the Tennessee Centennial Exposition, deducted the pertinent variable costs associated with the production of the lost revenue but ignored and did not deduct any underlying fixed costs. See also Fowler v. Printers II, 598 A.2d 794, 807 (Md. App. 1991), wherein the Maryland Court of Appeals stated that fixed costs should not be considered in determining lost profits from the breach of a covenant not to compete.

With the exception of the gross profit margin determination, the remainder of the assumptions made by Ivy in calculating his damages were concurred in by both the Master and the chancellor, and to that extent are binding on this court. T.C.A. § 27-1-113. However, upon reviewing this record we are of the opinion that the evidence preponderates against the action of the chancellor in reducing the determination of the gross profit margin to 27.2%. Based upon the evidence presented the chancellor should have applied the gross profit margin of 55.7% as developed and applied by the witness Ivy. We reverse the chancellor in this regard and find that McDonnell's damages for the breach of a two year restrictive covenant amounts to $305,000.

As for the contention by Powell that the calculation of the damage award at 27.6% does not equate with the amount of $141,000 as set by the trial court, our ruling on the damage issue renders any consideration of this issue of Powell moot.

III. The Reserve Account Balance.

As originally contemplated the reserve account was to be funded by a portion of Powell's commissions generated each month from sales, with the intent that any unpaid premiums of Powell's customers would be paid to McDonnell from the proceeds of the account. The reconciliation of this account was one of the several issues referred by the chancellor to the Master.

The Master's report stated that there was a deficit balance of $5,019.16 in this account at the time of trial. This amount reflected continuous changes in the account for some three years after Powell had left McDonnell's

employment, brought about by the making of late payments on the part of Powell's customers, along with bad debts as a result of some customers not paying at all. The Master found that the parties had failed to agree upon a proper method of dividing and allocating any balance that might remain in the reserve account at the time of termination and concluded that neither party was indebted to the other. The chancellor modified the Master's report as to this item, finding that a credit balance of $33,000 that was in existence at the time of separation should be divided equally between the parties, awarding Powell $16,042.45.

In our opinion the Master was correct in his disposition of this issue and the chancellor was in error in his modification, which is not supported by the evidence. The $33,000 credit balance did not represent actual dollars, but was an accounting measure instituted by McDonnell to provide Powell with a tax-free employment benefit. The credit balance represented future unpaid liabilities assumed by McDonnell as a favor to Powell rather than the actual investment by Powell of previously earned sales commissions. The record indicates that neither party ever expected that the credit balance would be "tapped", with the proceeds being paid out to either party, but instead each party understood that the credit balance served as a "floating" buffer zone for the absorption of any unpaid premiums of Powell's customers. Accordingly, the decree of the chancellor is reversed in this regard. We hold that neither party owes the other any amount regarding the reserve account.

IV. Attorney Fees.

McDonnell has appealed that portion of the chancellor's decree awarding it one-third of the amount of attorney fees and costs requested, which amounted to $48,127.36. The 1988 Agreement contained the following provision for the payment of attorney fees in the event of a breach by Powell of the covenant not to compete:

> In the event it shall become necessary for the CORPORATION to enforce any of the provisions of this non-competition clause by suit or by action in any court against agent, agent agrees that he shall and will pay to the corporation, in addition to any damages, costs and disbursements provided by law, a reasonable attorney's fee and all other expenses of litigation.

In the hearing before the Master, Powell contended that only a portion of the attorney fees requested by McDonnell were recoverable, as only a part of the dispute between the parties dealt with Powell's breach of the restrictive covenant. The Master awarded McDonnell 60% of its claimed attorney fees and costs. This was modified by the chancellor subsequently by his holding that McDonnell was entitled to only one-third of the total requested fees and costs.

McDonnell contends that a reasonable interpretation of this attorney fee provision is to the effect that in the event McDonnell was required to file suit for the enforcement of a covenant not to compete, then it would be entitled to recover all reasonable attorney fees and expenses resulting from any subsequent litigation, including all costs incurred on appeal. As this matter involves the interpretation of a written agreement, the appropriate scope of review is *de novo* with no presumption of correctness attaching. Rainey v. Stansell, 836 S.W.2d 117, 118 (Tenn. App. 1992). The contract contains no general provision regarding the payment of attorney fees. In addition, the case at bar concerns and involves several other issues not related to the covenant not to compete. We are of the opinion that McDonnell should only receive attorney fees and expenses directly related to the breach of the covenant not to compete. In establishing this amount, the appropriate test is whether each issue could have been independently appealed, assuming that Powell had not breached the covenant not to compete. Issues such as the reserve account and the amount of Powell's compensation are separate and independent issues outside the issue of the breach of the restrictive covenant. It does appear however that the vast majority of the time and effort expended by McDonnell focused on the amount of damages incurred by it as a result of the breach of

the restrictive covenant. Based upon this record, we are of the opinion that McDonnell should receive 80% of the attorney fees and costs it incurred in the litigation at the trial level. In addition, this issue is remanded to the trial court for a determination of reasonable attorney fees and expenses incurred by McDonnell on appeal, with 80% of this amount to be awarded to McDonnell.

V. Powell's Unpaid Compensation.

Powell contends by this issue that the chancellor erred in only awarding him $3,792.80 in unpaid compensation. Powell argues that not only is he owed a larger amount based upon what he earned, but also that his commission should have been calculated at a rate of 40% rather than 25%. We will first consider whether the court erred in ascertaining that Powell was entitled to a credit only in this amount, which had been previously agreed to by McDonnell.

The record reflects that Powell was advised that if he failed to sign the new agreement which had been submitted to him on or before March 5, 1992, that this failure to do so would be considered a resignation on his part. On March 19, 1992 McDonnell notified Powell that his refusal to sign the 1992 agreement as per the previous notification was considered a *de facto* resignation by him, which was accepted by McDonnell as of this latter date.

In a letter to Powell dated March 19, 1992 McDonnell informed Powell as to the company's position regarding the payment of any future commissions:

> I feel that we have no choice but to consider your refusal to sign the revised contract as your resignation from the employment of McDonnell Insurance, Inc. effective 3/19/92. . . . I am enclosing our company check to cover your salary from March 16, 1992 thru [sic] April 19, 1992, *thereby waiving our right to 30 days notice.* As soon as the figures are available for the commissions from March 1st to March 19th we will send you an additional check for 25% of the commissions booked during that period. (Emphasis Added).

It appears that the amount awarded by the chancellor had been determined pursuant to the provisions of this letter, but had not been paid over to Powell as a result of this litigation. This amount was in no way contested by

McDonnell. The evidence in this case does not preponderate against this award by the chancellor to Powell of his unpaid commission compensation.

In this connection Powell also contends that any commissions to which he was entitled should have been calculated at the rate of 40% rather than the rate of 25%. Powell is correct in stating that his normal compensation equaled nearly 40% of the total commission income generated for McDonnell. Powell's overall compensation, when considering the many fringe benefits provided to him by McDonnell, did equal around 40% of the total commissions he generated. However, this is not the commission rate that was historically applied to the commission itself. It is uncontradicted that his monthly commissions had always been calculated at 25% of the total commissions produced for McDonnell. Therefore, we find these two sub-issues to be without merit.

VI. Prejudgment Interest.

Finally, Powell contends that it was error for the chancellor to award McDonnell prejudgment interest accruing from the time of separation in March 1992. In Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn. 1994) our supreme court addressed the allowance of prejudgment interest to an injured party: "Where, as in this case, the amount of the obligation is certain, or can be ascertained by a proper accounting, and the obligation is not disputed on reasonable grounds, the Court may allow prejudgment interest in accordance with principles of equity." The record in this case indicates that McDonnell's claim for damages remained uncertain throughout the course of the trial. The damages incurred by McDonnell were by no means certain or readily ascertainable. Accordingly, we are of the opinion that the chancellor erred in awarding McDonnell prejudgment interest.

We affirm the decree of the chancellor holding that the restrictive covenant in the parties' employment agreement was reasonable and enforceable. This court is of the opinion however, that the chancellor erred in limiting the enforcement of this restrictive covenant for only a one year period,

rather than a two year period, as provided therein. This court is of the opinion and so holds that the chancellor was in error in reducing the gross profit margin utilized by Plaintiff's expert witness to ascertain the amount of Plaintiff's damages from 55.7% to 27.6%. In our opinion the preponderance of the evidence supports the profit margin percentage utilized by Plaintiff's witness. Accordingly, we modify the amount of damages awarded by the chancellor by increasing the award from $141,000 to $305,000.

We reverse the decree of the chancellor as to the disposition of the reserve account that equally split the existing balance between the parties. The decision of this court agrees with that expressed by the Master—that is, the method of handling the reserve account had never been agreed upon by the parties. Therefore, regarding this account Powell owes McDonnell nothing and McDonnell owes Powell nothing.

Regarding the claim of McDonnell for attorney fees and expenses, the award of the chancellor of one-third of those fees and expenses sought by McDonnell is modified. In our opinion the breach of the covenant not to compete triggered this entire litigation and is at the heart of this case. In our opinion McDonnell should be reimbursed 80% of the attorney fees and expenses sought, in the amount of $38,501.88. McDonnell also seeks attorney fees and other legal costs relative to this appeal. It is the opinion of this court that McDonnell is entitled to same, and upon remand the trial court is respectfully directed to conduct an appropriate hearing to determine the amount of these attorney fees and legal costs. Once determined, McDonnell is to be awarded 80% of this amount.

Lastly, we are of the opinion that the awarding of prejudgment interest by the chancellor is in error and this award is accordingly reversed. Costs in this cause on appeal are taxed 90% to Powell and 10% to McDonnell, for which execution may issue if necessary.

TOMLIN, Sr. J.

CRAWFORD, P. J., W.S. (CONCURS)

HIGHERS, J. (CONCURS)