

IN THE SUPREME COURT OF OHIO

ROBERT E. MARTIN,

APPELLANT

v.

AL MINOR & ASSOCIATES

APPELLEE.

06-2340

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 06 AP-217

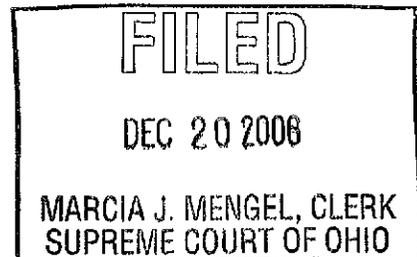
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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ROBERT E. MARTIN

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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents a critical issue of employment law regarding whether customer lists compiled by former employees strictly from memory can ever be the basis of a trade secret violation. The Eighth Circuit Court of Appeals holds that customer lists compiled strictly from memory *cannot* be the basis of a trade secret violation, while the judgment of the Tenth Circuit Court of Appeals holds that customer lists compiled strictly from memory *can* be the basis of a trade secret violation.

Ohio needs a ruling that clarifies whether employers can create an unlimited non-competition clause through Ohio's Trade Secrets Act, R.C. 1333.61. It is necessary and of great public interest because Ohio employees leave their employment every day and go out into Ohio's marketplace to shape their own economic destiny. Employers such as Appellee are using Ohio's Trade Secrets Act to prevent this competition from occurring by creating non-competition clauses where none otherwise exist as a way of stifling trade and retaliating against an employee who leaves their employ.

As a result of the decision of the court of appeals, the employee's memory is not his own. The result is that an employee's *memory* of a client list becomes the employer's asset, and a perpetual non-competition clause is created preventing the employee from using the memory of his employer's client list in a manner which competes with his former employer. Ohio's marketplace is obviously constricted by the court of appeals' decision.

The implication of the decision of the court of appeals affects Ohio's workplaces across the state. Ohio employers who cannot obtain an employee's consent to a non-

compete clause can still unilaterally create one by claiming that the memory of a customer list is a proprietary secret which the employee cannot use, ever, in the course of the employee's future employment. This end-run-around an employee who did not agree to a non-competition agreement actually binds the employee more harshly than if the employee had agreed to enter into a non-competition agreement in the first place. This Court has held that non-competition agreements must be limited in scope and duration to that which is reasonable pursuant to the facts of the case. Raimonde v. VanVlerah (1975), 42 Ohio St. 2d 21, 25-26. The decision of the court of appeals imposes a non-competition agreement that is unlimited in duration and is absolute in scope. The use of Ohio's Trade Secrets Act to impose a non-competition agreement voids this Ohio law.

The result of the court of appeals ruling is that employers in certain appellate districts can claim that an employee's memory of clients is a protected trade secret, while employers in other districts cannot. For example, an employee in Cleveland, Ohio may leave his employment with nothing but the memory of his employer's client list and can immediately begin to compete in the marketplace where no non-compete agreement exists. As a result of the decision of the Tenth District Court of Appeals in this case, that same employee in Columbus, Ohio cannot leave his employer's workplace with his memory of a client list and do the same thing. We are a state divided against itself on the application of Ohio's Trade Secrets Act to an employee's memory. The decision of the court of appeals stifles competition and undercuts Ohio's economy as well as the development of Ohio as a marketplace.

## **STATEMENT OF THE CASE AND FACTS**

This case is about the application of Ohio's Trade Secrets Act, R.C. §1333.61; there are very few facts in dispute.

On January 7, 2003, the Appellant, Robert Martin, resigned from his position as a pension analyst with the Appellee, Al Minor & Associates, Inc ("Al Minor"), which he held for approximately five (5) years. After Appellant Martin resigned his employment, he started his own pension analyst business and began to solicit potential clients. Appellant Robert Martin had been an employee at-will with no non-compete nor trade secrets agreement.

Appellant had been employed by Appellee Al Minor in 1998 to provide various professional administrative services for ERISA plans. Al Minor is a third party administrator and actuarial firm that designs, implements, and administers qualified retirement plans for client companies.

Just prior to Appellant Martin's resignation, Al J. Minor Jr. owner of Al Minor, requested that Martin sign a covenant not to compete. Appellant Martin refused and never signed a covenant not to compete agreement with Al Minor and Associates Inc., nor did Minor request that Appellant Martin sign any trade secrets agreement. In fact, it is not disputed that Minor did not request, nor did Appellant Martin sign, any employment agreement with Al Minor Jr. or with Al Minor and Associates.

Martin, subsequent to leaving Al Minor, set up his own ERISA consulting firm. Although Appellant Martin filed with the Ohio Secretary of State for a Limited Liability Company one week prior to his leaving Al Minor & Associates, he did not commence business as Martin Consultants LLC until his employment with Minor & Associates

ended. It is further undisputed that at no time during or after Appellant Martin's employment with the Appellee did he take any of the Appellee's documents, records, files, lists, or data of any type regarding any of Appellee's customers or operations and the Appellee does not allege that Mr. Martin did. Nor did Appellant Martin use any such documents, records, files, lists, or data in his current business.

As part of Mr. Martin's duties as a pension analyst at Appellee Al Minor & Associates Inc., Appellant Martin completed and filed forms entitled "Form 5500" for each client of Al Minor & Associates, Inc., which are federal reporting forms that list the client's name, telephone number, address and contact information. These forms are filed with the Department of Labor and are available public information.

Appellee Al Minor's client names and contacts are public information listed on the Internet, and web sites including "www.freeErisa.com" which lists the names of companies with ERISA plans, their addresses and telephone numbers, as well as the names of the plan administrators. All of Al Minor's client names, address, and contact information are available on [www.freeERISA.com](http://www.freeERISA.com).

After Appellant Martin left the Appellee's employ and started his own business, Appellant solicited potential customers by locating client names from public information listings on the Internet, which provided the names of companies with ERISA plans, their addresses and telephone numbers as well as the names of the plan administrators. A few of the client's Martin solicited were the Appellee's current or former clients.

Appellant Martin did not obtain any information about Appellee Al Minor's clients from Al Minor nor from any agent or representative of Al Minor, nor from files, records, current employees or any other data or information base of Al Minor when he left his employment with

Appellee. The information Appellant Martin used was strictly from his memory, which Appellant is obviously unable to delete. It is the decision of the court of appeals that Appellant's memory of a client list, and the memory of every other employee, may not be used in a manner which competes with his former employer.

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law: The memory of an employer's clients cannot be a protected trade secret.**

Regarding this issue of whether customer information compiled by former employees strictly from memory can be the basis of a trade secrets violation, the Eighth District Court of Appeals holds that customer lists compiled by former employees, strictly from memory, are not trade secrets. Ellison & Assoc. v. Pkarek, (Sept. 26, 1985), Cuyahoga App., No 49560, 1985 Ohio App. Lexis 7140. In Ellison, an accounting firm, using Ohio's Trade Secret Act, attempted to enjoin its former billing clerk from soliciting her former employer's billing clients after forming her own business. Like the case at bar, the employer in Ellison contended that the employee's memory of its clients constituted a customer list. Id. at 3. The Eight Circuit Court of Appeals held that a list compiled by an ex-employee using nothing more than his memory is not a trade secret. Id. at 3. Thus, an employee living in Cleveland may leave his employment and, using just his memory of the names of clients, start a competing business.

R.C. 1333.61 (D) defines "Trade Secret":

"Trade secret" means information, including the whole or any portion or phase of any scientific or technological information, design, process, procedure, formula, pattern, compilation, program, device, method, technique or improvement or any business information or plans, financial information or

listing of names, addresses, telephone numbers that satisfies both of the following:

- (1) It derives from independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In interpreting R.C. §1333.61, the Eight Circuit referred to its early case of Michael Shore & Co. v. Greenwald (March 21, 1985), Cuyahoga App. No. 48824, 1985 Ohio App. LEXIS 10447. In coming to the conclusion that Ohio's Trade Secrets Act did not apply to the memory of a client list, the Eight Circuit rejected the trial court's conclusion that "memories were as good as any written list" and stated:

This is not the law. If it were, then no Bailsman or any other employee could leave his employer and go into business with others or for himself, for surely he would have some 'memory' of what he had learned in his employer's business.

Michael Shore & Company, V. Greenwald, Appellant-Appellant, No. 48824, Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County, 1985 Ohio App. Lexis 10447.

In Commonwealth Sanitation Company of Cleveland Inc., v. Commonwealth Pest Control Company (8<sup>th</sup> App. Dist. 1961), 178 N.E. 2d 518, 1961 Ohio App. LEXIS 816, the Eighth District further held that:

The Court of Ohio Appeals, Eighth District, Cuyahoga County Court adopts the view that unless otherwise agreed, after the termination of the agency, the agent: (a) has no duty not to compete with the principal; (b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty; the agent is entitled to use general information concerning the method of business of the

principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent; (c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal; (d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

The Eighth District has noted this conflict of districts and further held in

Commonwealth Sanitation that:

There are two lines of authority regarding whether the knowledge and information which a former employee obtains as the result of their employment with a former employer is in fact of a confidential character. One line of authority indicates that customers of a former employee may not be solicited, even in the absence of a restrictive covenant. The other line of authority states that in the absence of a restrictive covenant or fraud, customers of a former employer, the names of whom are in the memory of the former employee, may be solicited. Thus, the former line of cases says that a customer list built by an employer over a period of years is the employer's property and its use by a former employee for his own advantage will be enjoined. The other cases under such facts deny an injunction. Accordingly, the Ohio Appeals, Eighth District, Cuyahoga County Court adopts the view that unless otherwise agreed, after the termination of the agency, the agent may solicit the former employer's customers retained in the agent's memory.

Thus, Appellant's actions in using only his own memory and having *not* signed a covenant not to compete would have been legal had Appellant been conducting his business in Cuyahoga County versus Franklin County.

In Franklin County, the employee's memory is not his own. The ruling of the Tenth District notes the Eighth District decisions but declines to follow their holdings and instead, follows the "second line" of cases which specifically reject the Eighth District's holding that memorized client lists are not trade secrets. This creates a clear split of legal authority in Ohio.

Therefore, while an ex-employee in Cleveland, Ohio can use a memorized client list to solicit former clients without violation of R.C. §1331.61, that same employee

cannot now do the same without liability in Columbus, Ohio. A decision of this Court will finally provide a uniform application to all appellate districts.

Appellee has alleged that Appellant Martin obtained and utilized client lists to establish a client base for Martin's consulting services in which he provided ERISA counseling services. In making this allegation, it is important to note that it is undisputed that Appellant did not take from his employer any files, documents, lists, records, data or anything when he left his employment. In fact, most employees leave their employment with nothing more than their memories.

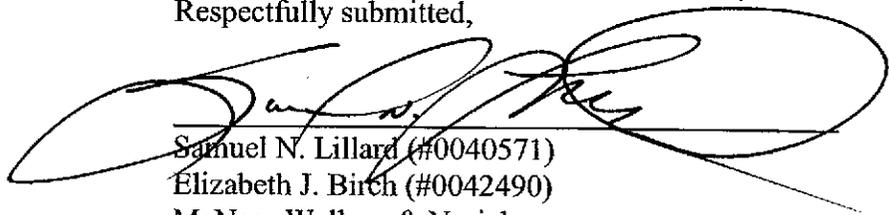
Since Appellant Martin did not take any client list or other information with him when he left Appellee's employment, the Appellee is only alleging that Appellant took his memories with him and utilized those memories in a competing way. Like most employees when they leave an employer, Appellant Martin did not physically take any information with him about Appellee's clients from any of the Appellee's files, records, current employees or take any other data or information base of Appellee when he left Appellee's employ.

Since Minor does not allege that Defendant Martin physically took a client list or other client information with him when he left, the remaining question is whether the memory of a client list is a protected trade secret and confidential information which the employee is prevented from using even where no non-competition agreement exists. The answer depends upon which appellate district one works in. Therefore, a decision by this Court on the status of a memory of a client list is necessary to provide uniform application across the State of Ohio and one that would significantly affect commerce across the State of Ohio as well.

**CONCLUSION**

For the foregoing reasons, Appellant Martin respectfully submits that the issue involves matters of great and significant interest and a question of law that impacts on employees and employers throughout the State of Ohio. Therefore, Appellant requests that this Court accept jurisdiction in this case so that the important issue presented will be reviewed on its merits.

Respectfully submitted,

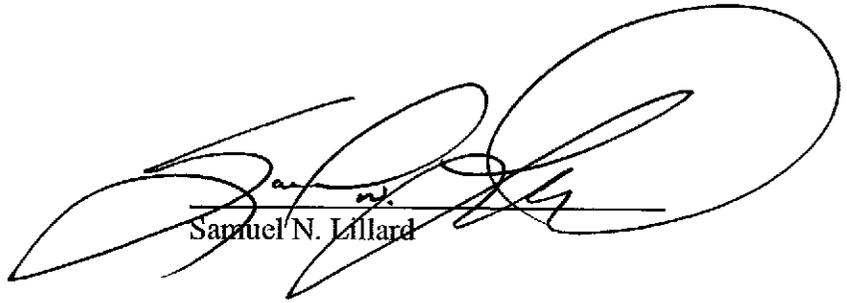


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**CERTIFICATE OF SERVICE**

I hereby certify that the following Memorandum in Support of Jurisdiction was sent to the below counsel for Appellee by regular U.S. Mail, postage prepaid, on this 20<sup>th</sup> day of December 2006:

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Samuel N. Lillard

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Al Minor & Associates, Inc., :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 06AP-217  
 : (C.P.C. No. 03CVH-03-2696)  
 Robert E. Martin, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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O P I N I O N

Rendered on November 9, 2006

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*Fry, Waller & McCann Co., L.P.A., and Barry A. Waller, for appellee.*

*Law Office of Mowery & Youell, Samuel N. Lillard and Elizabeth J. Birch, for appellant.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{1} Defendant-appellant, Robert E. Martin, appeals from a judgment of the Franklin County Court of Common Pleas adopting a magistrate's decision that granted damages to plaintiff-appellee, Al Minor & Associates, Inc. ("AMA"), on AMA's claim that defendant misappropriated trade secrets from AMA. Defendant assigns a single error:

THE TRIAL COURT ERRONEOUSLY DENIED THE APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S REPORT HOLDING THAT APPELLANT'S USE OF MEMORIZED CLIENT INFORMATION CONSTITUTED A MISAPPROPRIATION OF TRADE SECRETS.

Because AMA's client information is a trade secret under R.C. 1331.61(D), we affirm.

{¶2} AMA is an actuarial firm that serves as a third-party administrator of qualified retirement plans and assists businesses in creating, developing and managing qualified retirement plans, including ERISA plans. Albert R. Minor, Jr. is AMA's president and sole shareholder. AMA employed defendant from 1998 through 2003 as a pension analyst, assigning him to particular clients that qualified as defined contribution plans. Defendant did not sign an employment agreement, a covenant not to compete, or a written agreement concerning AMA's trade secrets.

{¶3} Prior to resigning from AMA, defendant formed his own company in the same line of business. Defendant left AMA without a client list or any other physical document, but retained his knowledge of AMA's clients and their respective plans. Shortly after leaving, defendant solicited and secured 15 clients that AMA formerly serviced.

{¶4} AMA filed a complaint against defendant for misappropriation of trade secrets in violation of R.C. 1331.61 et seq., when it became aware that some of the clients defendant was servicing were former AMA clients. Specifically, AMA contended defendant misappropriated both AMA's confidential client list and its confidential information concerning the administrative service needs of its clients' third-party pension plans. AMA sought monetary and injunctive relief.

{¶5} Defendant filed an answer, and the case was referred to a magistrate for trial. On January 12, 2005, the magistrate found defendant liable to AMA for misappropriation of trade secrets and awarded AMA \$25,973 in damages. Because AMA withdrew its request for a preliminary injunction and failed to address the continuing need for injunctive relief, the magistrate dismissed AMA's request for injunctive relief.

{¶6} Both AMA and defendant filed objections to the magistrate's conclusions of law pursuant to Civ.R. 53(E)(3); neither party contested the magistrate's findings of fact. Defendant contended the magistrate's decision was erroneous because AMA's client list and information were not trade secrets; AMA objected to the magistrate's calculation of damages. The trial court overruled both defendant's and AMA's objections and pursuant to Civ.R. 53(E)(4), approved and adopted the magistrate's decision in its entirety.

{¶7} Defendant's sole assignment of error contends the trial court erred in determining that AMA's client list and information are trade secrets. R.C. 1333.61(D) defines trade secret to mean "information, including the whole or any portion or phase of \* \* \* any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use[;] (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

{¶8} The Supreme Court of Ohio adopted six factors to consider in analyzing a trade secret claim: "(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.* by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information." *State ex. rel. The Plain Dealer v. Ohio*

*Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131, 134-135.

{¶9} Here, the trial court determined AMA's client list was an intangible asset that AMA acquired by devoting considerable time and resources over a 20-year period. The trial court also concluded AMA took sufficient precautionary measures to assure the client list remained confidential, including: (1) informing its employees that its client information was confidential and was not to be made public; (2) circulating a Computer Usage Policy that reminded its employees the client names and associated information were confidential, were not to be made public, and were not to be removed from the confines of the office; and (3) securing client information from those entering AMA's office. Premised on those findings, the trial court determined AMA's client list and information were trade secrets under R.C. 1331.61.

{¶10} Defendant first argues AMA's client list and information are not trade secrets because that information is available to the general public on the internet website [www.freeERISA.com](http://www.freeERISA.com). In support, defendant points to the magistrate's finding of facts to support his contention: AMA "agreed with the general assumption that each of the 15 aforementioned clients could be entered into the database and the corresponding [client information] could then be accessed through the 'view it' link." (Magistrate's Decision, 9.) Defendant concludes that because the undisputed evidence proves the public may readily access AMA's client list and information, they are not entitled to trade secret status.

{¶11} A customer list is an intangible asset that is presumptively a trade secret when the owner of the list takes measures to prevent its disclosure in the ordinary course

of business to persons other than those the owner selects. *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency* (2000), 88 Ohio St.3d 166, 173; *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App.3d 786. A customer list, however, is entitled to trade secret status "only if the information is not generally known or readily ascertainable to the public." *Ohio Environmental Protection Agency*, at 173, quoting *State ex rel. The Plain Dealer*, at 529.

{¶12} Here, the trial court, through its magistrate, found that although a browser could enter an individual client's name into [www.freeERISA.com](http://www.freeERISA.com) and obtain the client's contact information, a browser could neither independently obtain a compiled list of the clients AMA serviced nor determine which clients needed third-party pension plan administrative services. The trial court analogized defendant's method of searching the website to searching a telephone directory for a client list: "the mere fact that each of the clients at issue are [sic] listed in a telephone directory, or can be entered by name in a database, does not raise an inference that they are 'easily ascertainable.'" The court determined that because AMA's client list represented divergent trades, industries and businesses, any attempts to independently acquire AMA's client list from a database search would be exceedingly difficult and therefore not readily ascertainable to the public.

{¶13} The evidence demonstrates AMA spent considerable time and energy compiling its client list and used adequate measures to protect the client information from its competitors. Because the evidence reflects no readily available means by which someone outside the employ of AMA can specifically identify AMA's clients and readily determine which clients need third-party pension plan administrative services, AMA's

client list is a trade secret under R.C. 1331.61(D). Defendant's first argument is without merit.

{¶14} Defendant next argues AMA's client list and information are not trade secrets because defendant acquired the list from memory. Defendant notes undisputed evidence that he did not take any physical information relating to AMA or its clients prior or subsequent to his resignation. Defendant cites two Eighth District Court of Appeals cases for the proposition that customer lists a former employee compiles strictly from memory are not trade secrets. *Ellison & Assoc. v. Pkarek* (Sept. 26, 1985), Cuyahoga App. No. 49560; *Michael Shore & Co. v. Greenwald* (Mar. 21, 1985), Cuyahoga App. No. 48824. The trial court resolved defendant's argument in favor of AMA, relying on this court's opinion in *Mesarvey, Russell & Co. v. Boyer* (July 30, 1992), Franklin App. No. 91AP-974. In *Boyer*, we stated that "[w]hether created from a writing or from memory, a client list is a statutory trade secret under R.C. 1333.51(A)(3)."

{¶15} Defendant claims *Boyer* does not apply here for two reasons: (1) because R.C. 1331.51(A)(3) was repealed and replaced with R.C. 1331.61(D), and (2) because the employee in *Boyer*, unlike defendant, signed an employment contract with a non-compete clause. R.C. 1331.61(D) changed the definition of a trade secret from that contained in former R.C. 1333.51(A)(3). The change, however, has no bearing on the relevant aspect of *Boyer's* holding because *Boyer* focused on the trade secret's form, not its definition. Similarly, the non-compete clause was apposite to the relevant aspect of *Boyer's* holding because the court narrowly and separately addressed the issue of the trade secret's form from the larger issue of breach of contract. Because *Boyer* is indistinguishable, and because we previously determined that a client list such as the one

at issue fits the statutory definition of a trade secret under R.C. 1331.61(D), AMA's memorized client list warrants trade secret status.

{¶16} Defendant finally contends that prohibiting him from contacting AMA's clients effectively creates a perpetual non-compete agreement against public policy. Defendant is correct insofar as he notes that R.C. 1331.61(D) expanded the definition of trade secret from the former statute and increased the tension between a company's right to be protected against unfair competition and an individual's right to the unhampered pursuit of livelihood. Defendant's argument, however, ignores the constantly changing nature of business information and the relatively short period of time during which such information can be deemed sufficiently relevant to warrant trade secret status. Even so, we need not resolve the interplay of the two competing interests. Because AMA withdrew its request for a preliminary injunction early in litigation and failed to address at trial the continuing need for injunctive relief, the trial court's judgment does not enjoin defendant from contacting AMA clients in the future but only requires defendant to compensate AMA for past monetary damages. Accordingly, defendant's policy argument is unpersuasive in addressing the merits of the appeal before us.

{¶17} Having found defendant's arguments without merit, we overrule defendant's single assignment of error and affirm the judgment of the trial court.

*Judgment affirmed.*

BROWN and FRENCH, JJ., concur.

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FRANKLIN CO. O.H.O.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Al Minor & Associates, Inc.,	:	
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Plaintiff-Appellee,	:	
	:	No. 06AP-217
v.	:	(C.P.C. No. 03CVH-03-2696)
	:	
Robert E. Martin,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on November 9, 2006, and having overruled defendant's single assignment of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs to defendant.

BRYANT, BROWN and FRENCH, JJ.

By   
Judge Peggy Bryant