BY THE COURT:

DATE SIGNED: June 17, 2019

Electronically signed by William J. Domina
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT CIVIL DIVISION WAUKESHA COUNTY

Zywave, Inc.
Plaintiffs,

CASE NO. 18CV1891

vs.

Mark Dunahoo
Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO EXTEND DEPOSITION AND TO COMPEL

Zywave Claims

This lawsuit arises out of the former employment of the defendant, Mark Dunahoo, with the plaintiff, Zywave. During the course of his employment, the defendant signed a Confidentiality Agreement which provided:

> For a twenty-four (24) month period after termination of your employment for any reason, you will not use in any manner or disclose any Proprietary Information. Proprietary Information that is also a Trade Secret under Wisconsin law, shall not be disclosed or misappropriated as long as the information remains Trade Secret. Proprietary Information does not include information (i) that was or becomes generally available to you on a non-confidential basis, if the source of this information was not reasonably known to you to be bound by a duty of confidentiality, (ii) that was or becomes generally available to the public, other than as a result of a disclosure by you, directly or indirectly or any other breach of this Agreement, or (iii) that was independently developed by you without reference to any Proprietary Information.

> Nothing in this Agreement serves to restrict the statutory or common law Trade Secret protections afforded to the Group or your duty not to disclose Trade Secrets.

In October of 2018, Mark Dunahoo left his employment with the Zywave and went to work for a competitor, ThinkHR. The plaintiff filed this lawsuit claiming (1) trade secret misappropriation by Dunahoo pursuant to Wis. Stat. § 134.90; (2) Breach of the Confidentiality Agreement contract by Dunahoo; (3) Breach by Dunahoo of a duty of loyalty owed to his employer, Zywave.

Discovery Disputes

This decision is necessary due to disputes during the discovery process concerning (1) the allowable length of the deposition of the defendant Dunahoo by the plaintiff, Zywave; and, (2) that a corporate representative of Dunahoo's new employer, ThinkHR, declined to answer certain questions at his deposition at direction of ThinkHR counsel or produce certain documents in response to a demand for production. These disputes have evolved into motions by Zywave to extend the time for Dunahoo's deposition and to compel production of the demanded documents. The Court will deal with the issues raised seriatim.

Motion To Extend Time for Deposition

As noted by the complaint filed by Zywave, all claims focused on the "breakup" in the employee/employer relationship when Mark Dunahoo went to work for a competitor, ThinkHR. According to the record submitted, Zywave took the deposition of Mark Dunahoo on February 14, 2019. The deposition transcript reveals that the deposition concluded after defense counsel asked "Are you wrapping up here?.....[Y]ou've got a limit and you're past it…What is your intention? I'll give a little

leeway, but I'm not going to let—we're past eight hours already." Dunahoo deposition of 2/14/2019 at p. 335-336. After arguing over how long the deposition had been taking, plaintiff's counsel stated "I finish when I'm done. I don't know how much more time. Probably at least an hour." Dunahoo deposition of 2/14/2019 at p. 337. Unable to agree as to the length of time that concluding the deposition would take, defense counsel concluded the deposition.

The deposition of Mark Dunahoo commenced at 9:07 a.m. and concluded at 5:27 p.m.. There were 68 minutes of breaks during that period resulting in a total deposition time of 7 hours and 19 minutes. Section 804.05, Wis. Stats. provides that "A party shall be limited, unless otherwise stipulated or ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable number of depositions, not to exceed 10 depositions, none of which may exceed 7 hours in duration." The record does not reveal any stipulation or agreement to extend the time for depositions beyond 7 hours.[1] Moreover, the Court has not entered any order that would alter the time limit on deposition by oral examination.[2]

In essence, the plaintiff is requesting additional time beyond the 7 hours and 19 minutes taken to conduct the deposition of the defendant, Mark Dunahoo.[3] A trial court has broad discretion in fashioning discovery orders. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999). The plaintiff complains that Mr. Dunahoo's

[1] By affidavit, defense counsel indicates that an off-the-record offer was made to extend the Dunahoo deposition for an additional 30 minutes to allow completion. Apparently, this offer was not accepted by the plaintiff.

[2] The parties did submit a joint management report to the Court, required for cases assigned to the Commercial Docket pilot program, which indicated that there was a dispute as to the length of deposition time required in this case. To date, the Court has not entered a scheduling order. Contemporaneous with this decision, the Court is issuing its scheduling order setting the time for depositions at the statutory limit of 7 hours.

[3] Plaintiff argues that the defendant has "waived" its right to object to the deposition length by not speaking up sooner. However, the record reveals that there was an identified dispute in deposition length identified prior to the Dunahoo deposition of 2/14/2019. See. Cohen affidavit filed 4/30/2019 at para. 4. Thus, the Court rejects this claim of waiver.

deposition took longer than needed because of "evasive" answers given by him during the deposition. The Court has reviewed the transcript and did not find that Mr. Dunahoo's answers were evasive. Rather, what the Court did find is that the plaintiff appeared to be using Mr. Dunahoo's deposition to make inquiry about other employees who had previously left Zywave to go to ThinkHR, including employees who were under litigation with Zywave. The Court detailed the specific claims made by the plaintiff against Mr. Dunahoo in this case. The standard for legitimate discovery allows for inquiries into "relevant" matters, even if not ultimately admissible at trial, Wis. Stat. §804.01(2). After reviewing the deposition transcript in its entirety, this Court concludes that the plaintiff appears to have gone "fishing for other fish" which are not parties to this litigation. In so doing, the plaintiff wasted its deposition time and the Court will not reward this by granting the plaintiff more time to "complete" the deposition of Mr. Dunahoo. The Court, therefore, denies this portion of the plaintiff's motion to extend time for deposition.

Motion to Compel Document Production and Deposition Responses

The seminal discovery case in Wisconsin is *State ex rel Dudek, v. Circuit Court For Milwaukee County,* 34 Wis.2d 599, 150 N.W.2d 387. There the Supreme Court said:

> The ends of justice...are best served when our trial procedure results in an informed resolution of controversy. The basic objective of our trial system, then, is the ascertainment of the truth, whether by court or jury, on the basis of those factors legal and factual, best calculated to effect a decision which comports with reality. The thought, of course, is that justice can more likely be done if there is a preliminary determination of the truth of facts. A second observation is that our liberal rules of pretrial discovery...are meant to facilitate the job of the adversary system in accomplishing its objective. Pretrial discovery is designed to formulate, define and narrow the issues to be tried, increase the chances of settlement, and give each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial. Thus, the

> function of pretrial discovery is to aid, not hinder, the proper working of the adversary system.

Id. at 576. However *Dudek* also recites a note of caution: "But discovery, like all matters of procedure, has ultimate and necessary boundaries. *Id.* at 586. *See also Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451.

Recently, Wisconsin has tightened boundaries of discovery through passage of 2017 Wisconsin Act 235, effective July 1, 2018. Under this Act, parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Thus, to be discoverable, material or information must be not only relevant to claims or defenses, but also proportionate to the needs of a particular case.

A trial court has broad discretion in fashioning discovery orders, including whether to limit discovery through a protective order. *Paige K.B. v. Steven G.B.,* 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999). Where a movant shows good cause, Wis. Stat. §804.01(3) permits the circuit court to make any order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."
Wis. Stat. §804.01(2) allows discovery of non-privileged material, which is "relevant to the subject matter involved in the pending action...." However this "relevancy" test does not equate with the higher "relevancy" test at trial.[4] While discovery rights are broad and

[4] Although the statute no longer indicates that material that appears reasonably calculated to lead to the discovery of admissible evidence is included in acceptable discovery, the legislative direction that discoverable material which is less than evidence that may be admissible at trial remains. It appears that a

paramount to our justice system, they are not without limit. Wisconsin Stat. § 804.01(2)(a), sets forth the scope of allowable discovery and provides that subjects of discovery requests may object to requests that are not relevant to the subject matter involved in the pending action. Section 804.01(3) provides additional protections in the form of protective orders in response to annoying, embarrassing, oppressive, unduly burdensome or unduly expensive discovery requests, as follows:

> (3) Protective orders. (a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:
>
> 1. That the discovery not be had;
> 2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
> 3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
> 4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
> 5. That discovery be conducted with no one present except persons designated by the court;
> 6. That a deposition after being sealed be opened only by order of the court;
> 7. That a trade secret, as defined in s. 134.90(1)(c), or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
> 8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> (b) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 804.12(1)(c) applies to the award of expenses incurred in relation to the motion.
> (c) Motions under this subsection may be heard as prescribed in s. 807.13.

See, *Sands v. Whitnall Sch. Dist.*, 312 Wis. 2d 1, 41, 754 N.W.2d 439, 459 (2008).

"lower form" of relevancy, which has now been "bookended" by the standards of cost/benefit and proportionality, etc. continues to be present as the first standard that a requestor must satisfy.

Expenses related to a motion to compel discovery are authorized under Wis. Stat. §804.12(1). The court *shall* award the expenses, including attorney fees, relating to a motion to compel to the prevailing party. *Id.* at subsec. (l)c. Finally, the sanctions for disobeying an order resulting from a granted motion to compel are set out in subsec. (2).

Here, Zywave counsel strenuously argues that because ThinkHR did not ask for a protective order shielding it from any request that it considered inappropriate and unsupported that it cannot now complain that the breath of the document subpoena and the deposition questions that it faced is inappropriate or unsupported. While it may be a better process to seek a protective order, there does not appear to be anything in the Wisconsin statutes requiring an entity to do so.[5] Said differently, while an entity under subpoena or discovery deposition adopts a more risky strategy by refusing to produce certain demanded documents or to answer posed deposition questions, this course does not change the Court's analysis regarding what is in or out of bounds in terms of legitimate discovery.

For efficiency, this Court chooses to ignore whether the evidence sought by the plaintiff from ThinkHR, through its corporate representative, is relevant under ch. 804, Wis. Stats.. For this analysis, the Court will conclude that this information meets this relatively low criteria. Rather, the Court chooses to weigh the subject of the information not produced under the newly adopted and stricter balancing rules. The context of this case is a lawsuit against a former employee who left to work for ThinkHR. No claim has been brought against the new employer. The nature of the claims focus on very specific events which the Court discussed at length during the hearing on the request for

[5] The only statutory prerequisite to this Court's consideration of the limits on discovery is that the issue be raised "[u]pon the motion of any party." See Section 804.01(2)(am), Wis. Stats. The motion brought by the plaintiff, which is now considered by this Court, is a qualifying motion for this Court's decision.

injunctive relief. This request was denied by the Court. As noted earlier in this decision, the information sought by the plaintiff goes well beyond the claims brought by the plaintiff and reaches to other former Zywave employees, some of whom have been sued in litigation pending in other jurisdictions. The Court is not convinced that the information sought from the defendant's current employer, ThinkHR, is proportional to the specific claims brought against him. Moreover, the Court is convinced that the potential damage alleged by the plaintiff is in no way proportional to the "shotgun" requests by the plaintiff of ThinkHR and its corporate representative. In adopting the recent more restrictive discovery standards, the Wisconsin Legislature appears to direct that Courts establish a tighter rein on the costs of unnecessary litigation. It is in this spirit, that the Court denies the request of the plaintiff to compel the production of additional documents from ThinkHR and testimony from its corporate representative.

Order

IT IS HEREBY ORDERED THAT the plaintiff's motion to extend deposition and to compel is hereby **DENIED.**