COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2783 **Cir. Ct. No. 2003CV527**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

GREENSTONE FARM CREDIT SERVICES, ACA, FLCA AND PCA D/B/A AGRISOLUTIONS,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

ROBERT M. GIESLER,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. GreenStone Farm Credit Services appeals a summary judgment holding unenforceable a non-compete agreement signed by former employee Robert Giesler and denying GreenStone repayment of

consideration given to Giesler for signing the agreement. Giesler cross-appeals an order denying him attorney fees to which he claimed entitlement as the prevailing party. We conclude the court erroneously interpreted the non-compete clause.[1] Accordingly, we reverse the judgment and order and remand this case for further proceedings.

Background

¶2 GreenStone provides accounting and tax services to farmers. Giesler was an accountant employed by GreenStone and its predecessor, Farm Credit Services (FCS), for seventeen years. In 2001, FCS required its accountants to enter covenants not to compete. Giesler signed one and received $9,740 as consideration. There is no dispute about the transferability of the covenant once GreenStone took over FCS. Giesler decided to leave GreenStone in January 2003.

¶3 The covenant not to compete included the following language regarding customers:

> Employee agrees that he/she shall not, in any fashion, directly or indirectly, solicit, contact, or otherwise do any competitive business (by the rendering of services that are the same or similar to Employee's services, duties and responsibilities while employed with FCS) with any present or former FCS customer who was a customer within one year prior to the Employee's termination (hereinafter referred to as "customer-based restraint["]). A "Customer" is a person or entity to whom Employee has been assigned to service during his/her tenure with FCS.

Giesler has admitted that, after he left GreenStone, he worked with customers that he had previously serviced.

[1] This conclusion necessitates reversal on the consideration and attorney fees issues.

¶4 GreenStone brought this action to enforce the covenant. Giesler moved for summary judgment, seeking invalidation of the covenant as unreasonably restrictive. In July 2004, the court interpreted the covenant as applying to all customers Giesler serviced while working seventeen years for FCS and GreenStone and held the covenant was overbroad and, therefore, unenforceable.

¶5 GreenStone then moved for return of the consideration it had paid Giesler in exchange for the covenant. The court held that because the covenant was unenforceable, it would not "reward" GreenStone by making Giesler repay the money. Giesler brought a motion under a clause in the covenant allowing the prevailing party to seek attorney fees. The court denied that request, stating that it would not pick and choose parts of the covenant to enforce. GreenStone appeals and Giesler cross-appeals.

Discussion

¶6 We review summary judgments de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. A covenant not to compete is a contract. ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 837, 520 N.W.2d 93 (Ct. App. 1994). As such, we review the issue of the covenant interpretation de novo. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (1987) (interpretation of a contract is a question of law).

¶7 Covenants not to compete are regarded with suspicion in Wisconsin because of the restraints they place on worker mobility. ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶9, 243 Wis. 2d 305, 627 N.W.2d 444. Consistent with

encouraging employee mobility, we apply the following canons of construction to covenants not to compete:

> (1) such covenants are prima facie suspect; (2) they must withstand close scrutiny to pass legal muster as being reasonable; (3) they will not be construed to extend beyond their proper import or further than the language of the contract absolutely requires; and (4) they are to be construed in favor of the employee.

Id. (citations omitted). These canons are grounded in WIS. STAT. § 103.465.[2] ***Farm Credit Servs.***, 243 Wis. 2d 305, ¶10. Additionally, we make the following five inquiries when evaluating the enforceability of a covenant: "The covenant must: (1) be necessary for the protection of the employer or principal; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy." ***Pollack v. Calimag***, 157 Wis. 2d 222, 236-37, 458 N.W.2d 591 (Ct. App. 1990). It appears that the trial court, based on its interpretation, concluded

[2] WISCONSIN STAT. § 103.465 states:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

GreenStone's covenant failed the third inquiry and was unenforceable on that basis.[3]

¶8 The covenant, labeled "Territorial and Activity Restriction," consists of two sentences. The first sentence states that Giesler will not "do any competitive business … with any present or former FCS customer who was a customer within one year prior to … [Giesler's] termination." Neither Giesler nor the trial court had difficulty accepting the general idea of a one-year restriction—both agree the restriction would have been acceptable had it been expressed in only the first sentence.

¶9 However, based on the second sentence, which defines "Customer," Giesler argues he is prohibited from contacting "not only all customers Giesler worked with in the last year but also all customers that he worked with in the seventeen (17) years he was employed with FCS." The trial court interpreted the sentence similarly, stating:

> when [GreenStone] decides to tack on a definition of customer and then says the definition of customer means anybody who [Giesler] has served during his whole employment with the company, then I consider that to be unreasonable because the restrictive covenants are disfavored under the law.

We conclude Giesler and the trial court misinterpreted this portion of the covenant.

[3] We note that a "territorial" restriction need not necessarily be defined in geographic terms—it may, when appropriate, be defined by a customer list. *See* ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶13, 243 Wis. 2d 305, 627 N.W.2d 444.

¶10 The first sentence establishes the restriction while the second sentence limits those customers that the restriction covers. That is, the second sentence does not expand the definition of customer but rather constricts the customer base. This becomes evident when we substitute the definition of the second sentence in the first sentence. Then, the restriction is that Giesler will not "do any competitive business … with any present or former [person or entity to whom Giesler was assigned during his tenure] who was a [person or entity to whom Giesler was assigned during his tenure] within one year prior to the Employee's termination."

¶11 Giesler is only prohibited from servicing any of GreenStone's clients who had been (1) GreenStone's customers within the year preceding Giesler's termination and (2) were also serviced by Giesler within the year. This definition thus excludes GreenStone clients Giesler had serviced prior to his last year with the company. It also excludes GreenStone clients who had been customers during Giesler's last year but who were assigned to other accountants. This definition is actually less restrictive than just the first sentence would allow. That sentence by itself would have prohibited Giesler from soliciting all of GreenStone's clients from the year preceding his termination, regardless whether they had been assigned to Giesler or some other accountant.

¶12 This misinterpretation of the covenant was the basis on which the trial court held it unenforceable. We reverse the summary judgment because the covenant is not void for the reasons upon which the trial court relied. We therefore remand for further proceedings. We decline to determine whether the covenant is otherwise enforceable and trust the court will review the question on remand. This makes it unnecessary for us to consider the merits of the remaining issue on the appeal or the cross-appeal, because these other issues arise as a result

of the court's misinterpretation.[4] *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Of course, we also reverse on those issues, but our reversal should not be construed to mean that GreenStone is necessarily entitled to reimbursement of the consideration or that Giesler is necessarily entitled to attorney fees.