COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2604 **Cir. Ct. No. 2004CV265**

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

MSI PREFERRED SERVICES, INC.,

PLAINTIFF-RESPONDENT,

V.

CLEMENTS AGENCY D/B/A CLEMENTS INSURANCE AGENCY, FREDERICK W. CLEMENTS AND DEBRA C. CLEMENTS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Marathon County: GREG B. HUBER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Frederick and Debra Clements and Clements Agency appeal a summary judgment in MSI Preferred Services, Inc.'s favor dismissing their claim. The Clements argue that a clause in their agency contracts

requiring the return of MSI's property prior to the payment of a termination benefit is unenforceable for a variety of reasons. We reject their argument and affirm the judgment.

Background

¶2 Frederick Clements signed an agent's agreement with MSI on March 1, 1984. On January 1, 1995, Debra Clements also signed an agent's agreement with MSI. On December 15, 2003, the Clements notified MSI that they intended to terminate their respective contracts. Simultaneously, Frederick incorporated Clements Insurance Agency, and began competing with MSI. We will refer at times to Frederick and Debra Clements and Clements Agency collectively as "the Clements."

¶3 Frederick was entitled to termination benefits from MSI in accordance with the provisions of § 12 of the contract. In pertinent part, § 12 stated:

> 12. Termination Compensation.
>
> ….
>
> D. Cessation of Termination Compensation
>
> All liability of the companies for termination compensation provided for in paragraph 12 and its subparagraphs shall cease in the event any one or more of the following shall occur:
>
> (1) You either directly or indirectly, by and for yourself or as an agent for another, or through others as their agent, engage in or be licensed as an agent, solicitor, representative, or broker or in any way be connected with the property, casualty, health, or life insurance business, within one year following termination within a 25 mile radius of your business location at the time; or

> (2) You fail to return in good condition, within 10 days of termination, all materials, records, and supplies furnished to you by the companies during the course of this contract, together with any copies thereof; or
>
> (3) After termination of this contract, you directly or indirectly induce, attempt to induce, or assist anyone else in inducing or attempting to induce policyholders to lapse, cancel, or replace any insurance contract in force with the companies; furnish any other person or organization with the name of any policyholder of the companies so as to facilitate the solicitation by others of any policyholder for insurance or for any other purpose.

Both parties agree that the termination benefit due to Frederick is $269,612.76.

¶4 MSI notified Frederick that it would not pay him the termination benefit because MSI believed Frederick had retained policyholder records in violation of § 12.D(2) of the contract. MSI also notified Frederick that it had no intention of enforcing the non-compete provisions, §§ 12.D(1) and 12.D(3), of the contract. Frederick admits that he retained some policyholder records and information, although he contends some of these documents were not within the scope of § 12.D(2) of the contract.

¶5 MSI commenced a declaratory judgment action against the Clements, seeking entry of judgment declaring that it was not required to pay Frederick his termination benefit. Frederick filed a counterclaim seeking judgment for the termination benefit, and both parties filed motions for summary judgment.

¶6 The trial court granted MSI's summary judgment motion and denied the Clements' motion. The court concluded that § 12.D(2) was not a restrictive

covenant subject to WIS. STAT. § 103.465.[1] Furthermore, the court stated Frederick's entitlement to the termination benefit was conditioned upon Frederick's return of all policyholder records belonging to MSI. Because Frederick acknowledged that not all policyholder records had been returned, he failed to meet that condition and was not entitled to the benefit.

Standard of Review

¶7 We review summary judgment without deference, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. We first ask if the complaint states a claim and then look at the answer to determine if it raises a material issue of fact or law. *See* ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). If the complaint and answer are sufficient, we turn to the moving party's affidavits to determine if they support a prima facie case for summary judgment. *See* ***id.*** at 232-33. If a prima facie case for summary judgment is found, we ask whether the opposing party's affidavits present disputed material facts that entitle the opposing party to a trial. *See* ***id.*** at 233.

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

Discussion

¶8 The Clements first argue that § 12.D(2) is a restriction on post-employment activities, and thus it is invalid under WIS. STAT. § 103.465, which 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.

The trial court concluded that § 12.D(2) was not a restrictive covenant, stating that requiring the return of MSI documents did not impose an unreasonable restraint contrary to § 103.465. The interpretation of a statute and its application to a set of facts are questions of law we review without deference. ***Reyes v. Greatway Ins. Co.***, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999).

¶9 We agree with the trial court that the contract language was not a restrictive covenant. To begin, § 12.D(2) does not mention any post-employment restrictions on the Clements' future employment. They rely on ***Heyde Cos. v. Dove Healthcare, LLC***, 2002 WI 131, ¶13, 258 Wis. 2d 28, 654 N.W.2d 830, and similar cases, where the supreme court noted: "This court has recognized that [WIS. STAT.] § 103.465 essentially deals with restraint of trade and has held that the statute applies regardless of whether a restriction is labeled a 'non-disclosure' provision or a 'covenant not to compete.'" However, the Clements omitted the immediately preceding sentence where the ***Heyde*** court noted: "However, the explicit purpose of § 103.465, as plainly stated in the statute, is to invalidate

covenants that impose unreasonable restraints on employees." ***Id.*** Thus, ***Heyde*** and similar cases were dealing with the restraint of competition or the restraint of trade. No case law supports the Clements' argument that it is an improper restraint of competition or trade to contractually guard a party's business records entrusted to its agents and to protect the privacy rights of its customers within those records.

¶10 The Clements argue that the statute includes any contractual provision that limits post-termination activities. However, we do not agree that the statute can be read to apply this broadly. WISCONSIN STAT. § 103.465 is entitled "Restrictive covenants in employment contracts." The statute's public policy foundation is that an employer should not be able to limit the mobility of employees with a restrictive covenant. "[T]he fundamental right of a person to make choices about his or her own employment is well-established." ***Heyde***, 258 Wis. 2d 28, ¶22. Compliance with a contractual obligation to return all materials and records that already belong to MSI does not violate the public policy concerns favoring free trade and the mobility of employees. The Clements have not demonstrated that the contractual requirement that they return MSI's business records at the conclusion of their agency with MSI constituted an inappropriate restraint on commerce. Thus, § 103.465 does not invalidate § 12.D(2).

¶11 The Clements next argue that § 12.D, in its entirety, is a restrictive covenant, and this section is illegal and unenforceable because it does not comply with WIS. STAT. § 103.465. In other words, MSI cannot sever § 12.D(2) from the rest of § 12.

¶12 We conclude that § 12.D(2) is severable from the rest of § 12. It is noteworthy that the contract contained a severability clause. In ***Panzer v. Doyle***, 2004 WI 52, ¶258, 271 Wis. 2d 295, 680 N.W.2d 666, the supreme court held:

> When a contract contains a severability clause, that clause, while not controlling is entitled to great weight in determining whether valid portions can stand separate from any invalid portion. Whether a provision is severable from the remainder of the contract is largely a question of intent, with a presumption in favor of severability. (Footnotes omitted).

Further, Wisconsin has long accepted that a portion of a contract may be severable, despite the fact that other portions may be illegal. ***Schara v. Thiede***, 58 Wis. 2d 489, 495, 206 N.W.2d 129 (1973).

¶13 The Clements rely in large part on ***Mutual Serv. Cas. Ins. Co. v. Brass***, 2001 WI App 92, 242 Wis. 2d 733, 625 N.W.2d 648, to support their assertion that the provision at issue here is not severable. Their reliance is misplaced. In ***Brass***, we noted that the rationale for WIS. STAT. § 103.465 is to promote the "mobility of workers." ***Id.***, ¶6. We stated that the restrictive covenants in ***Brass*** were indivisible because they "unreasonably dampen[ed] the economic interests of Brass to earn a living." ***Id.***, ¶16. In other words, the restrictive covenants in ***Brass*** restricted Brass's economic mobility, specifically the type of clause § 103.465 proscribes. We concluded, "So long as a departing employee takes with him or her no more than his or her experience and intellectual development that has ensued while being trained by another, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse." ***Id.***, ¶17. Thus, the indivisible covenants in ***Brass***, which limited Brass's ability to freely seek employment, are distinguishable from § 12.D(2), which seeks to retain documents provided to the Clements in the course of their employment.

¶14 The Clements contend that MSI is attempting to make the same argument in favor of divisibility rejected in ***Streiff v. American Fam. Mut. Ins. Co.***, 118 Wis. 2d 602, 348 N.W.2d 505 (1984). However, the contract provisions differ greatly in each case. The court concluded in ***Streiff*** that because both provisions at issue in that case were restrictive covenants under WIS. STAT. § 103.465, if either of the covenants were invalid, neither could be enforced. ***Id.*** at 614-15. This differs from the present case where § 12.D(2) is not a restrictive covenant under § 103.465. Thus, ***Streiff*** is inapplicable.

¶15 The Clements contend § 12.D(2) is unconscionable,[2] and thus unenforceable because it is contrary to the public policy of the state as set forth in WIS. ADMIN. CODE. § INS 6.61(17) (Jan. 2002). That section ensures that insurers and their agents retain records so such records can be made available to the insurance commissioner if necessary within three years after termination.

¶16 Because MSI never relinquished ownership of or legal responsibility for the insurance records, we are not persuaded by this argument. The trial court implicitly rejected the claim that the Clements retained the records at issue to satisfy WIS. ADMIN. CODE. § INS 6.61(17). The first paragraph of the contract stated that any documents provided to the Clements by MSI remained the property of MSI. Thus, it was clear that MSI was not transferring its obligations under § INS 6.61(17) to the Clements.

[2] Alternatively, the Clements argue § 12.D(2) is a forfeiture or penalty clause which is unreasonable as a matter of law. The test for the validity of a stipulated damages clause "is ultimately a question of reasonableness, a legal question that is heavily influenced by all the facts and circumstances of the particular case." ***Putnam v. Time Warner Cable***, 2002 WI 108, ¶27, 255 Wis. 2d 447, 649 N.W.2d 626. We conclude that a clause requiring the return of company property prior to the payment of a termination benefit is reasonable particularly when considering evidence that MSI has been damaged.

¶17 The Clements also argue "MSI's obligation to pay Frederick termination compensation was contractual, and was not conditioned upon return of all policyholder records." More specifically, the Clements contend that even if § 12.D(2) is enforceable, "Frederick's entitlement to receive that termination compensation was fixed and vested as of the date the contract was terminated."

¶18 We reject this argument because the contractual terms are clear. Our goal in contract interpretation is to determine and give effect to the parties' intentions. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. When the language of a contract is unambiguous, we apply its literal meaning. ***Id.*** Public policy favors freedom of contract. ***Gulmire v. St. Paul Fire & Marine Ins. Co.***, 2004 WI App 18, ¶18, 269 Wis. 2d 501, 674 N.W.2d 629.

¶19 The parties' intent to require the return of all records before the termination benefit was to be paid is apparent. Section 12.D(2) requires Frederick to return within ten days of termination all materials, records, and supplies furnished to him by MSI. Frederick's failure to return these items resulted in the loss of his termination benefit pursuant to the contract. Despite the Clements' arguments, the contract is unambiguous on this issue.

By the Court.—Judgment affirmed.

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