COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP805 **Cir. Ct. No. 2006CV1277**

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

BENCHMARK MEDICAL HOLDINGS, INC. AND WISCONSIN PROSTHETICS & ORTHOTICS, INC.,

PLAINTIFFS-APPELLANTS,

V.

PERRY ALGER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 VERGERONT, J. Wisconsin Prosthetics & Orthotics, Inc.[1] (WPO) seeks to enforce a noncompete provision in an employment agreement against Perry Alger, a former employee. WPO appeals the circuit court order holding the agreement void and unenforceable for noncompliance with WIS. STAT. § 103.465[2] and granting summary judgment in Alger's favor.

¶2 We conclude that under ***Mutual Service Casualty Insurance Co. v. Brass***, 2001 WI App. 92, 242 Wis. 2d 733, 625 N.W.2d 648, the noncompete provision is overbroad and therefore void and unenforceable. Accordingly, we affirm.

BACKGROUND

¶3 The relevant facts for purposes of this appeal are not disputed. WPO is in the business of producing and servicing prosthetics and orthotics and has offices in Green Bay, Sheboygan, and Menasha. Orthotics as relevant to this case are body braces prescribed by a physician. In October 1999, WPO hired Alger to work as its only orthotist in its Menasha office. An orthotist is the technician who fabricates and fits patients with the braces. As a condition of his employment with WPO, Alger signed a "Non-Competition and Non-Disclosure Agreement."

¶4 In June 2006, Alger resigned his employment with WPO and began working as an orthotist with Great Lakes Orthotics and Prosthetics, located fifteen

[1] Wisconsin Prosthetics & Orthotics, Inc. is the wholly owned subsidiary of Benchmark Medical Holdings, Inc., which is also a plaintiff in this action. However, we refer only to WPO unless it is necessary to separately refer to Benchmark.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

miles from WPO's Menasha office.[3] WPO initiated this action, contending that Alger's employment with Great Lakes Orthotics breached the noncompetition and nondisclosure agreement and seeking injunctive and monetary relief.

¶5 Both parties filed motions for summary judgment. WPO's argument was limited to the noncompete provision; it did not pursue its claim that Alger breached the nondisclosure provision. WPO's position was that the restrictions in the noncompete provision were reasonably necessary to protect its interests and were therefore valid under WIS. STAT. § 103.465, and the reasonableness of the nondisclosure provision was not material to its motion. Alger countered that both the noncompete provision and the nondisclosure provision were unreasonable and therefore both were void and unenforceable. He also argued that case law did not permit enforcement of the noncompete provision if the nondisclosure provision was unreasonable.

¶6 The circuit court granted Alger's motion and dismissed the complaint. The court concluded that the noncompete and nondisclosure provisions were indivisible under ***Streiff v. American Family Mutual Insurance, Co.***, 118 Wis. 2d 602, 612, 348 N.W.2d 505 (1984), both had to be analyzed as

[3] The affidavit of WPO's president avers that it had an agreement with Administaff Companies, Inc. from March 2000 to April 2006 under which Administaff managed administrative functions and improved employee benefits; this did not affect its supervision of Alger and its full responsibility of the operations of the corporation; after its merger with Benchmark (see footnote 1) in April 2006, nothing changed in its operations; and Alger resigned in June 2006. In his affidavit, Alger refers to being "terminated" by Administaff Companies, Inc. in April 2006 and "thereafter" becoming an employee of Benchmark. His affidavit does not address when he left Benchmark or WPO or the circumstances. Because neither party on appeal argues that the precise relationships between Alger and Administaff or Alger and Benchmark matter to the issues raised on this appeal, we conclude any disputes between WPO and Alger over his relationship with these entities are not material, and we treat it as undisputed that Alger was employed by WPO. Because Alger does not dispute that he resigned in June 2006, we treat that as undisputed as well.

restrictions on competition, the nondisclosure provision was unreasonable because it contained no time limit or territorial restriction, and therefore both were void and unenforceable.[4]

DISCUSSION

¶7 WPO contends that the circuit court erred in granting summary judgment in favor of Alger, because, even if the nondisclosure provision is unreasonable, the noncompete provision is divisible from the nondisclosure provision and is enforceable. It is enforceable, WPO asserts, because it is reasonably necessary to protect its legitimate interests in maintaining its source of referrals from its business, the time and territory restrictions are reasonable, and it is neither oppressive to Alger nor against public policy. In identifying its legitimate interests, WPO relies on the affidavit of its president who avers that the vast majority of its business comes from area physician and clinic referrals, Alger

[4] In ***Streiff v. American Family Mutual Insurance, Co.***, 118 Wis. 2d 602, 348 N.W.2d 505 (1984), the provisions at issue were: one (5i(1)) that provided for extended earnings after termination if the employee insurance agent had complied with all the terms of the employment agreement; another (5(h)) that restricted the employee from soliciting and servicing policyholders and, for one year after termination within a specified geographic range, from inducing any policyholder to replace or cancel the employer's policy; another (5i(3)) that provided for a forfeiture of all rights to extended earnings if the employee failed to comply with all the provisions of the agreement, particularly 5(h); and another (5i(4)) that provided for a forfeiture of all rights to extended earnings if, while receiving extended earnings, the employee performed services in certain capacities for other insurers in any state in which the employer operated. ***Id.*** at 606-07, 613. The court rejected the argument that these provisions could be read separately, so that 5(h) was a condition precedent to receipt of any extended earnings and (5i) applied only after payment of the extended earnings had begun, thus permitting enforcement of (5(h)) regardless of the validity of (5i(4)). ***Id.*** at 611. The court concluded that (5h) and (5i) did were not "mutually exclusive, independent provisions that [came] into play in totally different fact situation so that the restraints are divisible," but instead, they had to be read together and both applied to the employee on the facts of the case. ***Id.*** at 612. "When read together, sections 5h and 5i place substantially similar restraints on [the employee] vis-à-vis [his employer] and make him subject to forfeiture of extended the earnings if he violates any of the restraints." ***Id.***

was encouraged to and did develop special relationships with the referring physicians and clinics while employed by WPO, and he was the only WPO employee who had any contact with physicians and clinics. WPO contends that WPO has a legitimate interest in protecting these referring sources from competition from Alger.

¶8 Alger responds that the circuit court properly concluded that both provisions are indivisible and the unreasonableness of the nondisclosure provision invalidates the noncompete provision. He also disputes that the noncompete agreement, when considered on its own, is valid.

¶9 We do not address the issue whether the two provisions are indivisible, because we conclude the noncompete provision is invalid on its own.[5]

[5] Alger makes the additional argument that the issue of the indivisibility of the two provisions is not properly before this court because WPO did not raise it in its initial summary judgment motion. Although we are not deciding the merits of the indivisibility issue, we clarify for the parties that there is no procedural impediment to our doing so. WPO did not raise the lack of indivisibility in its initial brief, but it was not obligated to do so. Its position was, simply, that the noncompete provision was valid and Alger breached it. In Alger's responsive brief he raised the issue of indivisibility as a defense, arguing that the unreasonableness of the nondisclosure provision made the entire agreement void. WPO disputed that proposition in its reply brief, asserting that the nondisclosure provision was immaterial to the enforceability of the noncompete provision. In response, Alger's attorney sent a letter to the court elaborating on his indivisibility position. The court took up this issue and decided it in Alger's favor. There is no merit to Alger's contention that he did not have a chance to fully develop his position on the issue in the circuit court; and, obviously, he has the opportunity to fully present his position on appeal, which he has done.

However, because our review is de novo, we need not decide the indivisibility issue if another issue is dispositive. *See* ***Doe v. General Motors Acceptance Corp.***, 2001 WI App 1999, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7 (we may affirm the circuit court's grant of summary judgment on a different issue, even if the circuit court did not address it). As noted above, we conclude the issue of the validity of the noncompete, when considered alone, is dispositive. This, too, was an issue that both parties briefed below, although the circuit court did not decide it, and they have both briefed it on appeal.

¶10 We review a grant of summary judgment by applying the same methodology as the circuit court and our review is de novo. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. When as here, there are no genuine disputes of material fact, the question is which party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).

¶11 The issue of law presented on this appeal involves the construction and application of WIS. STAT. §103.465, in light of existing case law, to the undisputed facts. Section § 103.465 provides:

> 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.

¶12 This statute expresses a strong public policy against the enforcement of unreasonable trade restraints on employees. ***Tatge v. Chambers & Owen, Inc.***, 219 Wis. 2d 99, 114-15, 579 N.W.2d 217 (1998). In order to be enforceable, contract provisions governed by this statute must: (1) be necessary to protect the employer; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy. ***Heyde Cos., Inc. v. Dove Healthcare, LLC***, 2002 WI 131, ¶16, 258 Wis. 2d 28, 654 N.W.2d 830 (citations omitted). In addition, the following canons of construction are applied to restrictive covenants: (1) they 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.***

¶13 The noncompete provision at issue here states in relevant part:

> 2. Covenant not to compete. Employee agrees that during the term of this employment with the Company, he will devote substantially all of his working time and best efforts to that employment.
>
> In addition, the Employee agrees that during the term of this employment of the Company and for a period of twelve (12) months thereafter if the Employee voluntarily terminates his employment or has his employment terminated by the Company for just cause and within a twenty-five (25) mile radius of the Company location at which the employee is principally employed, he will not directly compete with the Company by engaging in any of the following acts, which actions shall be considered violations of this Agreement.
>
> a. Employee shall not have any interest as a partner, proprietor, owner, stockholder, principal, agent, consultant, director or officer in any enterprise in competition with the business or the Company, other than ownership of securities of a publicly held corporation of which employee owns no more than 1% of any class of outstanding class securities.
>
> b. Employee shall not, within the geographical limitations set forth above and for the period of one (1) year, *become employed in any business or undertaking which competes in any manner with that of the Company*, nor will, during that period, render any services to any person, firm or corporation any information concerning the business, products, prices, customers, customer lists, or affairs of company except when and as requested to do in and about the performance of his duties under his employment.

(Emphasis added.)

¶14 Thus under clause (b) Alger was prohibited, for one year and within a twenty-five-mile radius of the location where he had worked, from becoming

"employed in any business or undertaking which competes…."[6] Because there is no limitation on the capacity in which Alger may be employed, he is restricted from *any* employment in a business that competes with WPO regardless of whether the new position is one in which Alger would utilize the physician and clinic contacts he developed at WPO. Alger argues that a prohibition on employment in any capacity with a competitor is broader than reasonably necessary to protect WPO's legitimate interests in the referrals that Alger had contact with, and the noncompete is therefore overbroad under ***Brass***.[7]

¶15 In ***Brass*** we considered a provision that was similar in that it prohibited an employee from being employed in any capacity, post-termination, by a particular competitor. The employee there had been employed by an insurance company as an insurance agent and the clause provided that, following termination, he would not "engage in or be licensed as an Agent … or in any way be connected with the property, casualty, health or life insurance business as a representative or employee of the American National Ins. Co … within a period of three years from the date of … termination…." ***Brass***, 242 Wis. 2d 733, ¶8. We stated that this clause

> prohibits [the employee] from accepting *any type* of employment with American National. This indicates, for example, that [he] could not work for American National as a claims adjuster or even as a janitor. It is unreasonable for [his prior employer] to prohibit [him] from holding *any*

[6] We observe that the phrase following "nor" in clause (b) does not read coherently because there appears to be some missing words between "corporation" and "any information." However, we need not resolve the meaning of this restriction because we are concerned with the restriction preceding "nor."

[7] Alger also argues that the noncompete clause, when considered on its own, is unreasonable for other reasons, but it is not necessary for us to address these.

> *position* at American National. [This provision] in its overbreadth, fails….

Id., ¶15.

¶16 WPO does not directly address Alger's argument based on ***Brass***; indeed, WPO does not discuss ***Brass*** in its reply brief. It asserts in reply that

> the non-compete does not seek to define its competitors as broadly as Alger suggests. WPO is merely seeking to enjoin Alger from directly competing with its legitimate business interests by creating a company which provides nearly identical services to that of WPO, serving the very same referral sources he developed through employment at WPO.

However, WPO does not explain how the language of the noncompete provision means something other than a prohibition on employment in any capacity with a competitor.

¶17 It appears that WPO's position is that, despite the broad wording of the activity proscribed in clause (b), the noncompete provision is valid because Alger's actual conduct would violate a narrower restriction that would be reasonably necessary to protect its legitimate business interests. However, that approach is similar to the court's approach in ***Fullerton Lumber Co. v. Torborg***, 270 Wis. 133, 70 N.W.2d 585, where the court concluded that a ten-year restriction on the specified activity was unreasonable, but a shorter period would be reasonable and enforceable; the court ultimately determined that a three-year restraint was reasonable and enforceable. *See also* ***Fullerton Lumber Co. v. Torborg***, 274 Wis. 478, 80 N.W.2d 461 (1957). WISCONSIN STAT. § 103.465 was passed in response to the ***Fullerton*** decision and was proposed by a legislator who was critical of the decision. As the court in ***Streiff*** explained:

> The legislator wanted a restraint containing overly broad and invalid provisions to be struck down in its entirety; he

> apparently did not want the court to give effect to an unreasonable restraint to the extent it might be reasonable. The objection to the "Torberg" [sic] practice, as the legislator noted, is that it tends to encourage employers possessing bargaining power superior to that of the employees to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full.

118 Wis. 2d at 608-09 (citation omitted).

¶18 The last sentence of WIS. STAT. § 103.465 plainly expresses this intent: "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 as would be a reasonable restraint." Thus, in deciding whether a noncompete covenant is enforceable, we do not first inquire what the employee did and whether the employer could reasonably restrict that conduct. Instead, we focus on the noncompete covenant and first determine whether it is enforceable under § 103.465. That inquiry depends upon facts such as the nature of the employer's business and the nature of the employee's position with the employer. For example, in ***Brass*** it was undisputed that the employee immediately upon termination began working for American National as an insurance agent and proceeded to contact the customers of its former employer, 242 Wis. 2d 733, ¶2; but our analysis focused on the restrictions in the contract. ***Id.***, ¶¶7-16. We concluded the restriction quoted in ¶15, *supra*, was overbroad because it prohibited any type of employment with American National, specifically mentioning positions other than that of agent. ***Id.***, ¶15. It is only after a determination that the noncompete covenant is enforceable that we examine the employee's conduct that allegedly constituted the breach to determine if there was a breach.

¶19 WPO may also be arguing that the language of the noncompete did not need to be more specific because it was obvious that Alger would not be employed by any competitive business except to work as an orthotics technician as he had done at WPO. However, we rejected a similar argument in ***Geocaris v. Surgical Consultants, Ltd.***, 100 Wis. 2d 387, 302 N.W.2d 76 (Ct. App. 1981). There we concluded that a restrictive covenant prohibiting a surgeon from practicing as a physician in a specified territory for nine months following termination of his employment with a surgical practice was not reasonably necessary because it was broader than necessary to protect the surgery practice. ***Id.*** at 389. We stated:

> We reject the trial court's conclusion that the restriction was reasonable because [the employee] was not likely to practice medicine in any capacity other than a surgeon. Although this fact may render immaterial the excessive aspect of the restriction, it is not material to the issue of whether the restriction was reasonably necessary for [the employer's] protection.

Id.

¶20 In summary, although the protection of referral contacts has been recognized as a legitimate interest for purposes of a restraint on competition by a an employee, the employer must establish that the restrictive covenant imposes a restraint no greater than reasonably necessary. ***Id.*** at 388-89. Based on the undisputed facts, we conclude WPO has not established that restricting employment in any capacity with a competitor is reasonably necessary to protect its legitimate interest in its physician and clinic referral contacts for orthotics. Accordingly, we conclude the circuit court properly granted summary judgment in favor of Alger.

By the Court.—Judgment and order affirmed.

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