COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1445 **Cir. Ct. No. 2006CV2060**

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

ROBERT DAVISON, M.D.,

PLAINTIFF-RESPONDENT,

V.

BAY AREA NUCLEAR MEDICINE, S.C. AND ROBERT MEREDITH, M.D.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bay Area Nuclear Medicine, S.C. ("BANM") appeals a summary judgment granted to Dr. Robert Davison after the circuit court determined that a covenant not to compete in Davison's employment contract was

unenforceable. BANM contends the circuit court misapplied the law and that material facts are in dispute.[1] We disagree and affirm the summary judgment.

BACKGROUND

¶2 In 2003, Davison was hired by BANM to practice nuclear medicine and perform thyroid and positron emission tomography services. Davison's employment contract included a restrictive covenant that stated in part:

> [F]or a period of one year after the termination of Physician's employment by Physician or by BANM, Physician will not engage in the practice of Physician's Specialty, acting individually or through any partnership, corporation, or other entity, at any location within 35 miles of BANM's location. For the purpose of [this section], the practice of the specialty of nuclear medicine, thyroid and PET services shall include the provision of patient care in any setting, inpatient, outpatient, and/or ambulatory care. Physician also agrees to relinquish all privileges at St. Vincent's Hospital if this agreement or employment with BANM is terminated.

¶3 BANM was located inside St. Vincent Hospital. While employed at BANM, Davison only practiced at St. Vincent Hospital, which provided 99% of BANM's patients. Pursuant to a contract between BANM and St. Vincent, BANM received all of St. Vincent's nuclear medicine referrals.

¶4 Around August 1, 2006, St. Vincent terminated its contract with BANM. Green Bay Radiology, S.C., replaced BANM as St. Vincent's exclusive provider of nuclear medicine services. Since the termination of its contract with St. Vincent, BANM has not established a nuclear medicine practice with any other

[1] While BANM contends that material facts are in dispute, it does not identify any disputed material facts in its argument.

hospital. Further, having lost its primary source of business, BANM terminated Davison's employment.

¶5 Davison sought alternative employment and received an offer from Green Bay Radiology, contingent upon Davison becoming free of any restrictive contract provisions that would interfere with the employment. Davison approached BANM about the restrictive covenants, but BANM refused to release him.

¶6 Davison sued BANM and its sole principal, Dr. Robert Meredith, seeking a declaration that the restrictive covenants were unenforceable. The circuit court granted summary judgment to Davison. The court concluded that the provision requiring Davison to relinquish all privileges at St. Vincent Hospital did not have a reasonable time limitation, and the restriction prohibiting him from practicing within a thirty-five-mile radius of BANM's location was overly broad and not reasonably necessary. The court further concluded that BANM did not have a protectable interest justifying enforcement of the covenant.

DISCUSSION

¶7 We review grants of summary judgment de novo, applying the same methodology as the circuit court. ***Park Bancorp., Inc. v. Sletteland***, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.[2]

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

¶8 WISCONSIN STAT. § 103.465 addresses restrictive covenants in employment contracts:

> 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 employer has the burden of proving that a restriction is reasonably necessary. ***Geocaris v. Surgical Consultants, Ltd.***, 100 Wis. 2d 387, 388, 302 N.W.2d 76 (Ct. App. 1981). However, whether a restriction is ultimately reasonable in light of the facts is a question of law. ***Id.*** Courts assess reasonableness considering the totality of the circumstances. ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 471, 309 N.W.2d 125 (Ct. App. 1981).

¶9 To be reasonably necessary, the employer must have a protectable interest justifying imposition of the restriction. ***Id.*** An employer is not entitled to be protected against legitimate and ordinary competition; instead, there must be special facts and circumstances that render the restrictive covenant reasonably necessary for the protection of the employer's business. ***Id.*** To enforce a restraint, the employee must present a substantial risk to the employer's relationships with its customers or to the security of confidential business information. ***Id.***

¶10 The following canons of construction apply to restrictive covenants in employment contracts: (1) restrictive 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. ***Wausau Med. Ctr., S.C. v. Asplund***, 182 Wis. 2d 274, 281, 514 N.W.2d 34 (Ct. App. 1994).

¶11 From the undisputed facts, we conclude that BANM does not have a protectable interest justifying enforcement of the restrictive covenant and the covenant is therefore not reasonably necessary to protect BANM.[3] As a result, the restrictive covenant is void and unenforceable pursuant to WIS. STAT. § 103.465.

¶12 BANM does not dispute that, upon the termination of its contract with St. Vincent, it no longer had a protectable interest. Instead, BANM argues that it is irrelevant whether it has a protectable interest now, asserting the relevant question is whether it had a protectable interest at the time the contract was executed. In support of this position, BANM relies upon our supreme court's decision in ***Farm Credit Services v. Wysocki***, 2001 WI 51, 243 Wis. 2d 305, 627 N.W.2d 444. Specifically, BANM appears to rely on the ***Wysocki*** court's following statement regarding covenants not to compete: "The standard rules of contract interpretation apply: the primary goal in contract interpretation is to determine and give effect to the parties' intention at the time the contract was made." *See* ***id.***, ¶12.

¶13 However, BANM takes the language from ***Wysocki*** out of context and misapplies it here. In ***Wysocki***, the court did not reach the issue of whether

[3] Because we conclude that BANM had no protectable interest, we need not evaluate the geographic restriction or the provision requiring the relinquishment of Davison's privileges at St. Vincent. However, given the undisputed facts, we believe both are overly broad.

the restraint at issue was reasonably necessary. ***Id.***, ¶¶1, 16. Instead, the court addressed whether the restriction was "invalid per se," based solely upon its language and the fact that the employer had subsequently merged with another company, thereby increasing the effective scope of the restriction. ***Id.***, ¶¶13-15. Thus, the ***Wysocki*** decision does not state that courts should ignore circumstances following the execution of an employment contract when deciding whether a restriction is reasonably necessary. In fact, the ***Wysocki*** court explicitly stated the opposite: "[T]he circuit court must determine whether the covenant not to compete was reasonable at the time [the employer] alleged [the employee] violated the agreement." ***Id.***, ¶10 n.1.

¶14 Thus, the facts following the execution of the employment contract are not to be ignored. Because BANM concedes it had no protectable interest in light of these facts, the restrictive covenant is not reasonably necessary for the protection of BANM and is unenforceable. *See* ***Fields***, 103 Wis. 2d at 471.

By the Court.—Judgment affirmed.

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