COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0744 **Cir. Ct. No. 02CV001012**

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

OVERHEAD MATERIAL HANDLING, INC.,

PLAINTIFF-APPELLANT,

V.

THOMAS POTRATZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Overhead Material Handling, Inc. appeals from an order dismissing its complaint alleging that former employee, Thomas Potratz, is engaged in employment which violates a covenant not to compete. Overhead argues that the circuit court could not determine the enforceability of the covenant without consideration of evidentiary material submitted by way of a motion for

summary judgment or at trial. We conclude that the circuit court properly determined that as a matter of law the covenant is unenforceable. We affirm the order of dismissal.

¶2 Potratz began his employment with Overhead in May 1992. Overhead is engaged in the sale, maintenance and repair of overhead cranes, hoists and lifting equipment. Potratz served as the manager of the parts department. He signed an employment agreement which included the following covenant not to compete:

> In addition to and independent of all of the other provisions hereof, if his employment is terminated for any reason, Employee agrees that from the date of termination, for a period of time equal to the length of Employee's employment with the Corporation, but not less than one (1) year and not more than two (2) years:
>
> (a) Employee shall not, directly or indirectly, compete with the Corporation or work for a competitor of the Corporation in the following counties in the State of Wisconsin: Milwaukee, Waukesha, Racine, Kenosha, Washington, Ozaukee, Brown, Winnebago, Outagamie and Marathon; and
>
> (b) Employee shall not, directly or indirectly, sell to, contact or solicit any customer of the Corporation, regardless of the geographic location of such customer, with respect to any part, product or service which is competitive with a part, product or service provided by the Corporation. For purposes of this provision, a customer of the Corporation is any person, firm, corporation or other entity to which the Corporation has sold a part, product or service during the two (2) years prior to the termination, or any person, firm, corporation or other entity which Employee has contacted, or solicited, directly or indirectly, on behalf of the Corporation during the two (2) years prior to termination.

¶3 Potratz's employment terminated in January 2002. He went to work for Morris Material Handling (MMH), a company based in Milwaukee and Waukesha counties and a competitor of Overhead's in supplying parts for the repair and maintenance of certain cranes.

¶4 Overhead commenced this action on April 25, 2002, and tried unsuccessfully to obtain a temporary restraining order to prohibit Potratz's continued employment at MMH. With the filing of his answer, Potratz moved to dismiss the action. A subsequently filed motion for judgment on the pleadings was granted when Overhead failed to appear at the hearing. However, the judgment was reopened and a hearing held on Potratz's first filed motion to dismiss. The circuit court granted Potratz's motion to dismiss.

¶5 Covenants not to compete are prima facie suspect; they must withstand close scrutiny to be adjudged reasonable and enforceable; they will not be construed to extend beyond their proper import or further than the language of the contract absolutely requires. ***Streiff v. Am. Family Mut. Ins. Co.***, 118 Wis. 2d 602, 610-11, 348 N.W.2d 505 (1984). This policy is codified in WIS. STAT. § 103.465 (2001-02).[1] To be enforceable five distinct inquiries must be satisfied:

[1] WISCONSIN STAT. § 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.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

"The covenant must (1) be necessary for the protection of the employer; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy." ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 470, 309 N.W.2d 125 (Ct. App. 1981) (citation omitted). Overhead argues that the circuit court cannot determine whether the covenant is reasonable without consideration of evidentiary proofs submitted by the employer as to its need for protection and the breadth of the employee's knowledge of customers or business decisions.[2]

¶6 We, like the circuit court, disagree. While the "very essence of what is reasonable involves the totality of the circumstances," ***Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981), that does not mean that in some circumstances a determination on any one of the five relevant inquiries cannot be made as a matter of law. *See* ***Behnke v. Hertz Corp.***, 70 Wis. 2d 818, 824, 235 N.W.2d 690 (1975) (covenant was void as a matter of law and question should not have been submitted to the jury). The issue is first one of contract construction. *See* ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶11, 243 Wis. 2d 305, 627 N.W.2d 444 ("we begin our analysis of this issue by scrutinizing the language of the covenant"). There is no reason why judgment on the pleadings cannot be considered and granted.

> A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents. We first examine the complaint to determine whether a

[2] It is clear that the circuit court dismissed the complaint based solely on the language of the covenant and the conclusion that the covenant is unenforceable. It declined to hear argument about the scope of Potratz's duties and knowledge of customer needs and pricing. Overhead contends that had the circuit court treated Potratz's motion as one for summary judgment, the affidavits it submitted would have required that the motion be denied because of a genuine issue of material fact on the question of reasonableness.

> claim has been stated. If so, we then look to the responsive pleading to ascertain whether a material factual issue exists. Whether judgment on the pleadings should be granted is a question of law that we review de novo.

Jares v. Ullrich, 2003 WI App 156, ¶8, ___ Wis. 2d ___, 667 N.W.2d 843, *review denied*, 2003 WI 140, ___ Wis. 2d ___, ___ N.W.2d ___ (Wis. Oct. 1, 2003) (No. 02-3100).

¶7 We first look at the covenant's requirement that Potratz "shall not … work for a competitor of the Corporation in the following counties in the State of Wisconsin …." This is similar to a provision struck down in ***Mutual Service Casualty Insurance Co. v. Brass***, 2001 WI App 92, ¶15, 242 Wis. 2d 733, 625 N.W.2d 648, because it prohibited the employee from accepting any type of employment with a competitor. A provision which prohibits an employee from accepting any type of employment with a competitor is overbroad and unreasonable. ***Id.*** This is true despite the apparent logic in Overhead's claim that Potratz would not seek or be hired by any competitor for any position other than a competing parts manager. *Cf.* ***Geocaris v. Surgical Consultants, Ltd.***, 100 Wis. 2d 387, 389, 302 N.W.2d 76 (Ct. App. 1981) (that the doctor was not likely to practice medicine in any field but his surgical specialty was not relevant to the issue of whether the overbroad covenant was reasonably necessary for the employer's protection).

¶8 The covenant also prohibits Potratz from directly or indirectly contacting or soliciting "any customer of the Corporation, regardless of geographic location of such customer, with respect to any part, product or service which is competitive with a part, product or service provided by the Corporation." The absence of a geographical limitation makes the provision overbroad. *See* ***Equity Enters., Inc. v. Milosch***, 2001 WI App 186, ¶15, 247 Wis. 2d 172, 633

N.W.2d 662 (that employer means to restrict terminated agents from employment opportunities in the insurance and securities industry throughout this country is unreasonable); ***Brass***, 242 Wis. 2d 733, ¶13 (provision that employee is to have nothing to do with any of employer's policyholders, known or unknown, in Wisconsin or anywhere else in the world is overbroad). Again, it does not matter that in fact Overhead's customers may only be found in the ten-county geographical limitation set forth in the other provision of the covenant. This portion of the covenant is not so limited.

¶9 The provision is also overbroad as a customer list limitation. Customer is defined as any person, firm, corporation or entity to whom, in the two years prior to termination of employment, Overhead has sold not just parts but any product or service. Thus, the customer "list" would potentially include entities unknown to Potratz because of sales or service outside his knowledge as parts manager.[3] Although a covenant need not use the employee's actual customer contacts as the limitation, *see* ***Rollins Burdick Hunter***, 101 Wis. 2d at 468, the covenant here fails to give any specific limitation making compliance knowingly possible. *Cf.* ***Equity Enters.***, 247 Wis. 2d 172, ¶15 n.4. The covenant is not enforceable because, as a matter of law, it fails to contain sufficiently restrictive language and, therefore, is harsh or oppressive as to the employee.

By the Court.—Order affirmed.

[3] The agreement also defines customer as any person, firm or corporation who Potratz contacted or solicited within two years of the termination of the employment. The two definitional phrases are stated in the disjunctive "or" and the limitation to persons or entities Potratz actually had contact with does not save the broader definition.

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