

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 03-3201

Cir. Ct. No. 03CV005235

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

THE HAYS BENEFITS GROUP OF WISCONSIN, LLC,

PLAINTIFF-APPELLANT,

v.

**PALMER & CAY OF WISCONSIN, LLC, ANTHONY P.
FIORETTI, GWEN M. HASSLINGER, GREG HUBLEY, AND
N. MELISSA TOBLER,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
MAXINE A. WHITE, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. The Hays Benefits Group of Wisconsin appeals a summary judgment order dismissing its breach-of-contract action against former

employees who it alleged had violated certain nonsolicitation agreements, and an interference-with-contract claim against their new employer. We affirm.

¶2 We first note that this court reviews summary judgment decisions *de novo*, applying the same method employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That method 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.

¶3 Shortly after four employees of Hays left the insurance brokerage firm to work at a competing firm, the competing firm acquired the account of Hays's single largest customer. At the time of his employment with Hays, one of the employees had signed an agreement providing:

- 5.2.2 During the term of this Agreement and for a period of eighteen (18) months from the date of Employee's voluntary termination or termination for Cause, Employee will not directly or indirectly solicit or accept business from any then current or former clients of HBGW, The Hays Group, Inc., or their affiliates.
- 5.2.3 During the term of this Agreement and for a period of eighteen (18) months from the date of Employee's termination, Employee shall not solicit or hire employees from HBGW, The Hays Group, Inc., or their affiliates.

The other three employees had signed agreements providing that they would not, during their employment or for eighteen months thereafter, "(a) solicit, divert, or take away Employer's customers; (b) attempt to cause any of the Employer's customers to refrain from patronizing the Employer; or (c) recruit or attempt to recruit or take away any employee of Employer, its subsidiaries and affiliates; (d) assist any other person or persons in any attempt to do any of the foregoing."

Hays filed suit seeking to enforce the nonsolicitation agreements, but the circuit court concluded that they were unenforceable as a matter of law. We agree.

¶4 WISCONSIN STAT. § 103.465 (2003-04)¹ provides:

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.

¶5 Hays first argues that WIS. STAT. § 103.465 applies only to noncompetition agreements, and that nonsolicitation agreements should be treated differently. However, in *Equity Enterprises, Inc. v. Milosch*, 2001 WI App 186, ¶¶2, 15, 247 Wis. 2d 172, 633 N.W.2d 662, we held that an employee's agreement not to solicit any of the employer's customers was void under § 103.465 because it did not contain any specified geographical territory. We see no significant distinction between the nonsolicitation clauses at issue here and the one in *Equity Enterprises* and, therefore, conclude that the territorial limitation requirement of the statute applies.

¶6 Hays next contends that this court in *Equity Enterprises* improperly ignored the supreme court's holding in *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 101 Wis. 2d 460, 466, 304 N.W.2d 752 (1981), that a territorial

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

restriction can be established not only by explicit geographical terms, but also by reference to “a particular group of forbidden customers or clients.” To the extent that Hays is arguing that we should overrule *Equity Enterprises* with respect to the need for an explicit geographic reference, we must reject the argument. This court cannot overrule a prior opinion.

¶7 To the extent that Hays is arguing that *Rollins* survives on that point because *Equity Enterprises* did not address it or could not overrule it, we are not persuaded that *Rollins* compels a different result here. We note that the agreements here applied to all customers of Hays and any of its affiliates, past and present, wherever they might be located in the world. Thus, the agreements would prohibit the former employees from contacting clients from branches and affiliates of Hays in other states and countries with whom the former employees would have had no contact whatsoever during their employment. This does not imply the same territorial limitation that, in *Rollins*, could be inferred from a much more specific list of actual customers. In other words, the agreements at issue here are so broad that they still represent an unreasonable and unenforceable restraint of trade, even if some implied territorial restriction based on more narrowly tailored customer lists might have been permissible under *Rollins*.

By the Court.—Order affirmed.

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

