COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2006

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. 2006AP501 **Cir. Ct. No. 2005CV222**

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

MILPRINT, INC.,

PLAINTIFF-RESPONDENT,

V.

RANDY L. FLYNN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Randy Flynn appeals an order enforcing his former employer's restrictive covenant on future employment and information disclosure. If any part of a restrictive covenant is unreasonable, the entire covenant is

unenforceable. WIS. STAT. § 103.465 (2003-04).[1] We conclude that the restrictive covenant here is unreasonably broad in parts, and we therefore reverse.

¶2 The respondent, Milprint, Inc., is a wholly owned subsidiary of Bemis, Inc., and manufactures flexible food packaging at a plant in Grant County. Alcan, Inc., also manufactures flexible food wrappers, and also has a plant in Grant County. Flynn was a Milprint employee from 1984 to 2005 and its plant manager from 1997 to 2005. In 2000 he signed a restrictive covenant with Bemis and "all Bemis' subsidiaries and affiliates."[2] In relevant parts it provided:

> Nondisclosure. I will not, during my employment, disclose or after termination thereof, use or disclose to any other person any trade secrets, processes, training manuals, lists or customers, clients, prospects, or other business contracts, or other confidential information, relating to Bemis, and I confirm that such information is the exclusive property of Bemis.
>
> Protection of Employer's Business. Whether or not I am employed in a sales capacity, I agree that during my tenure with Bemis and for a period of eighteen (18) months following termination of my employment with Bemis, whether voluntary or involuntary, I will not render services in the United States, directly or indirectly, to any Conflicting Organization in connection with the development, manufacture or sale of any Conflicting Product, nor will I manage, operate or participate in, or be employed, directly or indirectly, by any Conflicting Organization in connection with the development, manufacture or sale of any Conflicting Product.
>
> "Conflicting Product" means any product, process, system or service of any person or organization other than Bemis, in existence or under development which is the same as or

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

[2] For purposes of this appeal, we assume without deciding that Flynn was an employee of Bemis, as Milprint contends.

> similar to or competes with, or has a usage allied to a product, process, system or service which is in existence or under development at Bemis and upon which Employee worked (in either a sales or non-sales capacity) at any time during his/her employment by Bemis, or about which Employee acquired Confidential Information.
>
> "Confidential Information" means any trade secrets, plans, calculations, concepts, design sheets, design data, system design, computer programs, algorithms, software, firmware, hardware, manuals, drawings, processes, specifications, instructions, research, test procedures and results, equipment, identity and description of computerized records, customer lists, supplier identity, marketing and sales plans, financial information, costs, pricing information, and all other concepts or ideas, involving or reasonably related to the business or prospective business of Bemis….

The covenant provided that all terms would remain in effect until eighteen months after termination of Flynn's employment.

¶3 Flynn left Milprint in 2005 and began working in a comparable managerial position at the Grant County Alcan plant. This lawsuit represents Milprint's effort to enforce the restrictive covenant quoted above. Flynn's appeal seeks reversal of the trial court's order enforcing the restrictive covenant for eighteen months, which is currently stayed pending resolution of the appellate proceedings.

¶4 A restraint in a restrictive covenant is enforceable only if it is reasonably necessary to protect the employer, and any covenant imposing an unreasonable restraint is void and unenforceable. WIS. STAT. § 103.465. In determining whether the covenant meets this test courts must examine whether the covenant: (1) is necessary to protect the employer; (2) provides a reasonable time limit; (3) provides a reasonable territorial limit; (4) is not harsh or oppressive to the employee; and (5) is not contrary to public policy. ***Heyde Companies, Inc. v.***

Dove Healthcare, LLC, 2002 WI 131, ¶16, 258 Wis. 2d 28, 654 N.W.2d 830. In addition, courts should apply the following rules of construction: (1) covenants are *prima facie* suspect; (2) they are closely scrutinized; (3) they will not be construed to extend beyond their proper scope or further than absolutely necessary; and (4) they are construed in favor of the employee. ***Id.*** Whether a covenant is enforceable as reasonably necessary is a question of law, resolved with reference to the facts of the particular case. ***Wausau Medical Center, S.C. v. Asplund***, 182 Wis. 2d 274, 281, 514 N.W.2d 34 (Ct. App. 1994). The same rules govern enforceability of restrictive covenants whether the restriction is a non-competition provision or a non-disclosure provision. ***Tatge v. Chambers & Owen, Inc.***, 219 Wis. 2d 99, 111-12, 579 N.W.2d 217 (1998).

¶5 We conclude that the non-disclosure agreement in the covenant is unreasonable under WIS. STAT. § 103.465. It applies to not only specific and identifiable categories (such as trade secrets, specifications, test results and pricing information), but to "all other concepts or ideas" reasonably related to the business of Bemis. The agreement prevents disclosure of this broadly defined information to any person, not just to competitors. Consequently, Flynn could not reasonably be expected to know what he could or could not disclose about his knowledge and experience. For example, it places him in a position where he might not be able to answer the questions of a prospective employer regarding his past job experience, even if that employer is engaged in a business totally unrelated to Bemis's concerns. The provision is therefore unduly harsh and oppressive to Flynn. It is also contrary to public policy because it overly restricts Flynn's ability to use his knowledge and experience to find and maintain employment. It is far broader than necessary to protect the limited interest of Bemis in protecting itself from competitors gaining knowledge of specific aspects of its operations.

¶6 The non-compete provision of the covenant is also unreasonably broad. It bars Flynn's employment in *any* capacity with a competing business anywhere in the United States. The restriction effectively bars his employment in his only field of expertise and experience unless he leaves the country. Again, the provision is unduly harsh and oppressive to Flynn and violates the public policy to promote freedom of employment. *See* ***Heyde***, 258 Wis. 2d 28, ¶22 (recognizing the fundamental right of a person to make choices about his or her own employment). We conclude that, so long as Flynn does not disclose confidential information, it is not reasonably necessary to Bemis's interests to prevent Flynn from working for a competitor.

¶7 Our decision in favor of Flynn renders moot Milprint's claim to contractual attorney fees. On remand the trial court shall enter judgment dismissing Milprint's complaint.

By the Court.—Order reversed and cause remanded with directions.

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