COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP617 **Cir. Ct. No. 2006CV1268**

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

STAR DIRECT, INC. D/B/A STAR DISTRIBUTING,

PLAINTIFF-APPELLANT,

V.

EUGENE DAL PRA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: DANIEL T. DILLION, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 VERGERONT, J. Star Direct, Inc. appeals the summary judgment dismissing its claim against a former employee for breach of two noncompete clauses in an employment agreement. It contends the circuit court erred in

concluding that the clauses were void and unenforceable under WIS. STAT. § 103.465.[1]

¶2 We conclude, based on the undisputed facts, that one of the clauses is overbroad and therefore invalid and unenforceable under WIS. STAT. § 103.465. We also conclude that under ***Mutual Service Casualty Insurance Co. v. Brass***, 2001 WI App 92, 242 Wis. 2d 733, 625 N.W.2d 648, the two clauses are one indivisible covenant under WIS. STAT. § 103.465. Because they are one indivisible covenant, the invalidity of one clause renders the entire covenant—including the other clause—invalid and unenforceable under § 103.465. Accordingly, the circuit court properly entered summary judgment dismissing the complaint and we affirm.

BACKGROUND

¶3 For purposes of this opinion, the facts are undisputed. Star Direct, Inc., d/b/a Star Distributing (Star), distributes approximately thirty different product categories to approximately 800 convenience stores, service stations, truck stops, travel centers, and other retail outlets throughout Wisconsin, Illinois, Minnesota, North Dakota, and the Upper Peninsula of Michigan. The product categories include dietary products, toys, figurines, cigarette papers, lighters, and cameras. Star serves its customers by employing route sales associates, who call on customers and potential customers on a particular route.

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

¶4 In September 2002, Star purchased two routes from CB Distributors, and CB Distributors entered into a covenant not to compete regarding these routes. Eugene Dal Pra was employed by CB Distributors as a sales associate for one of those routes. Star hired Dal Pra and assigned him to approximately the same route he had at that time. Dal Pra signed an employment agreement that contained this provision:[2]

> D. **Non-Compete.** Independent of any obligation under any other Paragraph of this Contract, during the term of Employee's employment with Employer, Employee shall not, directly or indirectly, whether as an individual for his own account or for or with any other person, firm, corporation, partnership, joint venture, association, or other entity whatsoever, become engaged in the business of the Employer, that being the distribution of consumer products to service stations and/or convenience stores. *Further, for twenty-four (24) months, after termination of Employee's employment with Employer, Employee shall not interfere with, or endeavor to entice away from Employer any person, firm, corporation, partnership or entity of any kind whatsoever which is a customer of Employer or CB Distributors, or which was a customer of Employer or CB Distributors within a period of time of one year prior to the termination of Employee's employment with Employer, for which Employee performed services or otherwise dealt with on behalf of Employer or CB Distributors or relative to which Employee obtained special knowledge as a result of his position with Employer; and Employee shall not approach any such customer or past customer for any such purpose or knowingly cooperate with the taking of any such action by any other person, firm, corporation or entity of any kind.*
>
> Additionally, for a period of twenty-four (24) months after termination of Employee's employment with Employer, Employee shall not, directly or indirectly, whether as an individual for his own account or for or with

[2] Dal Pra contends that, because the agreement was signed by an entity other than Star, Star does not have standing to enforce the agreement. Because of our conclusion that the two clauses are unenforceable under WIS. STAT. § 103.465, we need not resolve this issue. For ease of reference we refer to Star as the employer throughout this opinion.

> any person, firm, corporation, partnership, joint-venture, association or other entity whatsoever, become engaged in any business which is substantially similar to or in competition with the business of the Employer, within a fifty (50) mile radius of Rockford, Illinois.

(Emphasis added.) We will refer to the italicized portion of the first paragraph as "the customer clause" and the second paragraph as the "business clause." The agreement also contained a confidentiality provision.

¶5 Dal Pra voluntarily terminated his employment with Star in August 2006. According to his deposition, Dal Pra then began his own business distributing general merchandise under the name Distributing Plus. In his new business Dal Pra calls on some of the same customers he called on within the last year of his employment with Star and sells some of the same products Star sold them.

¶6 Star filed this action alleging that Dal Pra breached the customer clause and the business clause. Both parties moved for summary judgment, with Star seeking summary judgment on the issues of Dal Pra's liability and Star's entitlement for injunctive relief, and Dal Pra seeking dismissal of the complaint on the ground the "Non-Compete" section was void and unenforceable under WIS. STAT. § 103.465.

¶7 The circuit court granted summary judgment in favor of Dal Pra and dismissed the complaint. The court ruled that both the customer clause and the business clause were vague and overbroad, were not reasonably necessary to protect Star, and were indivisible because they overlap. It also ruled that the confidentiality provision of the employment agreement was overbroad.

DISCUSSION

¶8 On appeal, Star contends that it is entitled to summary judgment because, based on the undisputed facts, both the customer clause and the business are enforceable and the confidentiality provision does not render them void. Dal Pra responds that the circuit court decided all issues correctly in his favor.

I. Standard of Review and Applicable Law

¶9 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. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶10 This appeal involves the construction and application of WIS. STAT. §103.465 in light of existing case law. 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.

¶11 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, a contract provision 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 Companies, Inc. v. Dove Healthcare, LLC***, 2002 WI 131, ¶16, 258 Wis. 2d 28, 38-39, 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.***

II. Business Clause

¶12 The business clause prohibits Dal Pra, for twenty-four months and within a fifty mile radius of Rockford, Illinois, from becoming "engaged in any business which is substantially similar to or in competition with the business of the Employer."

¶13 Star contends that this clause is reasonably necessary to protect its legitimate business interests because there is no dispute that most of the customers and prospective customers Dal Pra called on during his employment with Star and with CB Distributors were located within a fifty-mile radius of Rockford. Star asserts that the circuit court erred in accepting Dal Pra's argument that the phrase is overbroad because it prohibits Dal Pra from selling any products to convenience stores and gas stations. According to Star, the only reasonable construction of "engaging in any business which is substantially similar to or in competition with the business of the Employer" is that Dal Pra cannot sell to convenience stores and gas stations the same products that Star sells to those entities. Star asserts that "substantially similar" means "essentially the same" and that a business that

distributed products to convenience stores and gas stations that Star does not distribute would not be "substantially similar" and would not be "competitive."

¶14 Dal Pra responds that Star's construction is inconsistent with the language of the employment agreement. The first provision of the first section of the agreement, which is titled "Acknowledgments of The Parties," provides: "A. Employer is presently engaged in the business of the distribution of products to convenience stores, service stations, truck stops and travel centers." In addition, the first sentence of the noncompete provision, which addresses activity during the term of employment, states that the employee may not "become engaged in the business of the Employer, that being the distribution of consumer products to service stations and/or convenience stores." Dal Pra argues that nowhere in the agreement is the employer's business defined by the particular products it distributes and that such a limitation cannot be reasonably read into the business clause.[3] In Dal Pra's view, the business clause is broader than necessary to protect Star, because Star does not assert, and has made no showing, that it has a legitimate interest in preventing Dal Pra from selling products its does not sell to convenience stores, service stations, truck stops, and travel centers.

¶15 We agree with Dal Pra that it is not reasonable to ignore the description of the employer's business stated elsewhere in the contract when interpreting the meaning of "the business of the Employer" in the business clause, which has no description or definition of the term. The description in the

[3] Dal Pra also responds that "substantially similar" does not mean "the same." He asserts that the same business is a competitive business, while the disjunctive "or" plainly shows that "substantially similar" and "competitive" have different meanings. We need not resolve the parties' dispute on this point.

"Acknowledgments" section contains a very specific listing of the categories of customers to which Star distributes "products," but provides no detail on what the product or product categories are. The similar, though not identical description in the first sentence of the "Non-Compete" section also contains specific categories of customers[4] but no limitation on products other than "consumer." The only reasonable construction of these descriptions is that Star views its business as limited to particular categories of customers, but does not view it as limited to particular categories of products. When we then turn to the business clause, we find there is no indication in the language of that clause that Star intends the "business of the employer" to be construed more narrowly such that the products are limited to those Star distributes. Had Star, the drafter of this agreement, intended its "business" to have this narrower meaning in this clause, one would expect that Star would make *some* reference to the products or product categories it distributes.

¶16 We recognize that Star's president has submitted an affidavit in which he avers that

> neither of the covenants not to compete contained in Mr. Dal Pra's Employment Agreement preclude Mr. Dal Pra from distributing bread, beer, gasoline, or cigarettes to anyone, including customers Mr. Dal Pra serviced as an employee of Star Distributing. Moreover, I have never had any intent to preclude Mr. Dal Pra from engaging in such employment.

[4] Neither party attaches significance to the fact that the employment agreement uses the phrase "convenience stores, service stations, truck stops and travel centers" in the Acknowledgment Section and the phrase "service stations and/or convenience stores" in the first sentence of the noncompete provision.

However, the standard rules of contract interpretation apply in construing covenants that are governed by WIS. STAT. § 103.465. ***Farm Credit Servs. of N. Cent. Wisconsin v. Wysocki***, 2001 WI 51, ¶¶11-12, 243 Wis. 2d 305, 627 N.W.2d 444. Under standard principles of contract law we do not consider a party's intent unless we first conclude the contract is ambiguous. ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶12, 275 Wis. 2d 650, 686 N.W.2d 675. The intent of Star's president is not relevant to the determination of whether the meaning of the business clause is plain or ambiguous.

¶17 We conclude this employment agreement plainly prohibits Dal Pra, for twenty-four months from termination within a fifty-mile radius of Rockford, from engaging in a business that is "substantially similar" to that of the employer's business, that business being "the distribution of products to convenience stores, service stations, truck stops, and travel centers." This restriction plainly prohibits, for that period of time and within that area, Dal Pra from distributing to those categories of customers many products that Star does not distribute and that are not substantially similar to the products or product categories that Star does distribute. Star does not contend that this restriction is reasonably necessary to protect its business interests. Accordingly, based on the undisputed facts, we conclude the business clause is overbroad in scope and therefore invalid and unenforceable under WIS. STAT. § 103.465.

III. Divisibility of the Business Clause and the Customer Clause

¶18 The parties dispute whether the customer clause and the business clause are indivisible for purposes of applying WIS. STAT. § 103.465.[5] Under ***Streiff v. American Family Mutual Insurance Co.***, 118 Wis. 2d 602, 613-15, 348 N.W.2d 505 (1984), if clauses are indivisible they must be read as one covenant under § 103.465, and if one clause of a covenant is invalid, the entire covenant is invalid. Star asserts that the two clauses here are distinguishable from those held to be indivisible in ***Streiff***. Dal Pra responds that these clauses, like those in ***Streiff***, "restrict several similar types of activities and set forth a different time and geographical restraint for the restricted activity." ***Id***. at 612. We conclude that our application of ***Streiff*** in ***Brass*** compels the conclusion that the two clauses here are indivisible.

¶19 In ***Streiff*** there were four provisions at issue. The first, 5i(1), provided that, in order to receive extended earnings after termination, the employee insurance agent had to comply with all the terms of the employment agreement; the second, 5h, 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; the third, 5i(3), provided for a forfeiture of all rights to extended earnings "payable thereafter" if the employee failed to comply with all the provisions of the

[5] The parties also dispute whether the confidentiality clause is indivisible from the customer clause and the business clause. In ***Tatge v. Chambers & Owen, Inc.***, 219 Wis. 2d 99, 112, 579 N.W.2d 217 (1998), and ***Gary Van Zeeland Talent, Inc. v. Sandas***, 84 Wis. 2d 202, 218-20, 267 N.W.2d 242 (1978), the supreme court held that WIS. STAT. § 103.465 applied to the nondisclosure provisions in those agreements. Because of our conclusion that the customer clause and the business clause are indivisible, we need not address the confidentiality clause.

agreement, particularly 5h; and the fourth, 5i(4), provided for a forfeiture of all rights to extended earnings "payable thereafter" if, while receiving extended earnings, the employee performed services in certain capacities for other insurers in any state in which the employer operated. ***Id***., 605-06, 611-12. The employer had conceded that 5i(4) was unreasonable as to the territory described but contended that it could enforce 5h to deny the employer extended earnings. ***Id***. at 607.

¶20 This court ruled that 5h and 5i were "distinct provisions with separate factual bases to their operation": 5h was a condition precedent to the right to recover extended earnings and 5i was both a condition subsequent to the right to recover extended earnings and a condition precedent to their forfeiture. Therefore, we concluded, because 5h when considered alone was valid, it could be enforced without inquiry into the validity of 5i(4). ***Streiff v. American Family Mut. Ins. Co.***, 114 Wis. 2d 63, 67, 337 N.W.2d 186 (Ct. App. 1983).

¶21 The supreme court disagreed with this court and concluded that 5h and 5i were not "mutually exclusive, independent provisions that [came] into play in totally different fact situation so that the restraints are divisible." Instead, they had to be read together and both applied to the employee on the facts of the case. ***Streiff***, 118 Wis. 2d 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***. "The clauses of the covenant are intertwined," the supreme court concluded, "and the covenant must be viewed in its entirety, not as divisible parts." ***Id***. at 613.

¶22 Because the clauses in ***Streiff*** were one indivisible covenant, the supreme court concluded that the invalidity of 5i(4) rendered the entire covenant unenforceable, even that part of the covenant that would be a reasonable restraint. *See* ***id***. at 614-15.

¶23 In ***Brass***, we applied ***Streiff*** to three clauses in an insurance agent's employment contract. One clause provided that the company's obligation to commence and continue termination compensation was subject to the condition that the employee not induce policyholders to cancel or replace insurance contracts they had with the company or furnish any person with the name of any policyholder of the company so as to facilitate solicitation of that policyholder. ***Brass***, 242 Wis. 2d 733, ¶7. A second clause provided that, for a period of one year after termination, the employee would not induce any policyholder credited to the employee's account on the termination date to cancel any policy with the company or solicit such a policyholder to purchase insurance coverage competitive with that sold by the company. ***Id***. A third clause provided that, for three years following termination, the employee would not in any way be connected with the property, casualty, health, or life insurance business of a specific competitor. ***Id.***, ¶8.

¶24 In ***Brass*** we read ***Streiff*** to say that clauses are "intertwined and indivisible [if] they govern several similar types of activities and establish several time and geographical restraints," and we concluded this was true of the three clauses before us. ***Id.***, ¶11. While recognizing that, because of our conclusion that all three clauses were one indivisible covenant, only one needed to be unreasonable to render all invalid, we went on to explain that each of the three was overbroad. ***Id.***, ¶¶11-15.

¶25 In this case, the customer clause provides that, for twenty-four months after termination of his employment with Star, Dal Pra may not "interfere with, or endeavor to entice away" from Star anyone who was a customer of Star or CB Distributors at the time of Dal Pra's employment termination or within one year prior to the termination in two situations: (1) Dal Pra performed services or otherwise dealt with that customer on behalf of Star or CB Distributors, or (2) Dal Pra obtained special knowledge as a result of his position relative to that customer as a result of his employment. The business clause prohibits Dal Pra, for twenty-four months and within a fifty mile radius of Rockford, Illinois, from becoming "engaged in any business which is substantially similar to or in competition with the business of the Employer."

¶26 The customer clause here, speaking in general terms, is directed to activity similar to that addressed in the first and second clauses in ***Brass***: interfering with the employer's relationship with its customers. The business clause here is comparable to the third clause in ***Brass***, which is directed at working for a competitor. It follows that, under ***Brass***, the two clauses here are indivisible.

¶27 Star argues that, because of the severability clause in Dal Pra's employment contract, the two clauses should be considered divisible.[6] However, a

[6] Following is the severability clause in full; the emphasized language is the portion Star relies on:

(continued)

severability clause in an employment contract does not override the outcome that is mandated by WIS. STAT. § 103.465 and the case law applying it. *See* ***General Med. Corp. v. Kobs***, 179 Wis. 2d 422, 431-32, 507 N.W.2d 381 (Ct. App. 1993) (WIS. STAT. § 103.475 negates the assertion that the severability clause in the contract allows a court to enforce those contract terms that are reasonable).

¶28 Because we conclude the customer clause and the business clause are one indivisible covenant, and because we have already concluded the business clause is overbroad and therefore invalid under WIS. STAT. § 103.465, the customer clause is also invalid. *See* ***Streiff***, 118 Wis. 2d at 614-15. Accordingly, we do not analyze the customer clause to determine whether, if it were an independent clause, the undisputed facts show that it is reasonable.

CONCLUSION

¶29 We conclude, based on the undisputed facts, that the business clause is overbroad and therefore invalid and unenforceable under WIS. STAT. § 103.465. We also conclude that under ***Brass*** the business clause and the customer clause are

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> In the event any of the restrictions contained in this Contract are held to be in any respect an unreasonable restriction upon Employee, then the court so holding shall reduce the territory to which it pertains and/or the period of time in which it operates, or effect any other change to the extent necessary to render any of the restrictions enforceable. *Each of the terms and provisions of this Contract is to be deemed severable in whole or in part and, if any term or provision or the application thereof in any circumstances should be invalid, illegal or unenforceable, the remaining terms and provisions or the application thereof to circumstances other than those as to which it is held invalid, illegal or unenforceable, shall not be affected thereby and shall remain in full force and effect.*

(Emphasis added.)

one indivisible covenant under § 103.465. Therefore, the customer clause is also invalid and unenforceable under § 103.465. Accordingly, the circuit court properly entered summary judgment dismissing the complaint.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶30 VERGERONT, J. (*concurring*). I agree with the majority opinion that our application of ***Streiff v. American Family Mut. Ins. Co.***, 118 Wis. 2d 602, 613-15, 348 N.W.2d 505 (1984), in ***Mutual Service Casualty Insurance Co. v. Brass***, 2001 WI App 92, 242 Wis. 2d 733, 625 N.W.2d 648, compels the conclusion that the customer clause and the business clause are indivisible and therefore one covenant. However, while we are bound to follow published decisions of our court, we may express our disagreement. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). I write separately because, were it not for our decision in ***Brass***, I would agree with Star that ***Streiff*** does not support the conclusion that the customer clause and the business clause are indivisible and therefore one covenant.

¶31 If I were analyzing and applying ***Streiff*** without regard to our decision in ***Brass***, I would read ***Streiff*** differently than we did in ***Brass***. In my view the ***Streiff*** court's conclusion of indivisibility is dependent upon the fact that the clauses the employer argued were separate—5h and 5i(4)—were expressly linked by the language in 5i(1) and 5i(3). I view the crux of the ***Streiff*** court's decision to be that 5h and 5i were indivisible for purposes of the receipt of extended earnings because compliance with the former was required for receiving and continuing to receive extended earnings. I would not read ***Streiff*** as establishing a test for indivisibility under which clauses are indivisible if they "govern several similar types of activities and establish several time and geographic restraints." ***Streiff***, 118 Wis. 2d at 613. While the ***Streiff*** court used that language, I read that as a description of the clauses the court had already

determined to be indivisible; I do not read it as replacing or summarizing the reasoning the court engaged in to reach the conclusion of indivisibility.[1]

¶32 In addition to disagreeing that the ***Streiff*** court adopted a standard for indivisibility that is divorced from the facts in that case, I think in ***Brass*** we gave an overly broad construction to the "similar types of activity" standard we derived from ***Streiff***. The first and second clauses in ***Brass*** were almost identical in terms of the activity they restrained. Therefore I can easily see why we concluded that those two clauses governed "similar types of activities. However, the third clause was directed at a different type of activity—working in any capacity for a particular competitor. We did not explain in ***Brass*** why we concluded that all three clauses governed "similar activities." It is evident, however, that we employed a very broad definition of the phrase.

¶33 My concern is that in ***Brass*** we have laid a framework that will result in treating as one indivisible covenant practically all clauses restraining competition in an employment agreement. I do not think ***Streiff*** requires this; and

[1] This language comes from the following sentence in ***Streiff v. American Family Mutual Insurance Co.***, 118 Wis. 2d 602, 348 N.W.2d 505 (1984):

> Since we hold that sections 5h and 5i(4) constitute an indivisible covenant governing *several similar types of activities and establishing several time and geographic restraints* rather than two covenants (one a condition precedent and the other a condition subsequent), we need not decide whether a restraint that is reasonable as to activity, duration, and territory is enforceable under sec. 103.465, when an agreement includes a second restraint which is unreasonable as to activity, duration and territory and is unenforceable under sec. 103.465.

Id. at 613 (footnote omitted, emphasis added).

I think there should be a more careful analysis of the common law and of WIS. STAT. § 103.465[2] before deciding this is the correct result.

¶34 Accordingly, I respectfully concur.

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