COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0263

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

CHOICE PRODUCTS, U.S.A., INC.,

PLAINTIFF-APPELLANT,

V.

PAUL TAGUE, DOROTHY TAGUE AND MARKETING PRODUCTS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County: GREGORY GRAU, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. This appeal concerns the interpretation of language used in the parties' non-compete agreements. Choice Products USA, Inc., appeals an order denying its motion to reconsider the denial of a preliminary injunction and dismissal of some of its claims against Paul and Dorothy Tague and

Marketing Products, Inc. (collectively "the Tagues").[1] Choice argues that the trial court misapplied the law in construing the parties' non-compete agreements. Because the trial court misinterpreted § 103.465, STATS., to conclude that established rules of contract construction do not apply, we reverse and remand for further proceedings.

Choice filed this action seeking, among other things, to restrain the Tagues from violating their non-compete agreements. Choice's complaint alleges that the Tagues are former employees and that they had agreed they would not, within two years after termination, sell frozen pizzas or other food products handled by Choice in the area where they had worked for Choice.

Dorothy Tague's affidavit attested that she has worked in the fundraising business since 1983, first as a sole proprietor and later with her husband in a company known as Market Products, Inc. They sold a number of products, such as candy and nuts, to fund raising groups such as schools and parent teacher organizations. In 1996, the Tagues signed agreements with Choice containing the following language:

> [I]n the event he/she should no longer be employed …with Choice Products, he/ she will not, within two years … after the date of termination from his/her employment, directly or indirectly, sell frozen pizzas or any other food products handled by Choice Products U.S.A., Inc. to any customer … either on his/her own account or through or on behalf of any other person, firm, or corporation. This paragraph only applies to the *area* that the employee *worked* for choice Products. (Emphasis added.)

[1] In an order dated February 10, 1999, we granted leave to appeal the order.

The interpretation of this language lies at the heart of the controversy. The trial court held that through § 103.465, STATS., the legislature has set non-compete agreements apart from general contracts and that general rules of contract construction do not apply. The trial court stated:

> The law of the State of Wisconsin is clear pursuant to Section 103.465 if any relevant provision of a restrictive covenant is too broad or too general, the covenant is invalid in its entirety.
>
> As set forth in my earlier ruling, I simply find that the terms "worked" and "area" as used by the plaintiff in the restrictive covenant are too broad and too general to pass legal muster.
>
> This is the proposition that I intended to advance through the term ambiguous in the original ruling.

As a result, the trial court held that the non-compete agreements were invalid. It denied injunctive relief and dismissed Choice's claims relating to the non-compete agreements. It later denied Choice's motion to reconsider and this appeal ensued.

The Tagues argue that the scope of the potential area covered by the word "worked" is too broad to be enforceable. They contend that Choice's definition of "worked" could include "sell, promote, advertise or otherwise deal" with Choice products. For example, even contacting a person to buy, who decides not to purchase the product, would constitute "work" under this broad definition. The Tagues further argue that the term "area" is overly broad, because a single contact that did not result in a sale would nonetheless prohibit the Tagues from working anywhere within the entire county where the contact occurred. The Tagues further argue that canons of contract construction directly conflict with the requirements of § 103.465, STATS., and if the language is too broad or too general, the entire agreement is invalid.

The issue before us is whether § 103.465, STATS., provides an alternative analysis to established rules of contract construction. We conclude that it does not. This issue involves statutory interpretation, a question of law we review de novo. ***NBZ, Inc. v. Pilarski,*** 185 Wis.2d 827, 835, 520 N.W.2d 93, 95 (Ct. App. 1994). We first look to the plain meaning of the statutory language to determine legislative intent. ***Hainz v. Shopko Stores, Inc.,*** 121 Wis.2d 168, 172, 359 N.W.2d 397, 400 (Ct. App. 1984). "The canons of construction provide that a statute does not abrogate any rule of common law unless the abrogation is so clearly expressed as to leave no doubt of the legislature's intent." ***NBZ***, 185 Wis.2d at 836, 520 N.W.2d at 96.

The plain language of § 103.465, STATS., does not address the issue of construction of an ambiguous non-compete contract. Instead, it provides that the specified term and specified territory restrictions must be "reasonably necessary." Section 103.465 states:

> 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.

Nothing in the unambiguous language of § 103.465, STATS., indicates a legislative purpose to overturn established rules of contract construction. We will not read one into it.

Whether a restriction in the specified territory is "reasonably necessary" under § 103.465, STATS., is a separate issue from the ambiguity or definiteness of the language the parties used to express their agreement. Initially, we address the relationship between contract ambiguity and indefiniteness. The definiteness question is relevant to contract formation, not interpretation. ***Management Computer Servs. v. Hawkins, Ash, Baptie & Co***., 206 Wis.2d 158, 178, 557 N.W.2d 67, 75 (1996). Courts often describe the definiteness requirement as mutual assent or meeting of the minds. ***Id.*** Mutual assent is judged by an objective standard, looking to the words used in the contract. ***Id.***

If a contract has been formed, ambiguities in the contract are explained through principles of contract interpretation and do not effect contract formation. "An ambiguous contract is not necessarily indefinite." ***Id.*** "While courts will not enforce contracts when the terms are so vague that they cannot with reasonable certainty ascertain the intent of the parties, they will, if possible, attach sufficiently definite meaning to the intent of the parties to enforce the contract." ***UAW v. Scofield,*** 50 Wis.2d 117, 133, 183 N.W.2d 103, 111 (1971). "Courts are not inclined to strike down such a contract for uncertainty if the deficiency can be supplied consistent with reasonableness in the interest of preserving the contract which parties thought they made." ***Gerruth Realty Co. v. Pire***, 17 Wis.2d 89, 91-92, 115 N.W.2d 557, 558-59 (1962). "Even though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by their subsequent conduct and by their own practical interpretation." ***Management Computer***, 206 Wis.2d at 179, 557 N.W.2d at 76.

"The ultimate aim of all contract interpretation is to ascertain the intent of the parties." ***Patti v. Western Machine Co.,*** 72 Wis.2d 348, 353, 241

N.W.2d 158, 160 (1976). "If [their] intent can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence." ***Id.*** If a contract is ambiguous, the trial court's duty is to determine the parties' intent at the time of making the contract, which becomes a question of fact. *See* ***id.*** at 353, 241 N.W.2d at 161. A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. ***Wilke v. First Fed. S&L Ass'n***, 108 Wis.2d 650, 654, 323 N.W.2d 179, 181 (Ct. App. 1982).

Consequently, it is the trial court's function to determine if the parties entered into an agreement and, if so, what the parties intended at the time of making the contract when they used the terms "area" and "worked." The court may determine the meaning of an unambiguous contract as a question of law. ***Schlosser v. Allis-Chalmers Corp***., 86 Wis.2d 226, 244, 271 N.W.2d 879, 887 (1978). Whether the contract is ambiguous also presents a question of law. ***Wausau Underwriters Ins. Co. v. Dane County,*** 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). In the event the court determines that in the context of their agreement, the terms "area" and worked" are ambiguous, the court may accept extrinsic evidence to determine their intent. ***Patti*** 72 Wis.2d at 353, 241 N.W.2d at 160. After the court has determined whether the parties assigned an ascertainable meaning to these terms, it must next determine whether the restrictions imposed by the agreement were "reasonably necessary" within the meaning of § 103.465, STATS.

One canon of contract construction is that a vague or indefinite contract is unenforceable. ***Shetney v. Shetney***, 49 Wis. 2d 26, 38-39, 181 N.W.2d 516, 522 (1970). But we note that the same source states that a court should, if possible, attach a sufficiently definite meaning to a bargain of the parties who intended to enter into a contract and that a contract should not be vitiated by lack

of definiteness if the conduct of the parties will reasonably supply the omissions. ***Id***. at 39, 181 N.W.2d at 522. As a result, we remand with directions to apply the established rules of contract construction to determine whether the court may ascertain the parties' intent with respect to the meaning of the terms area and worked. Once the terms are assigned a sufficiently definite meaning, the court should apply the provisions of § 103.465, STATS., to determine if the restraint is "reasonably necessary' for the employee's protection.

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

This opinion will not be published. RULE 809.23(1)(b)5, STATS.