COURT OF APPEALS
DECISION
DATED AND RELEASED

July 20, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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

No. 94-2055

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

STATE ARMS GUN CO., INC.,

Plaintiff-Appellant,

v.

MICHAEL S. SCHMELLING AND STATE MANUFACTURING & ARMS CO., INC.,

Defendants-Respondents.

APPEAL from a judgment and orders of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Sundby, JJ.

DYKMAN, J. State Arms Gun Co., Inc. (State Arms) appeals from orders granting Michael S. Schmelling and State Manufacturing & Arms Co., Inc.'s (State Manufacturing) summary judgment motion and denying State Arms's motion for reconsideration in which the trial court voided a restrictive covenant after determining that the geographical limitation was unreasonable. State Arms argues that the geographical limitation is reasonable because the

parties possessed equal bargaining power when they negotiated the contract and because much of State Arms's business is conducted within the restricted area. We conclude that the restriction is unreasonable because it is overly broad in scope. The entire covenant is therefore void. Accordingly, we affirm the orders.

State Arms also appeals from a judgment in which it was awarded $15,340.70 after a jury found Schmelling liable for breach of fiduciary duty. According to State Arms, the trial court erroneously exercised its discretion when it excluded from evidence the restrictive covenant proffered for the purpose of proving this claim. We conclude that the trial court properly exercised its discretion when it excluded the restrictive covenant from evidence and therefore affirm.

BACKGROUND

In 1982, Klaus Horstkamp, a co-owner of 3-H Precison Works, hired Schmelling to work as a machinist's apprentice. Upon completing his apprenticeship in late 1985, Schmelling began to work for National Electrostatics. At the same time, he also did contract work as a self-employed machinist for 3-H and State Arms Gun Company, also owned by Horstkamp. That same year, Horstkamp, Schmelling and David Engel founded a new company, State Manufacturing. A fourth company, State Arms, was formed in 1987. All of the companies operated in the same building located in Waunakee, Wisconsin, and with the exception of State Arms Gun Company, all are in the business of tool and die making.

Schmelling went to work for State Arms in 1987 and became its president in March 1988. He entered into a contract in July 1988 containing a restrictive covenant which provided in part:

> I, Mike Schmelling, hereby covenant and agree, in consideration of employment by State Arms ... whether such employment be past, present or future, that in the event my employment is terminated for whatever reason I will not ... compete with the

> business of State Arms ... in any manner whatsoever for a period of two years from and after the date of termination, within the sales area of [State Arms] said sales area encompassing a sixty (60) mile radius area with the midpoint being the business location of [State Arms] as of the date of my termination. I recognize that the current business location ... [in] Waunakee, WI, may change at some future date.

In September 1990, Schmelling left State Arms and resigned as president. For a short time, he worked at another company, but in December, he started working full time for State Manufacturing. Horstkamp commenced an action against Schmelling and State Manufacturing alleging breach of contract, breach of fiduciary duty, conspiracy and violation of the Uniform Trade Secrets Act.[1] The trial court granted Schmelling and State Manufacturing's motion for summary judgment dismissing the breach of contract claim, concluding that the restrictive covenant was unenforceable because the geographical limitation was unreasonable. The court also denied State Arms's motion for reconsideration.

Before trial, the court determined that it would not permit State Arms to admit the restrictive covenant into evidence to support the breach of fiduciary duty claim concluding that because the covenant was void, it did not exist under the law. The jury returned a verdict in favor of State Arms on the breach of fiduciary duty claim and awarded damages of $15,340.70. The trial court denied State Arms's motion for a new trial. State Arms appeals.

STANDARD OF REVIEW

An appeal from a grant of summary judgment raises an issue of law which we review *de novo*, by applying the same standards employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). Summary judgment methodology is well known. We initially examine the complaint and answer to determine whether a claim has been stated and whether material issues of fact have been raised. ***Id.*** We then consider the documents offered by the moving party to determine whether they

[1] Section 134.90, STATS.

establish a *prima facie* case. ***Id.*** If they do, we then look to the documents offered by the party opposing the motion to determine if any material facts remain in dispute entitling the opposing party to a trial. ***Id***. at 372-73, 514 N.W.2d at 49-50.

The interpretation of a contract is also a question of law which we review *de novo*. ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis.2d 206, 212, 341 N.W.2d 689, 691 (1984). Whether a specific restraint as to area and time is reasonable is a question of law to be resolved on the basis of the facts. *See* ***Fields Found., Ltd. v. Christensen***, 103 Wis.2d 465, 478-79, 309 N.W.2d 125, 132 (Ct. App. 1981).

The admission of evidence rests within the sound discretion of the trial court. ***Pophal v. Siverhus***, 168 Wis.2d 533, 546, 484 N.W.2d 555, 559 (Ct. App. 1992). To sustain a discretionary ruling we need only find that the trial court examined the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion. ***Id.***, 484 N.W.2d at 560. If the trial court fails to explain the reasons for its decision, or does so inadequately, we will independently review the record to determine if there is a reasonable basis for its decision. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

RESTRICTIVE COVENANTS

State Arms alleges that the trial court erred when it concluded that the geographical limitation was unreasonable. According to State Arms, the geographical limitation is reasonable because the parties possessed equal bargaining power when they negotiated the contract and because it conducts business within the sixty-mile radius circle set forth in the covenant. We disagree.

A restrictive covenant is intended to prevent a former employee from competitively using information or contacts gained as a result of the employee's association with the employer because in many businesses, the relationship with customers is the employer's most valuable asset. ***Pollock v. Calimag***, 157 Wis.2d 222, 237, 458 N.W.2d 591, 599 (Ct. App. 1990). We are guided by the following general principles when construing a restrictive covenant: (1) the restrictions are *prima facie* suspect; (2) the restrictions must

withstand close scrutiny to pass legal muster as being reasonable; (3) the restrictions will not be construed to extend beyond their proper import or further than the language of the contract absolutely requires; and (4) the restrictions are to be construed in favor of the employee. ***Streiff v. American Family Mut. Ins. Co.***, 118 Wis.2d 602, 610-11, 348 N.W.2d 505, 510 (1984).

Section 103.465, STATS.,[2] provides that a restrictive covenant is lawful and enforceable only if the limitations imposed upon the employee are reasonably necessary for the protection of the employer. When we determine that a portion of a restrictive covenant is unreasonable, we void the entire covenant. ***Id.*** For the purposes of § 103.465, the restrictive covenant must satisfy a five-part test: (1) it must be reasonably necessary for the protection of the employer; (2) it must provide a reasonable time restriction; (3) it must provide a reasonable territorial limit; (4) it must be reasonable as to the employee; and (5) it must be reasonable as to the general public. ***Chuck Wagon Catering, Inc. v. Raduege***, 88 Wis.2d 740, 751, 277 N.W.2d 787, 792 (1979). Our analysis in this case focuses on the reasonableness of the geographical limitation.

"Flat rules of reasonableness do not exist for restrictive covenants ...." ***Fields Found.***, 103 Wis.2d at 479, 309 N.W.2d at 132. What is reasonable turns on the facts of a particular case. ***Wausau Medical Ctr., S.C. v. Asplund***, 182 Wis.2d 274, 284-85, 514 N.W.2d 34, 39 (Ct. App. 1994). A geographical restriction is reasonable if it is limited to the route or customers actually served. ***Chuck Wagon***, 88 Wis.2d at 754, 277 N.W.2d at 793. The test, then, is whether the geographical limit is reasonably related to where the business is generated. *See* ***id.*** The scope of the geographical restriction cannot be broader than the

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[2] Section 103.465, STATS., provides:

> A covenant by an assistant, servant or agent not to compete with his employer or principal during the term of the employment or agency, or thereafter, 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 such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint.

scope of the employer's activities. ***Behnke v. Hertz Corp.***, 70 Wis.2d 818, 822, 235 N.W.2d 690, 693 (1975).

While a restriction which is expressed in terms of a particular group of forbidden customers and not in geographical terms is not necessarily fatal, ***Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton***, 101 Wis.2d 460, 466, 304 N.W.2d 752, 755 (1981), a restrictive covenant is unreasonable when it contains an overly broad geographical limit. ***Gary Van Zeeland Talent, Inc. v. Sandas***, 84 Wis.2d 202, 218, 267 N.W.2d 242, 250 (1978). "The propriety of a territorial restriction must be considered in connection with the circumstances of the parties and the activities of the employee." ***Wisconsin Ice & Coal Co. v. Lueth***, 213 Wis. 42, 45, 250 N.W. 819, 820 (1933). However, "[i]t is generally proper for the employer, by such a contract, to exact a covenant not to compete in such territory as may constitute the field of the employee's activities, but the covenant can go no further than this." ***Id.*** at 47, 250 N.W. at 820-21.

Consequently, we have concluded that a fifty-mile restriction covering an area from which sixty-two percent of the employer's business was generated bore a reasonable relationship to the employer's business and was not overly broad because it left a portion of the business open to competition. ***Fields Found.***, 103 Wis.2d at 479, 309 N.W.2d at 132. However, a restrictive covenant that prevented an employee from competing with her employer in the entire city of Milwaukee was unreasonable and beyond the scope of the employer's activities because the employer only did business at the city's airport. ***Behnke***, 70 Wis.2d at 822-24, 235 N.W.2d at 693-94. Additionally, a restrictive covenant that set no geographical limit was also unreasonable and void. ***Gary Van Zeeland***, 84 Wis.2d at 218, 267 N.W.2d at 250. Also, a provision which prohibited an employee from competing in all fifty states was "clearly unreasonable for it is much greater than that required for the protection of [the employer], for whose benefit the restriction was made, and it imposes an undue hardship upon [the employee]." ***Union Cent. Life Ins. Co. v. Balistrieri***, 19 Wis.2d 265, 270-71, 120 N.W.2d 126, 129 (1963). *See also* ***Streiff***, 118 Wis.2d at 607, 348 N.W.2d at 508 (employer conceded that the portion of a covenant preventing an employee from competing throughout the United States was overly broad and unreasonable).

Because State Arms's complaint states a cause of action for breach of contract and Schmelling has made a *prima facie* case to dismiss the claim asserting that the restrictive covenant is unreasonable and void, the decisive

issue is whether State Arms's affidavits establish a material factual dispute as to whether the covenant's geographical limitation is reasonable. The crux of State Arms's argument is that the geographical limitation and the entire restrictive covenant are reasonable because the parties possessed equal bargaining power when they entered into the agreement. Thus, they should be permitted to bargain to any type of limitation including one that might otherwise be unreasonable. However, State Arms ignores the plain language of § 103.465, STATS., and the case law that has developed as to the factors to be considered in determining when a restrictive covenant will be enforced.[3]

In determining whether the restrictive covenant is enforceable, we not only consider whether it is reasonably necessary for the employer's protection, but also whether it provides a reasonable geographical limit. ***Chuck Wagon***, 88 Wis.2d at 751, 277 N.W.2d at 792. While consideration of the relative bargaining power of the two parties may be relevant for determining whether a territorial restriction is reasonable, a restriction which is broader than the scope of the employer's activities is patently unreasonable and unenforceable. ***Behnke***, 70 Wis.2d at 822, 235 N.W.2d at 693. Thus, State Arms's argument that because the parties possessed equal bargaining power, the geographical limitation must be reasonable cannot stand alone to support a restrictive covenant. We must also consider the scope of the employer's activities.

The trial court determined that the restrictive covenant prevents Schmelling from competing with State Arms in Madison, Middleton, Verona, Fitchburg, Stoughton, McFarland, Monona, Sun Prairie, Beaver Dam, Waupun, Ripon, Portage, Reedsburg, Mauston, Baraboo, Sauk City, Mazomanie, Spring Green, Richland Center, Mount Horeb, Dodgeville, Mineral Point, Platteville, Monroe, Beloit, Janesville, Whitewater, Ft. Atkinson, Oconomowoc and Watertown. State Arms argues that its business is conducted within this area.

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[3] In so far as State Arms's request asks us to develop a new test for restrictive covenants, we decline to do so. The court of appeals is an error-correcting court. ***State ex rel. Swan v. Elections Bd.***, 133 Wis.2d 87, 93-94, 394 N.W.2d 732, 735 (1986). We are bound by prior decisions of the Wisconsin Supreme Court. ***State v. Olsen***, 99 Wis.2d 572, 583, 299 N.W.2d 632, 638 (Ct. App. 1980). We look to existing law to determine whether an error has occurred. New theories of recovery or defenses involving public policy determinations are more appropriate when addressed to the supreme court or the legislature, if possible. *See* ***Employers Health Ins. Co. v. Tesmer***, 161 Wis.2d 733, 740-41, 469 N.W.2d 203, 206 (Ct. App. 1991).

State Arms's affidavits and depositions offered in support of its opposition to the summary judgment motion do not create a factual dispute as to whether the scope of the restriction exceeds its actual business area. Our review of these documents shows that State Arms conducted business with Fristam Pumps, Germania Dairy and Waunakee Alloy. The trial court found that these three businesses are located in Waunakee and Middleton. Additionally, while the testimony upon which State Arms relies also notes several other companies, Coburn Company, Stoughton Trailer, Wisconsin Porcelain and Waukesha Bearings, our review of the supporting documents has failed to reveal the extent of State Arms's dealings with them or where these businesses are located. Even if we assume that Stoughton Trailer is located only in Stoughton, Wisconsin, the affidavits do not tell us whether State Arms's business with the company was a one-time sale or a continuing contract.

State Arms also points to a paralegal's affidavit in support of its argument which lists names and locations of companies with which State Arms does business.[4] However, this affidavit is dated February 18, 1994, two days after the trial court granted summary judgment in favor of Schmelling and State Manufacturing and was offered in support of State Arms's motion for reconsideration. State Arms also points to statements in Horstkamp's affidavit that he and Schmelling agreed to a sixty-mile radius circle because they "wanted to market State Arms machining services within a one-hour driving distance of our Waunakee plant." However, this affidavit is dated February 21, 1994, five days after the trial court granted summary judgment.

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[4] The affidavit provides:

> I have located addresses for the following companies with which State Arms did business prior to September 19, 1990, and have determined that they are within a 60-mile radius of State Arms in Waunakee: Apache, located in Beaver Dam, Wisconsin; Advanced Dental Concepts, located in Madison, Wisconsin; Alkar, located in Lodi, Wisconsin; Waukesha Bearing, located in Waukesha, Wisconsin; Beloit Special Machine, located in Beloit, Wisconsin; Del Monte, located in Arlington, Wisconsin; Coburn Company, located in Whitewater, Wisconsin; Stoughton Trailers, located in Stoughton, Wisconsin.

Section 802.08(2), STATS., provides that an opposing party's affidavit must be served at least five days before the summary judgment hearing. A party may not evade that requirement by serving supplementary affidavits at a later date under the guise of a reconsideration motion. Although newly discovered evidence might justify relief from judgment under § 806.07(1)(b), STATS., that argument has not been made here. State Arms merely sought a second opportunity to present evidence when its first submissions failed to create a disputed fact regarding the reasonableness of the geographical restriction. Were we to accept this method of reviewing summary judgment motions, we would effectively remove the five-day requirement of § 802.08(2) from the statute. Accordingly, we will not consider this evidence.

State Arms has failed to show that the scope of this restriction is reasonably related to its business ventures and has failed to point to any other portions of the record before the trial court when it ruled on the summary judgment motion which might support its argument. It is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an assignment of error. ***Zintek v. Perchik***, 163 Wis.2d 439, 482-83, 471 N.W.2d 522, 539 (Ct. App. 1991). Section 103.465, STATS., and ***Streiff***, 118 Wis.2d at 610-11, 348 N.W.2d at 510, dictate that we construe restrictive covenants narrowly and in favor of the employee. We conclude that State Arms has failed to raise a factual dispute as to whether the geographical restriction is reasonable. Based upon the facts before the trial court on summary judgment, we conclude that the restriction is overly broad and not reasonably related to State Arms's business. Consequently, the entire covenant is void.

EVIDENTIARY DETERMINATION

State Arms contends that the trial court erroneously exercised it discretion when it ruled that the restrictive covenant would not be admissible as evidence relating to State Arms's breach of fiduciary duty claim. The covenant contains statements pertaining to confidential information to which Schmelling was privy as president of State Arms. According to State Arms, this evidence was highly relevant and not prejudicial, and that without it, State Arms could not prove how Schmelling breached his fiduciary duty and the extent of its damages resulting from his breach. We disagree.

The admissibility of evidence is a discretionary decision which will not be reversed unless it is erroneously exercised or is premised upon an erroneous view of the law. ***Christensen v. Economy Fire & Casualty Co.***, 77 Wis.2d 50, 55, 252 N.W.2d 81, 84 (1977). Section 904.01, STATS., defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Section 904.03, STATS.

The trial court determined that it would not admit any language from the restrictive covenant because it was nonenforceable, void and illegal. The court explained:

> It is an illegal contract and it is a void contract, so it's a nonexisting contract and it's indivisible and you can't pick out one part and say we want to talk about that part. We want to talk about the part that's not enforceable. It's a nonexisting agreement by law, by operation of law. It's void.
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> And to suggest that you can introduce a void contract just for the terms, strikes me as just probably error if I let it come in, in light of the court's ruling. So, I don't believe there can be any use of that document or any portion of that document. It's as if it never existed under the law. I mean, along those same lines, because it's a void document, you can't even suggest there was consideration or anything else that went into it, because it doesn't exist.

Section 103.465, STATS., provides that the entire restrictive covenant is void when a provision is unreasonable. Thus, a determination that the covenant is unenforceable because of an unreasonable limitation is more than a formality. Evidence as to a voided covenant's existence and contents is irrelevant and of no probative value. The admission of the reasonable parts of the covenant would amount to a return to the blue pencil rule which the legislature abandoned

when it enacted § 103.465.[5] Additionally, Schmelling's fiduciary duty is imposed by common law, *see* ***Racine v. Weisflog***, 165 Wis.2d 184, 190, 477 N.W.2d 326, 329 (Ct. App. 1991), and is not dependant upon the recitation of statements contained in a restrictive covenant. The jury found that Schmelling breached his fiduciary duty to State Arms and awarded damages accordingly. We conclude that the trial court's refusal to admit the restrictive covenant was not an erroneous exercise of discretion.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

[5] Under the blue pencil rule, if the terms of a restraint in a restrictive covenant were divisible, the court struck the overly broad language and enforced the valid portions. ***Streiff v. American Family Mut. Ins. Co.***, 118 Wis.2d 602, 607-08, 348 N.W.2d 505, 509 (1984).

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SUNDBY, J. (*dissenting*). The majority affirms the trial court's grant of summary judgment to Mike Schmelling dismissing State Arms's action to enforce a covenant not to compete.[6] While the principal issue in this case is the validity of the covenant not to compete, an important sub-issue is presented as to summary judgment methodology. The trial court granted Schmelling's motion on February 16, 1994. State Arms promptly moved the court to reconsider its decision. It supported its motion with several affidavits, including an affidavit of a paralegal employed by State Arms. She deposed that she had determined from a review of invoices and sales journals that State Arms did business with companies located in Beaver Dam, Madison, Lodi, Waukesha, Beloit, Arlington, Whitewater and Stoughton. The trial court considered the paralegal's affidavit, but concluded that even if State Arms's service area did grow as claimed, the area "still does not bear a reasonable relationship with a restriction prohibiting Schmelling from competing with State Arms within a circle with a 120-mile diameter." That conclusion of the trial court is subject to our de novo review.

This identical situation was presented in ***Citizens State Bank v. Timm, Schmidt & Co.***, 113 Wis.2d 376, 335 N.W.2d 361 (1983). Citizen's filed two affidavits from its president, one filed October 8, 1980, which was considered by the trial judge in his original decision. ***Id.*** at 380, 335 N.W.2d at 363. The other affidavit was filed October 28, 1980; the trial court refused to grant Citizen's motion to file this affidavit. However, in its decision on Citizen's motion for reconsideration, the trial court did review the president's second

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[6] The covenant not to compete reads in part:

> I, Mike Schmelling, hereby covenant and agree, in consideration of employment by State Arms Gun Company, Inc., whether such employment be past, present or future, that in the event my employment is terminated for whatever reason I will not directly as a shareholder, officer, director, employee, joint venturer, partner, corporation, individual or in any capacity whatsoever, compete with the business of State Arms Gun Company, Inc. in any manner whatsoever for a period of two years from and after the date of termination, within the sales area of the Corporation, said sales area encompassing a sixty (60) mile radius area with the midpoint being the business location of the Corporation as of the date of my termination.

affidavit. The supreme court said: "Therefore the October 28, 1980 affidavit is part of the record before this Court." ***Id.*** at 381, 335 N.W.2d at 363.

Whether affidavits may be filed on a motion to reconsider the grant of summary judgment under § 802.08(2), STATS., is at least questionable. The Judicial Council Note, 1992, § 802.08(2), reveals that the five-day requirement for filing affidavits before the summary judgment hearing was intended to preclude local rules governing summary judgment and "promote uniformity of practice."

If § 802.08(2), STATS., is construed to preclude the filing of affidavits on a motion for reconsideration of a summary judgment, the result is that there is no such thing as reconsideration of a decision granting summary judgment. A motion for reconsideration must be based on facts other than those which were before the trial court when it heard the motion. *See* ***Ver Hagen v. Gibbons***, 55 Wis.2d 21, 26, 197 N.W.2d 752, 755 (1972). If the party seeking reconsideration cannot present new evidence to the trial court by way of affidavit, there is nothing for the trial court to reconsider. However, we should not decide this question without giving the parties an opportunity to brief the question. I therefore respectfully dissent.