Fox Valley Thoracic Surgical Associates, S.C., d/b/a Appleton Heart Surgeons, Plaintiff-Appellant,

v.

Robert J. Ferrante, M.D. and Appleton Cardiology Associates, Ltd., Defendants-Respondents, Robert Wilson, M.D., Michael Gitter, M.D., William Fletcher, M.D., Sija Majahalme, M.D., Thedacare, Inc. and Green Bay Cardiothoracic & Vascular, Defendants, General Casualty Company of Wisconsin, Intervenor.

No. 2006AP3201.

Court of Appeals of Wisconsin, District III.

Opinion Filed: February 19, 2008.

Before Hoover, P.J., Peterson & Brunner, JJ.

¶ 1 PER CURIAM.

Fox Valley Thoracic Surgical Associates, S.C., d/b/a Appleton Heart Surgeons ("Heart Surgeons"), appeals a summary judgment dismissing its claims against Appleton Cardiology Associates ("Cardiology Associates") and Dr. Robert Ferrante. Heart Surgeons contends the circuit court erred when concluding that a covenant not to compete in an employment contract was unenforceable and by determining there were no genuine issues of material fact on its numerous claims. We affirm the summary judgment.

BACKGROUND

¶ 2 Heart Surgeons operated a surgical practice in Appleton, Wisconsin, specializing in heart and thoracic surgery. Most of its business came from referrals by other doctors, primarily cardiologists. Ninety percent of its referrals came from one source, Cardiology Associates.

¶ 3 In 2002, Heart Surgeons hired Ferrante as a heart surgeon. Ferrante's employment contract included a covenant not to compete stating:

> At no time during the term of Employee's employment with Employer, or for one (1) year immediately following the termination of such employment, ..., will Employee ... engage in the practice of heart surgery or thoracic medicine, within the city limits of Appleton, Neenah or Menasha, Wisconsin, nor within a radius of thirty miles of the city limits of the Cities of Appleton, Neenah or Menasha, Wisconsin.

¶ 4 In December 2003, Heart Surgeons offered to make Ferrante a partner in the company. Rather than accept the partnership, Ferrante gave notice of his resignation. His final day of work was March 19, 2004. Before leaving Heart Surgeons, Ferrante explored employment with Cardiology Associates, Thedacare, and others. There is also evidence that Ferrante may have asked Cardiology Associates whether it would continue to provide him referrals if he started his own practice.

¶ 5 On March 29, Ferrante opened his own surgical practice in the same building as Heart Surgeons. He leased office space, support staff, and equipment from Thedacare, which also provided him with an operating line of credit. Thedacare also arranged for reception services for Ferrante through Cardiology Associates. Cardiology Associates continued to provide referrals to Ferrante in his new practice.

¶ 6 Following Ferrante's departure, Cardiologists Associates' referrals to Heart Surgeons slowed significantly. Heart

Surgeons closed its practice and commenced this action against Ferrante, Thedacare, Cardiology Associates, a number of individual cardiologists, and Green Bay Cardiothoracic & Vascular. Heart Surgeons asserted a number of claims, but the claims relevant to this appeal include breach of the covenant not to compete in Ferrante's employment contract, breach of Ferrante's duty of loyalty to his employer, tortious interference with Ferrante's employment contract by Thedacare and Cardiology Associates, and a conspiracy in restraint of trade in violation of WIS. STAT. § 133.03(1).[1]

¶ 7 Pursuant to motions to dismiss, the individual cardiologists were dismissed from the case. By stipulation and order, Thedacare and Green Bay Cardiothoracic & Vascular were also dismissed. After motions for summary judgment, the circuit court concluded the covenant not to compete was unenforceable and there were no genuine issues of material fact regarding Heart Surgeons' other claims. Summary judgment was entered accordingly.

DISCUSSION

¶ 8 We review grants of summary judgment de novo, applying the same methodology as the circuit court. *Park Bancorp., Inc. v. Sletteland*, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08.

Covenant Not to Compete

¶ 9 Heart Surgeons contends the circuit court erred by concluding that the covenant not to compete in Ferrante's employment contract was invalid pursuant to WIS. STAT. § 103.465. The circuit court determined the employment agreement's prohibition was overbroad because it prevented Ferrante from practicing thoracic medicine, not just heart surgery, and because the geographic restraint was greater than reasonably necessary to protect Heart Surgeons.

¶ 10 WISCONSIN Stat. § 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.

The employer has the burden of proving that a restriction is reasonably necessary. *Geocaris v. Surgical Consultants, Ltd.*, 100 Wis. 2d 387, 388, 302 N.W.2d 76 (Ct. App. 1981). Whether a restriction is ultimately reasonable in light of the facts is a question of law. *Id.* Courts assess reasonableness considering the totality of the circumstances. *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 471, 309 N.W.2d 125 (Ct. App. 1981).

¶ 11 The following canons of construction apply to restrictive covenants in employment contracts: (1) restrictive covenants 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. *Wausau Med. Ctr., S.C. v. Asplund*, 182 Wis. 2d 274, 281, 514 N.W.2d 34 (Ct. App. 1994).

¶ 12 From the undisputed facts in the record, we conclude the geographic restriction is not reasonably necessary to protect Heart Surgeons. As a result, the covenant is void pursuant to WIS. STAT. § 103.465.

¶ 13 We first note that while Heart Surgeons characterizes the geographic restriction as a "thirty-mile radius," it is actually more than that. The restriction covers an area extending thirty miles beyond the outer limits of three different cities. Heart Surgeons had the burden of establishing facts demonstrating that this restriction was reasonably necessary for its protection. *See Geocaris*, 100 Wis. 2d at 388.

¶ 14 Heart Surgeons contends the restriction is reasonable in light of information regarding the zip codes of patients it has served. We disagree because Heart Surgeons obtained these patients via referrals. The patients' addresses, by themselves, do not demonstrate the geographic area in which Heart Surgeons competes for referrals. This is the area that Heart Surgeons arguably needed to protect.

¶ 15 Moreover, most of Heart Surgeons' referrals came from a single source, Cardiology Associates. Yet, Heart Surgeons has not proffered evidence demonstrating how its geographic restriction is necessary to keep Ferrante from unfairly competing for those referrals. Given the lack of relevant evidence, the circuit court was correct to conclude that Heart Surgeons did not meet its burden of establishing the reasonableness of the geographic restriction.

Tortious Interference with Contract

¶ 16 Heart Surgeons also claims that Cardiology Associates tortiously interfered with Ferrante's employment contract. The circuit court concluded that the tortious interference claim depended upon the validity of the contract and therefore failed because of the contract's invalidity. Heart Surgeons contends the circuit court erred because a tortious interference claim can be maintained for interference with a terminable-at-will contract.

¶ 17 Ordinarily, a tortious interference with contract claim requires proof of five elements: (1) the plaintiff had a current or prospective contractual relationship with a third party; (2) the defendant interfered with that contractual relationship; (3) the interference was intentional; (4) a causal connection exists between the defendant's interference and the plaintiff's damages; and (5) the defendant was not justified or privileged to interfere. *Wolnak v. Cardiovascular & Thoracic Surgeons*, 2005 WI App 217, ¶14, 287 Wis. 2d 560, 706 N.W.2d 667. We have held that "intent" requires the interfering party to act with the purpose of interfering with the contract. *Cudd v. Crownhart*, 122 Wis. 2d 656, 660, 364 N.W.2d 158 (Ct. App. 1985). Overall, one must "intentionally and improperly interfere[] with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract." *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 105, 279 N.W.2d 493 (Ct. App. 1979) (quoting RESTATEMENT (SECOND) OF TORTS § 766 at 7 (1979)). Where a contract is unenforceable, effectively becoming terminable at will, our supreme court has held that the "the malicious procurement of the termination thereof by an intermeddler, while the parties thereto were ready and willing to continue performance, would render [the intermeddler] liable for damages caused thereby." *Bitzke v. Folger*, 231 Wis. 513, 523, 286 N.W. 36 (1939).

¶ 18 We conclude that the record does not create a genuine issue of material fact on this claim. First, there is no evidence that Ferrante was ready and willing to continue performance of his employment. *See id.* Every indication was that Ferrante was seeking a way out.

¶ 19 In this regard, that Cardiology Associates was approached by Ferrante before he left Heart Surgeons and continued to support him afterward does not establish that it intentionally and improperly interfered with Ferrante's employment relationship with Heart Surgeons. *See Cudd*, 122 Wis. 2d at 660; *Charolais Breeding Ranches*, 90 Wis. 2d at 105. The evidence simply would not support a finding that Cardiology Associates maliciously procured Ferrante's termination of his employment with Heart Surgeons. *See Bitzke*, 231 Wis. at 523.

Duty of Loyalty to Employer

¶ 20 Heart Surgeons further claims that Ferrante breached his fiduciary duty of loyalty to his employer. In Wisconsin, a corporate officer or director is under a fiduciary duty of loyalty, good faith, and fair dealing in the conduct of corporate business. *Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.*, 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Ct. App. 1996). An "officer" is a person charged with important functions of management such as a president, vice president, or treasurer. *Id.* at 443. Among the facts a court may consider when determining whether an employee is an officer are: (1) the individual's managerial duties; (2) whether the position occupied is one of authority; and (3) whether the individual possesses superior knowledge and influence over another and is in a position of trust. *Id.* If it is unclear whether an employee is an officer, the controlling question is whether the employee "is vested with policy-making authority or has

the ability to make decisions which bind the company." *Id.* at 444.

¶ 21 According to Heart Surgeons, Ferrante was an officer because he had the ability to control his own surgical methods, and nurses worked under his direction; was entrusted with obtaining and maintaining the medical records of patients; and was responsible for maintaining information necessary for the upkeep of Heart Surgeons' patient list, business contact lists, and scheduling and appointment books. Heart Surgeons also asserts that, in addition to offering him a partnership, it had a meeting with Ferrante where it shared financial information and offered him an opportunity to oversee the corporation's financial matters and business operations.

¶ 22 We disagree with Heart Surgeons' contention that the above facts are sufficient to carry its claim beyond summary judgment. Most of these facts only demonstrate that Ferrante was a physician, doing what physicians do. If Ferrante was also shown financial information and offered managerial responsibilities, that would not change the outcome. All this demonstrates is that Ferrante was offered policy-making authority but refused to accept it.

Restraint of Trade

¶ 23 Finally, Heart Surgeons argues that Ferrante and Cardiology Associates engaged in a conspiracy to restrain trade in violation of Wis. Stat. § 133.03(1). Specifically, Heart Surgeons contends the parties engaged in a group boycott by conspiring to deny it referrals.

¶ 24 WISCONSIN STAT. ch. 133 is drawn largely from federal antitrust law, specifically the Sherman Act. *Independent Milk Producers Co-op v. Stoffel*, 102 Wis. 2d 1, 6-7, 298 N.W.2d 102 (Ct. App. 1980). Wisconsin STAT. § 133.03(1) traces the wording found in Section 1 of the Sherman Act and states, in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal...." *See* 15 U.S.C. § 1 (2004). Because there is limited Wisconsin case law on antitrust issues, Wisconsin courts often look to federal courts for guidance. *Independent Milk*, 102 Wis. 2d at 7.

¶ 25 There are two types of analyses for examining whether agreements violate antitrust laws. *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1088 (6th Cir. 1996). The first analysis applies the "per se" rule, which employs a presumption that an agreement is an antitrust violation. A prerequisite to applying the "per se" rule to a group boycott claim is that the agreement creating the restraint must be "horizontal," meaning it results from an agreement between firms that are ordinarily competitors at the same level of the market. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998). A "vertical" restraint, by contrast, results from an agreement between firms at different levels of a market. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 730 (1988).

¶ 26 The alternative to the "per se" rule is the "rule of reason" analysis, which requires the factfinder to decide whether, under all the circumstances, the restrictive agreement imposes an unreasonable restraint on competition. *Betkerur*, 78 F.3d at 1089. An analysis of a restraint's reasonableness includes an examination of the purpose of the restraint, market power, and the anticompetitive effect of the restraint. *Independent Milk*, 102 Wis. 2d at 8. A restraint must have a significant impact on competition in the marketplace to be found unreasonable. *Id.*

¶ 27 In cases where the "rule of reason" analysis applies, circumstantial evidence of a conspiracy in restraint of trade must be strong in order to survive summary judgment. *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 409 (5th Cir. 2007). Detailed evidence is necessary to support a "rule of reason" analysis. *Betkerur*, 78 F.3d at 1088-89. Antitrust law limits the range of permissible inferences that can be drawn from ambiguous evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

¶ 28 Here, the circuit court determined that there was no evidence of a "horizontal" agreement, and therefore the "rule of reason," rather than the "per se," analysis applied. Applying the "rule of reason" analysis, the court concluded that Heart Surgeons offered no evidence of the alleged conspiracy's effect on the marketplace. Instead, Heart Surgeons focused on the alleged conspiracy's effect on its own business.

¶ 29 On appeal, Heart Surgeons suggests the per se analysis should apply but does not develop its argument on that

issue, so we need not address it. *See* *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). Instead, Heart Surgeons focuses on the "rule of reason" analysis. To demonstrate how the alleged restraint affects competition, Heart Surgeons asserts that the output of medical services in Northeast Wisconsin has been cut in half because Heart Surgeons, which consisted of two surgeons after Ferrante's departure, went out of business and was replaced by only one surgeon, Ferrante. Heart Surgeons also asserts that the quality of medical services available in the market has decreased because its two other surgeons were "superior surgeons with decades of experience," while implying Ferrante is comparatively inexperienced and incompetent.[2] Heart Surgeons argues that these two "obvious anticompetitive effects" are sufficient to survive a motion for summary judgment.

¶ 30 We cannot agree that the two assertions relied upon by Heart Surgeons constitute the detailed evidence of anticompetitive effects necessary to sustain a group boycott claim. *See* *Betkerur*, 78 F.3d at 1088-90. Without evidence establishing the alleged conspiracy's details, along with a more complete picture of the market for heart surgery, a factfinder could not engage in a proper examination of the purpose of the restraint, market power, and the anticompetitive effect of the restraint.[3] *See* *Independent Milk*, 102 Wis. 2d at 8. Consequently, a factfinder could not find there was an unreasonable restraint on competition without venturing beyond the realm of permissible inferences in an antitrust case. *See* *Matsushita*, 475 U.S. at 588.

By the Court.—Judgment affirmed.

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

[2] This argument appears disingenuous given that Ferrante was trained by "superior surgeons with decades of experience" and apparently became so skilled and respected that they offered him a partnership.

[3] We note the evidence that a conspiracy to boycott Heart Surgeons actually existed is purely circumstantial, and the inference is not particularly strong because Cardiology Associates continued to provide referrals to Heart Surgeons after Ferrante's departure, until it was sued. *See* *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 409 (5th Cir. 2007); *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1090 (6th Cir. 1996).