COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP942 **Cir. Ct. No. 2007CV1281**

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

JOHN MARTIN,

PLAINTIFF-APPELLANT,

V.

STASSEN INSURANCE AGENCY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. John Martin appeals a judgment dismissing his declaratory-judgment action against his former employer, the Stassen Insurance Agency, Inc. Martin claims that the circuit court erred when it upheld choice-of-law and forum-selection clauses in an employment contract requiring that any

dispute between Martin and Stassen Insurance be resolved by Illinois law in certain Illinois state or federal courts. We affirm.

I.

¶2 Martin sold insurance for Stassen Insurance in its Woodstock, Illinois, office. The "Stassen Insurance Agency" was a sole proprietorship when Martin signed his employment agreement with the firm in July of 1997. On January 1, 1998, the sole proprietorship merged into a corporation, the "Stassen Insurance Agency, Inc." Martin was notified of the merger and continued to work for the corporation. The employment agreement had choice-of-law and forum-selection clauses:

> **17. GOVERNING LAW:**
>
> This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance, or otherwise, by the laws of the State of Illinois.
>
> ….
>
> **19. CONSENT TO JURISDICTION:**
>
> Any suit or proceeding arising out of or related to this Agreement shall be commenced only in a state court located in McHenry County, Illinois or a federal court located in Rockford, Illinois, and each party to this Agreement hereby consents to the exclusive jurisdiction of such courts.

(Uppercasing and bolding in original.) The employment agreement also had a covenant not to compete and a restrictive covenant governing non-competition and confidential customer information.

¶3 In September of 2007, Martin resigned his employment with Stassen Insurance and started an insurance agency in Lake Geneva, Wisconsin. This spawned two legal actions—one in Wisconsin and one in Illinois.

¶4 On October 23, 2007, Martin sued Stassen Insurance in the Circuit Court for Walworth County, Wisconsin, seeking declarations whether: (1) the employment agreement "was assigned or otherwise transferred to Stassen Insurance Agency, Inc."; and (2) the post-employment restrictions in the employment agreement, particularly the restrictive covenant, were valid and enforceable under WIS. STAT. § 103.465 (restrictive covenants in employment contracts). *See* WIS. STAT. § 806.04(2) (Uniform Declaratory Judgments Act).

¶5 Martin's lawyer then sent a letter dated October 29, 2007, to Stassen Insurance telling it of the declaratory-judgment action and trying to settle the case:

> At Mr. Martin's request I have filed a declaratory judgment action in Walworth County to ask the Court to determine whether the contract is enforceable, and if so, whether the post employment restriction is valid and enforceable.
>
> However, before proceeding with any type of litigation, I thought it appropriate and prudent to write you and advise you of the filing of this lawsuit and to allow you the opportunity to review this issue with your counsel. That is, I have not taken steps to have the summons and complaint served, and will withhold taking any action to serve the summons and complaint for a period of 30 days to allow you to review this issue with your counsel.

¶6 On December 5, 2007, Stassen Insurance sued Martin in the Circuit Court for McHenry County, Illinois, seeking to enforce the covenant not to compete and the restrictive covenant. On December 6, 2007, the Illinois circuit court issued a temporary restraining order prohibiting Martin from "engaging in any competitive act which involves any existing or former client" of Stassen Insurance. Sometime on that same day, Martin served the Wisconsin summons and complaint on Stassen Insurance.

¶7 On January 10, 2008, Stassen Insurance filed an answer in the Wisconsin case. It also moved to dismiss that case under the choice-of-law and

forum-selection clauses, or in the alternative, stay it pending the outcome of the Illinois case. In support, Stassen Insurance submitted an affidavit from John Stassen, the president of Stassen Insurance, in which he claimed, as material that:

- Stassen Insurance was founded in 1967 and had "always" been located in Woodstock, Illinois.
- Stassen Insurance was "an Illinois domestic corporation."
- Martin lived in Harvard, Illinois when he signed the employment agreement.
- Martin moved to Wisconsin in May of 1999.
- Martin "always" worked out of the Woodstock, Illinois office.

Martin did not dispute any of these averments, but contended that Wisconsin law applied because: (1) he now lived in Wisconsin; and (2) his business was in Wisconsin.

¶8 On February 19, 2008, the Illinois circuit court issued a preliminary injunction prohibiting Martin from "soliciting or accepting any form of insurance business from any customer as of 9/26/07 of [Stassen Insurance] or from using the confidential information of [Stassen Insurance] regarding its customers."

¶9 On March 10, 2008, Stassen Insurance's lawyer told the Wisconsin circuit court that the Illinois circuit court had entered a preliminary injunction enforcing the employment agreement, representing that "[t]hroughout proceedings in the Illinois Litigation, the parties have proceeded under Illinois law. Martin has never contested that, or taken the position that Wisconsin law applies to the

contract." The lawyer also submitted Martin's deposition testimony that he lived in Harvard, Illinois "at the time [he] executed the Employment Agreement."

¶10 As we have seen, the Wisconsin circuit court granted Stassen Insurance's motion to dismiss, concluding that Illinois law applied.

II.

¶11 In deciding Stassen Insurance's motion to dismiss, the circuit court had before it many exhibits, affidavits, and Martin's deposition. Accordingly, we consider the motion as one for summary judgment. *See* WIS. STAT. RULE 802.06(2)(b) ("If … matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."). We review *de novo* a circuit court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2).

¶12 This case turns on whether the choice-of-law and forum-selection clauses in the employment agreement are valid. This is also a question of law that we review *de novo*. *See* ***Drinkwater v. American Family Mut. Ins. Co.***, 2006 WI 56, ¶14, 290 Wis. 2d 642, 649, 714 N.W.2d 568, 571 (choice-of-law determination question of law subject to independent review); ***Beilfuss v. Huffy Corp.***, 2004 WI App 118, ¶6, 274 Wis. 2d 500, 504, 685 N.W.2d 373, 375 (interpretation of contract is question of law subject to *de novo* review).

¶13 The general rule in Wisconsin is that parties to a contract may agree that the law of a particular jurisdiction will control their contractual relationship.

Bush v. National Sch. Studios, Inc., 139 Wis. 2d 635, 642, 407 N.W.2d 883, 886 (1987). Martin claims, however, that the choice-of-law and forum-selection clauses are invalid under ***Beilfuss*** because Illinois law is contrary to Wisconsin's law on covenants not to compete. *Cf.* ***Pactiv Corp. v. Menasha Corp.***, 261 F. Supp. 2d 1009, 1015 (N.D. Ill. 2003) ("Under Illinois law, a court, at its discretion, may modify or 'blue-pencil' an unreasonable agreement in order to make it comport with the law, or sever unenforceable provisions from a contract."). We disagree.

¶14 ***Beilfuss*** invalidated forum-selection and choice-of-law clauses in a contract between an Ohio corporation and a Wisconsin resident requiring that: (1) any suit in connection with the employment agreement be brought in Ohio courts; and (2) that Ohio law govern any dispute between the parties. ***Id.***, 2004 WI App 118, ¶¶2–3, 7, 16, 274 Wis. 2d at 502–503, 504–505, 509, 685 N.W.2d at 374, 375, 377. Acknowledging that under ***Bush***, parties are generally free to choose by contract the forum and applicable law that will govern their disputes, ***Beilfuss***, 2004 WI App 118, ¶13, 274 Wis. 2d at 507–508, 685 N.W.2d at 377, ***Beilfuss*** held that in that case Wisconsin's policy of protecting employees against non-compete clauses that violated WIS. STAT. § 103.465 made the clauses unenforceable, ***Beilfuss***, 2004 WI App 118, ¶¶13–15, 274 Wis. 2d at 508–509, 685 N.W.2d at 377. This recitation of ***Beilfuss*** does not, however, end our analysis.

¶15 In contract cases, we must apply the law of the state with which the contract has its "'most significant relationship.'" ***State Farm Mut. Auto. Ins. Co. v. Gillette***, 2002 WI 31, ¶26, 251 Wis. 2d 561, 577, 641 N.W.2d 662, 670–671 (quoted source omitted). As we show below, this is what ***Beilfuss*** did. Relevant contacts for the choice-of-law analysis include: (1) the place where the contract

was executed; (2) the place where the contract was negotiated; (3) the place where the contract was performed; (4) the place most relevant to the subject matter of the contract; and (5) the respective domiciles, residences, places of incorporation, and places of business of the parties. ***Utica Mut. Ins. Co. v. Klein & Son, Inc.***, 157 Wis. 2d 552, 557, 460 N.W.2d 763, 765 (Ct. App. 1990). Further, the "justified expectations" of the parties to the contract are entitled to deference. ***Id.***, 157 Wis. 2d at 557 n.1, 460 N.W.2d at 765 n.1.

¶16 Here, the undisputed facts show significant contacts with Illinois: (1) Stassen Insurance is and was an Illinois corporation with its office in Illinois; (2) Martin was an Illinois resident when he signed the employment agreement; and (3) Martin worked out of Stassen Insurance's office in Illinois. In contrast, the only contacts with Wisconsin are that: (1) Martin moved to Wisconsin in 1999; and (2) Martin started an insurance agency in Wisconsin after he quit working for Stassen Insurance in Illinois. These contacts with Wisconsin are, in the context of the parties' relationship, minimal compared to the parties' contacts with Illinois. Further, unlike the situation in ***Beilfuss***, they blossomed after the parties negotiated the employment agreement and after it was in large part performed. Thus, unlike the situation here, the plaintiff in ***Beilfuss*** not only lived in Wisconsin for almost a decade before he started to work for Huffy, but also worked for Huffy exclusively out of his Wisconsin home. Brief of Plaintiff-Appellant David Beilfuss at 1, ***Beilfuss v. Huffy Corp.***, 2004 WI App 118, 274 Wis. 2d 500, 685 N.W.2d 373 (No. 03-2006). Further, according to the Record in that case, he visited Ohio "on no more than four occasions" during his fifteen-month work for Huffy. Brief of Plaintiff-Appellant David Beilfuss at 1–2. Here, Illinois is the state with the most significant relationship to Martin's employment agreement. *See* ***Burns v. Geres***, 140 Wis. 2d 197, 201–202, 409 N.W.2d 428,

430–431 (Ct. App. 1987) (Arizona law applied to negligence action against Arizona corporation for injuries sustained in Arizona where only contacts with Wisconsin were plaintiff was a Wisconsin resident and corporation had facility in Wisconsin). Accordingly, the parties' choice-of-law and forum-selection agreements are valid. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 453–454, 405 N.W.2d 354, 377 (Ct. App. 1987) (choice-of-law provision enforced where the contract's significant contacts were with the state whose law was selected); ***Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.***, 2006 WI App 187, ¶23, 296 Wis. 2d 273, 286, 722 N.W.2d 633, 640 ("parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but will be enforced if not unfair or unreasonable").[1]

¶17 It would be contrary to the public-policy interests recognized by ***Beilfuss*** to require the nullification of otherwise valid contract clauses merely because the party seeking their nullification moves to Wisconsin after the contract is negotiated, signed, and largely performed; both Stassen Insurance and Martin relied on the employment agreement until Martin started his own agency in Wisconsin. *See* ***Utica Mut. Ins. Co.***, 157 Wis. 2d at 557 n.1, 460 N.W.2d at 765 n.1 (In making a choice-of-law analysis, the "justified expectations" of the parties to the contract are entitled to deference.). Given the plethora of significant

[1] As we have seen, Martin appeared before the Illinois circuit court and fully participated in the proceedings. Neither party on appeal, however, discusses whether the Wisconsin circuit court was required to give full faith and credit to the Illinois circuit-court preliminary injunction. *See generally* U.S. CONST. art. IV, § 1; WIS. STAT. § 806.24 (Uniform Enforcement of Foreign Judgments Act). Accordingly, we do not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

contacts with Illinois, the circuit court properly applied the parties' choice-of-law and forum-selection agreements and dismissed Martin's action.[2]

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

[2] Martin also claims in his reply brief that the Wisconsin circuit court did not determine whether the employment agreement was assigned or transferred from the sole proprietorship to the corporation. We will not address this issue, however, because Martin did not argue it in his main brief. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 775 n.3, 635 N.W.2d 188, 193 n.3 (court will not address issues raised for first time in reply brief).