COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2641 **Cir. Ct. No. 2007CV4503**
2007CV4504

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

NURSING CENTERS, INC.,

PLAINTIFF-RESPONDENT,

V.

ROBIN CHERUBINI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 FINE, J. Robin Cherubini appeals that part of a judgment and order that did not award her attorney fees under WIS. STAT. RULES 802.05 and 804.12(3). This case arises out of consolidated actions brought against her by her former employer, Nursing Centers, Inc., alleging that she breached her employment contract by violating her non-compete and confidentiality agreements, and seeking,

among other things, a temporary injunction in connection with Cherubini's alleged violations. The only issues on appeal are whether the circuit court appropriately exercised its discretion in denying Cherubini's request for actual costs under the frivolous-action rule, WIS. STAT. RULE 802.05, and whether it properly denied costs under the discovery-sanction rule, WIS. STAT. RULE 804.12(3). We affirm.

I.

¶2 Nursing Centers is a temporary-placement agency, placing nurses in nursing homes and other health-care facilities. It hired Cherubini in June of 2005 as a "personnel coordinator" to schedule nurses to fill the requests of Nursing Centers's clients. When hired, Cherubini signed three separate employment contracts, including non-compete and confidentiality agreements. Cherubini's non-compete agreement provided, as material here:

> ARTICLE II. AGREEMENT NOT TO COMPETE.
>
> Employee agrees that, for a period of two (2) years immediately following termination of his/her employment (for any reason and by either party hereto), Employee shall not (either as a principal, agent, consultant, employee, or otherwise) solicit or accept any business from a competitor or perform any services of a competitive nature for a competitor, any clients or customers known (or reasonably should be known) by Employee to be a client or customer of the Company and with whom Employee has had contact through his/her employment by the Company during the applicable term of Employee's employment. Employee acknowledges that this Agreement necessarily implies an agreement not to help or assist any other person, association, or entity solicit or accept any such competitive business.
>
> Pursuant to this Article, Employee is specifically barred from soliciting the following clients and customers (at the time of execution of this agreement):
>
> [The agreement lists eighty-three Nursing Centers clients, including, as material here, Becker Schoop, Mount Carmel and Sunrise.]

> Pursuant to this Article, Employee is specifically barred from performing any services for the following competitors (at the time of execution of this agreement):
>
> [The agreement lists twenty-three Nursing Centers competitors.]
>
> ARTICLE III. AGREEMENT NOT TO SOLICIT COMPANY EMPLOYEES.
>
> During the course of Employee's employment, and for two (2) years thereafter, Employee will not induce, hire or encourage any Company employee to terminate employment with the Company or, directly or indirectly, solicit the employment of any Company employees.

¶3 In October of 2006, Cherubini gave Nursing Centers a two-week notice that she was leaving. According to the Record, Nursing Centers's president, Lynn Hagen, asked Cherubini to leave immediately, and reminded her that she had a two-year non-compete agreement. According to Hagen's testimony, when she asked Cherubini for whom she was going to work, Cherubini refused to tell her. Hagen also testified that Cherubini told her that, as phrased by Hagen, she could "work anywhere she wants." Cherubini later joined, in sequence, two competitors of Nursing Centers, Staffing Partners Health Care and Barbara Guthrie Medical Services.

¶4 When Nursing Centers discovered that Cherubini was working for Staffing Partners and contacting Nursing Centers's employees and clients, it sought a temporary injunction to stop her. At the injunction hearing, the circuit court, the Honorable Clare L. Fiorenza, presiding, was presented with the following evidence:

- David Key, a Nursing Centers nurse, testified that Cherubini had scheduled him when she worked at Nursing Centers, and that after she left, he "was contacted [by Cherubini] … , and I was told [by] her that if I go to Staffing Partners, they are staffing nurses." Key

worked a few shifts for Staffing Partners, including one at Becker Schoop, one of Nursing Centers's clients.

- Pamela Jackson, Nursing Centers's Branch Manager testified:

> Q Well, let me ask you this, on April 20th, the day the Motion was filed, it's true that you did not know what grave risk of immediate and irreparable injury Nursing Centers was facing?
>
> A I'm not sure about the exact date, but I knew that [Cherubini] was contacting [Nursing Centers's] clients and that's a grave risk in my definition.

- Jackson also told the circuit court that three or four of Nursing Centers's nurses, William Austin, David Key and Deb Wagoner, had been contacted by Cherubini or Staffing Partners after Cherubini left Nursing Centers. Jackson confirmed that while at Nursing Centers, Cherubini placed nurses with Nursing Centers's clients, including: Becker Schoop, Mount Carmel Burlington, Pleasant View, and Sunrise Health Care.

- Staffing Partners's manager, Kathy Sue Muench, testified that after Cherubini started to work there, Staffing Partners began placing nurses in facilities it had never before serviced, including: Becker Schoop, Mount Carmel Burlington, Pleasant View, and Sunrise Care Center, and these nurses were placed by Cherubini. She also testified that even after Cherubini left Staffing Partners, it continued to place nurses at these facilities.

- Cherubini admitted during her testimony that while seeking employment at Barbara Guthrie, she told Barbara Guthrie's Michelle

Weiss that: "I do have the following nurses who will stay loyal and follow me to new opportunities." She also admitted contacting Nursing Centers nurse Lisa Engelbrecht about coming to work for Staffing Partners.

- Hagen testified Cherubini harmed Nursing Centers: "By soliciting Nursing Centers['s] clients to her new company" and "by soliciting Nursing Centers['s] nurses while she work[ed] at the new company," which "cuts into the market … into our business … diluting our business." She further told the circuit court:

> Nursing Centers would be harmed if we have a former employee go to a new company that competes with Nursing Centers by capitalizing on the relationship that they had at Nursing Centers, bringing that to the new employer with that vendor, and taking business away from Nursing Centers, taking shifts, [and] placements, away from Nursing Centers.

¶5 At the end of the hearing, the circuit court denied Nursing Centers's request for a temporary injunction because Nursing Centers "failed to demonstrate a reasonable probability of success on the merits[,] which is necessary for the issuance of a temporary injunction" because it had "serious concerns about the validity" of the non-compete agreement and whether it violated WIS. STAT. § 103.465.[1] The circuit court explained:

[1] WISCONSIN STAT. § 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

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> The first paragraph of Article II of that agreement contains no geographic limitation and there is reference to competitors, not solely clients or customers.
>
> In the second paragraph of Article II the defendant is prohibited [from] soliciting 83 clients and customers, some who were not doing business with the plaintiff….
>
> The third paragraph of Article II prohibits the defendant from performing any services for 23 licensed competitors of the plaintiff. There is no narrowing of "services," the agreement provides any services.
>
> Article III contains a "no hire" provision which may not be enforceable by the plaintiff.

The October 1 judgment dismissing Nursing Centers's complaint against Cherubini declared that the non-compete restrictions were "void, illegal and unenforceable in their entirety." After its oral ruling, Cherubini asked the circuit court to rule on whether Nursing Centers had shown irreparable harm. The circuit court declined, explaining: "That's really not my determination. … [T]hat's not a decision the Court is to make. … I'm not ruling on it." The circuit court further indicated that although it did not "know what irreparable harm has been demonstrated, but I'm not officially ruling on it," noting that that issue would be within the purview of the judge who would receive the case following the rotation of judicial assignments, the Honorable Timothy G. Dugan.

¶6 Cherubini filed two separate motions seeking sanctions under WIS. STAT. RULES 802.05 and 804.12(3). Cherubini argued that what she contended was Nursing Centers's inability to prove irreparable injury made the injunction motion

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> 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.

frivolous. She also sought sanctions based on Nursing Centers's denial of requests to admit that Nursing Centers had not suffered irreparable injury as a consequence of what Cherubini was alleged to have done.

¶7 The circuit court, Judge Dugan presiding, held a hearing on these motions, and, after reviewing all of the testimony and evidence from the injunction hearing, related what it characterized as its "initial reaction," in order to give the lawyers an "opportunity to argue." The circuit court noted:

> If the agreement, covenant had been enforceable, the fact that the defendant was contacting facilities that were listed as facilities she could not contact and staffing at those facilities that the plaintiff, in fact, had worked or they were customers of the plaintiff; and further, that the defendant was contacting -- first of all, said that she had a following of nurses that would follow her to her new employment, leaving the plaintiff with fewer employees to place at temporary services; the fact that she did contact at least two of those individuals, one of whom went and worked, although temporarily for the competitor, all substantiate that the nature of the violations would or at least substantially could result in irreparable harm.

During the argument, Nursing Centers's lawyer emphasized that Nursing Centers was irreparably harmed when Cherubini "brings in a facility [with which she worked while employed at Nursing Centers], that Staffing Partners was not working with before" and "even after … Miss Cherubini leaves [Staffing Partners], [Staffing Partners is] still staffing with that facility that Miss Cherubini brought over."

¶8 Following the lawyers' arguments, the circuit court "affirm[ed] [its] initial conclusions" and ruled: "I find, as I indicated, that the pursuit of the temporary injunction on the grounds of irreparable harm was not frivolous."

II.

¶9 Cherubini's motions for sanctions were based on WIS. STAT. RULES 802.05(2) and 804.12(3). We address each in turn.

A. WIS. STAT. RULE 802.05.

¶10 WISCONSIN STAT. RULE 802.05(2) provides:

> REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose….
>
> (b) The claims … and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law….
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonably opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Id. If a party violates RULE 802.05(2), the circuit court may impose sanctions under RULE 802.05(3); *see also* ***Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 547, 597 N.W.2d 744, 753 (1999).[2] Whether an action is

[2] WISCONSIN STAT. RULE 802.05(3) provides in pertinent part:

(continued)

frivolous is a determination vested in the circuit court's discretion to which we owe deference. ***Storms v. Action Wis., Inc.***, 2008 WI 56, ¶34, 309 Wis. 2d 704, 720, 750 N.W.2d 739, 747. "[T]he nature and extent of investigation undertaken prior to filing a suit are issues of fact, and a circuit court's determinations on such questions will be upheld unless clearly erroneous." ***Ibid.*** Whether a proper investigation was conducted is a discretionary determination, which we will uphold if the circuit court "'examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Ibid.*** (citations omitted). "Whether the circuit court's determinations of fact support a conclusion that a lawsuit was continued frivolously, however, is a question of law that this court reviews independently." *See* ***id.***, 2008 WI 56, ¶35, 309 Wis. 2d 704, 721, 750 N.W.2d 739, 747.

¶11 A circuit court may issue a temporary injunction when, the party seeking that relief demonstrates: (1) "reasonable probability of ultimate success on the merits," (2) lack of an alternative "adequate remedy at law," and (3) "irreparable harm." ***Werner v. A.L. Grootemaat & Sons, Inc.***, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313–314 (1977). Harm is irreparable if it cannot be adequately compensated by monetary damages. ***Pure Milk Products Co-op. v. National Farmers Org.***, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979).

SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation.

¶12 Cherubini points to the deposition testimony of Hagen and Jackson to argue Nursing Centers's action was frivolous because they could not identify any specific harm caused by Cherubini:

- Hagen:

> Q Was there an event that happened in April 2007 that caused Nursing Centers, Inc. to file a lawsuit against Robin Cherubini?
>
> A I don't know.
>
> ….
>
> Q So what was the event that was occurring at or around April 20, 2007, [the date Nursing Centers sought the temporary injunction] that was causing -- presenting Nursing Centers, Inc. with a grave risk of immediate and irreparable injury?
>
> A On April 20th, I don't know if there was, on that day, a grave risk.

- Jackson:

> Q. So on April 20th, the day that this motion was filed, what grave risk of immediate and irreparable injury are you aware of Nursing Centers facing?
>
> A. I don't know.
>
> Q. Okay. So in or around April 20 of 2007 … what, if anything are you aware of Robin Cherubini doing that month that was causing Nursing Centers to have a grave risk of injury?
>
> A. I'm not sure.

Cherubini argues these answers prove Nursing Centers did not have any evidence of irreparable injury justifying a motion for a temporary injunction. We disagree, and the circuit court's analysis is instructive:

> The fact that the plaintiff at the time of the temporary injunction hearing didn't have a dollar amount

> that could be attributed, discovery continued, remained open. Ultimately during the course of a trial, that may have been further developed. However, the fact that the defendant was contacting and, for example, in the first instance … four of the facilities that had not used Staff[ing] Partners before the defendant arrived, then began using [those facilities] is, I believe, at least sufficient evidence to demonstrate the claim is not irreparable [*sic*--frivolous]. The fact that the defendant may not have been initially successful in taking away the business doesn't demonstrate that the dollar amount couldn't be developed later on.

The circuit court's findings are not clearly erroneous; they are supported by the testimony and evidence from the injunction hearing. Hagen testified she knew Cherubini was contacting Nursing Centers's customers and nurses, but because of the ongoing nature of the temporary-nurse-staffing industry where the facilities' needs for nurses change over time, there is no realistic way to conclusively and comprehensively calculate the amount of lost business caused by a former employee's violation of his or her non-compete agreement. Hagen testified that the harm is measured "[b]y the amount of business that we lose," but could not give an exact total "[b]ecause we never know how much business a particular client has … we could look at our billing and see if it has decreased. We can go in and see that, if we had 20 shifts this week, and all of a sudden when they've added a new vendor, and now our shifts that we are doing is 10, that could show that we have lost business." But this is "difficult" "[b]ecause their needs change":

> They may have three people quit. Let's take a nursing home as an example, they may have three nurses quit and two go out on maternity leave. They maybe knew about the maternity leaves, but not the three that were leaving. Now their needs have changed. If we have added another vendor into the mix that was able to [enter] in a quicker rate than normal because of the relationship of an employer that used to work for us now that the new … agency, we would lose those shifts. We would lose those placements.

When asked if she could "conclusively prove exactly how much you would lose if a former employee left Nursing Centers, went to a competitor, and began staffing with a former Nursing Centers's client," Hagen said "No":

> We would have to look at the client, the facility's site … how much business now the other agency that she went to was getting compared to Nursing Centers. … [I]f we get 50 percent, 75 percent, which we do, and then another competitor comes in, and we have some that are 100 percent, but the majorities aren't. If a competitor comes in and knows of the relationship that we have, they capitalize on that. Now we're getting -- instead of us getting 50 percent of that client's business, now we're getting 35 percent.
>
> As time goes on, perhaps that whole level of business of that client changes. Maybe they went from using 200 shifts a week, to 300 shifts a week, and we would've gotten 50 percent of 300 shifts, now we're only getting 30 percent of the 300 shifts, so now our relationship has been diluted.

¶13 Nursing Centers's inability to specifically identify the harm does not make the action frivolous. Rather, Hagen's hearing testimony supports the pursuit of an injunction as the proper equitable remedy. *See* ***American Mut. Liability Ins. Co. v. Fisher***, 58 Wis. 2d 299, 306, 206 N.W.2d 152, 156 (1973) (when "future damages are difficult or impossible to ascertain" seeking an injunction is proper remedy). The hearing testimony supports the circuit court's determination that Nursing Centers had a reasonable belief Cherubini's alleged violation of her non-compete agreement could cause Nursing Centers to lose both clients and nurses.

¶14 Cherubini also argues that Nursing Centers violated WIS. STAT. RULE 802.05 because: (1) Nursing Centers waited six months from when Cherubini left Nursing Centers to when it sued her and this shows that Nursing Centers did not believe it was at risk of suffering irreparable harm; (2) there was no mass exit of nurses or clients from Nursing Centers; and (3) Nursing Centers is not the sole

provider of nurses to medical facilities, as shown by the emails medical facilities frequently send seeking nurses from many nurse-staffing agencies. We disagree.

¶15 First, the delay in filing the lawsuit supports the circuit court's non-frivolous ruling—Nursing Centers waited to see whether Cherubini was going to work for a direct competitor and whether she would "compete" with it in violation of the agreement by attempting to solicit staff and clients to her new employer. It did not rush to file without conducting a reasonable inquiry.

¶16 Second, as the circuit court correctly observed, Nursing Centers could reasonably believe that Cherubini was doing things to bleed off its customers and nurses, whether or not she was ultimately successful.

¶17 Third, the fact that medical facilities sent out bulk emails to many temporary-staffing agencies does not negate that Nursing Centers wanted and worked to be the first choice for its clients, clients with whom it had contracts, thus eliminating those clients' need to fill their shifts by sending out mass emails.

¶18 The circuit court properly exercised its discretion when it ruled that Nursing Centers's request for a temporary injunction was not frivolous.

B. WIS. STAT. RULE 804.12.

¶19 WISCONSIN STAT. RULE 804.12(3) requires the circuit court to award attorney fees incurred by a party that proves the truth of an allegation denied in a request to admit.[3] ***Id.***; ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 146–148, 502

[3] WISCONSIN STAT. RULE 804.12(3) provides, as material:

> EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter

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N.W.2d 918, 922 (Ct. App. 1993). Our review of the circuit court's decision on this issue is mixed. *See* ***id.***, 178 Wis. 2d at 148, 502 N.W.2d at 923. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Ibid.*** Whether those facts require an award of fees and expenses under RULE 804.12(3), however, "is a question of law that we review independently." ***Ibid.***

¶20 Cherubini argues she is entitled to attorney fees and expenses as a sanction for Nursing Centers's denial of her two requests to admit that it had not suffered irreparable injury and would not likely suffer irreparable injury.[4] We disagree.

> as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

[4] The two requests to admit and answers were as follows:

> [Request No.] 12. Admit that Nursing Centers, Inc. has not suffered irreparable injury as a result of any activities by Robin Cherubini since her termination.
>
> **Response**: Deny.
>
> [Request No.] 13. Admit that Nursing Centers, Inc. [i]s not likely to suffer irreparable injury if Robin Cherubini is not enjoined during the pendency of these consolidated actions.
>
> **Response**: Deny.

¶21 Before Cherubini could recover sanctions under WIS. STAT. RULE 804.12(3), she had to prove that Nursing Centers did not suffer irreparable injury and would not likely suffer irreparable injury. She has not done so; it is thus no answer to argue the obverse: that Nursing Centers never proved that it *had* suffered irreparable injury. The circuit court never made a finding on whether irreparable injury was proven or not proven, and we are affirming the circuit court's ruling that Nursing Centers's request for a temporary injunction was not frivolous. The circuit court did not err in denying Cherubini's request for sanctions under RULE 804.12(3).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.