COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2016AP2025 **Cir. Ct. No. 2013CV3142**

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

JOHN KARSTEN,

PLAINTIFF,

V.

TERRA ENGINEERING & CONSTRUCTION CORPORATION,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

V.

ROBERT J. KARSTEN AND MIDWEST DRILLED FOUNDATIONS & ENGINEERING, INC.,

THIRD-PARTY DEFENDANTS,

MIDWEST DRILLED FOUNDATIONS-LANDFILL DIVISION, LLC AND LANDFILL DRILLING & PIPING SPECIALISTS, LLC,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 LUNDSTEN, P.J. Terra Engineering & Construction appeals the circuit court's order granting summary judgment in favor of multiple parties that, for purposes here, we refer to collectively as "the Midwest defendants." Defendant Robert Karsten is included in our references to "the Midwest defendants," but plaintiff John Karsten is not. References to "Karsten" in this opinion are to plaintiff John Karsten.

¶2 The dispute on appeal is limited to whether Terra may enforce noncompete clauses, otherwise known as restrictive covenants, in a contract between Terra and Karsten, a former Terra employee. According to Terra, Karsten diverted business from Terra to one or more Midwest defendants in violation of that contract.

¶3 Terra argues that the circuit court erred in granting summary judgment against Terra and in favor of the Midwest defendants after the court concluded that the restrictive covenants are unreasonable and, thus, unenforceable. More specifically, Terra argues that, based on our decision in ***Selmer Company v. Rinn***, 2010 WI App 106, 328 Wis. 2d 263, 789 N.W.2d 621, we should conclude that the statute that ordinarily governs restrictive covenants does not apply here or, at a minimum, that there is a factual dispute as to whether the statute applies. Terra further argues that, even if the statute applies, the restrictive covenants are reasonable and, thus, enforceable. We reject both arguments and therefore affirm.

Background

¶4 According to the pleadings, Terra is in the business of designing and constructing landfill gas extraction and piping systems, earth retention systems, foundations, energy systems, underground utilities, and watercourse projects. Karsten was a long-time Terra employee who, by the time he left Terra, had served on Terra's board and had become Terra's president.

¶5 In 1991, Terra and Karsten entered into the contract that contains the restrictive covenants at issue here. We discuss pertinent terms of the contract and the substance of the covenants in the Discussion section below. It is sufficient here to say that the covenants limited Karsten's ability to engage in competitive activity both before and after leaving employment with Terra.

¶6 In September 2013, Karsten left Terra. According to Terra, possibly before and certainly after that time, Karsten began competing with Terra, namely by becoming affiliated with or forming each of the Midwest defendants. The circuit court proceedings that gave rise to this appeal began when Karsten sued Terra, seeking a declaration that the restrictive covenants are unenforceable. Terra, in turn, brought the Midwest defendants into the lawsuit, alleging that the Midwest defendants tortiously interfered with the contract between Terra and Karsten. It appears that the parties agree that Terra's tortious interference claim against the Midwest defendants is based on Karsten's alleged violation of one or more of the restrictive covenants. As noted, Terra's allegations included that Karsten diverted business to the Midwest defendants in violation of his contract with Terra.

¶7 On summary judgment, the circuit court concluded that the restrictive covenants are unenforceable under WIS. STAT. § 103.465, the statute

that ordinarily governs restrictive covenants.[1] The court therefore dismissed Terra's tortious interference claim against the Midwest defendants. Terra appeals the resulting order.

Discussion

¶8 This court reviews summary judgment decisions de novo, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶9 As noted above, Terra argues that the circuit court erred in granting summary judgment here for two reasons. First, Terra argues that, under the ***Selmer*** case, WIS. STAT. § 103.465 does not apply here. Second, Terra argues that, even if the statute applies, the restrictive covenants are reasonable and, thus, enforceable. We address each argument in separate sections below.

---

[1] All references to the Wisconsin Statutes are to the 2015-16 version. WISCONSIN STAT. § 103.465 provides:

> **Restrictive covenants in employment contracts.** 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 section, 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.

A. Applicability of WIS. STAT. § 103.465 to the Restrictive Covenants

1. Why the Applicability of WIS. STAT. § 103.465 Matters

¶10 We start by briefly explaining why the applicability of WIS. STAT. § 103.465 matters.

¶11 Under the common law existing before the statute's passage, courts could reform an unreasonable restrictive covenant and enforce the covenant to the extent that it was reasonable to do so. *See* ***Fullerton Lumber Co. v. Torborg***, 270 Wis. 133, 139-48, 70 N.W.2d 585 (1955) (concluding that the 10-year period in a restrictive covenant was unreasonable but that enforcing the covenant for a minimum of 3 years would be reasonable). In contrast, under the statute, a restrictive covenant that imposes an unreasonable restraint is entirely unenforceable; it may not be reformed and enforced by a court. *See* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶65, 319 Wis. 2d 274, 767 N.W.2d 898 ("This statute was passed in 1957 in response to [supreme court decisions] authorizing courts to modify unreasonable covenants to make them reasonable and enforceable."); *see also* ***Henderson v. U.S. Bank, N.A.***, 615 F. Supp. 2d 804, 810 (E.D. Wis. 2009) ("An important feature of this statute is that it forbids judicial modification of an unreasonable restrictive covenant.").

¶12 Thus, if the statute applies here, our conclusion in section B. below that the restrictive covenants are unreasonable ends the matter. If, instead, the statute does *not* apply, our conclusion in section B. might lead to remand and further proceedings in the circuit court to consider reforming and enforcing the covenants.

*2. We Will Assume Without Deciding That **Selmer** Binds Us*

¶13 Were it not for our 2010 ***Selmer*** case, there would be no dispute that WIS. STAT. § 103.465 applies to the restrictive covenants here. Section 103.465 covers a "covenant by an [employee] ... not to compete with his or her employer ... during the term of the employment ... or after the termination of that employment ..., within a specified territory and during a specified time." We discern no reason why this statutory language would not apply to the covenants at issue here. Certainly, Terra makes no non-***Selmer***-based argument as to the applicability of the statute.

¶14 However, we do not write on a clean slate. In ***Selmer***, we stated that "not all noncompete agreements fall within WIS. STAT. § 103.465's ambit." ***Selmer***, 328 Wis. 2d 263, ¶19. Rather, according to our ***Selmer*** decision, the statute applies when either: (1) the covenant is a condition of employment or (2) the employer possesses an unfair bargaining advantage over the employee. *See **id.***, ¶23. Specifically, we wrote:

> We have established that where it appears the covenant cannot be separated from the employment relationship—either because the covenant is a condition of employment, or because the employer possesses an unfair bargaining advantage vis-à-vis the employee—the covenant receives the exacting scrutiny mandated by § 103.465.

Id. Stating the ***Selmer*** rule conversely, WIS. STAT. § 103.465 does not apply when a covenant is not a condition of employment *and* the employer does not possess an unfair bargaining advantage over the employee.

¶15 In ***Selmer***, we proceeded to apply this test to circuit court fact finding and concluded that WIS. STAT. § 103.465 did not apply to a restrictive covenant contained in a stock option agreement between an employer and an

employee. *See* ***Selmer***, 328 Wis. 2d 263, ¶¶13, 21-23. In particular, we relied on circuit court findings indicating that the employee in ***Selmer*** was free to refuse to enter into the stock option agreement without affecting his employment. *See* ***id.***, ¶¶21-22.

¶16 We question now whether ***Selmer*** comports with the text of WIS. STAT. § 103.465. Further, we question whether ***Selmer*** conflicts with supreme court case law. *See* ***Star Direct***, 319 Wis. 2d 274, ¶20 ("Wisconsin Stat. § 103.465 governs the enforceability of restrictive covenants."); ***Holsen v. Marshall & Ilsley Bank***, 52 Wis. 2d 281, 287, 190 N.W.2d 189 (1971) (concluding that "a provision in an employer's profit sharing and retirement plan that calls for forfeiture of benefits by employees who engage in competitive enterprises is valid and enforceable only if it meets the requirements of sec. 103.465"); *but see* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306-10, 306 N.W.2d 292 (Ct. App. 1981) (a case relied upon by ***Selmer*** in which the court declined to apply the statute to restrictive covenants made *between companies* as part of the sale of a business and when the covenants contained no restrictions on the right of individual employees to enter into competitive employment).

¶17 Rather than enter into a more extended discussion about our concerns with ***Selmer***, we will assume without deciding that ***Selmer*** is good law under precedent of our supreme court, and we will apply it. We simply note that, to the extent ***Selmer*** fails to comport with statutory language, we are bound by ***Selmer***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court has the power to modify or overrule a court of appeals decision). But, if ***Selmer*** conflicts with one or more supreme court decisions, we would be bound to follow the supreme court decisions. *See* ***Cuene v. Hilliard***,

2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509 ("To the extent that a supreme court holding conflicts with a court of appeals holding, we follow the supreme court's pronouncement."). Because we conclude here that Terra loses even if ***Selmer*** is good law, we need not definitively resolve whether there is in fact such a conflict.

*3. Why We Reject Terra's **Selmer**-Based Argument*

*a. Whether, Under the **Selmer** Test, the Covenants Here Are Not a Condition of Employment*

¶18 As we explained above, under ***Selmer***, WIS. STAT. § 103.465 does not apply when a covenant is not a condition of employment *and* the employer does not possess an unfair bargaining advantage over the employee. Terra attempts to avoid the consequences of applying the statute here by persuading us that both of these conditions are present. We need not address both because, for the reasons that follow, we conclude that the covenants at issue here *are* a condition of employment, obviating the need to address the unfair bargaining advantage issue.

¶19 According to Terra, as in ***Selmer***, the evidence in this case, including the contract itself, "demonstrate[s that] the restrictive covenants were not a condition of Karsten's employment with Terra but were instead tied to granting Karsten an option to purchase stock in Terra." However, the contract language here, unlike in ***Selmer***, clearly makes the restrictive covenants a condition of employment. As the Midwest defendants point out, we need look no further than the first page of the contract, which begins with the following provisions:

> WHEREAS, the Company and the Employee wish to document *the terms and conditions of continued*

> *employment* and to provide the Employee with an opportunity for stock ownership in the Company.
>
> NOW, THEREFORE, in consideration of the foregoing and the mutual covenants herein made, the Company and the Employee hereby agree as follows:
>
> **1. <u>Employment</u>**. The Company hereby employs the Employee, and the Employee hereby accepts employment with the Company, *upon the terms and subject to the conditions set forth in this Agreement.*

(Italics added; bold and underlining in original.)

¶20 The conclusion that Karsten's employment was contingent on Karsten agreeing to the restrictive covenants "set forth" in the contract is further made clear by express language stating that Karsten can be terminated for noncompliance with the restrictive covenants. Specifically, paragraph 13 of the contract states that "any breach" of the restrictive covenants is grounds for termination for cause.

¶21 We could point to other contract provisions supporting the view that the restrictive covenants are a condition of Karsten's employment, but the provisions we have already discussed are more than sufficient to support this conclusion.

¶22 Terra correctly points out that the contract here expressly ties the restrictive covenants to Karsten's option to purchase stock in Terra. But Terra does not explain why this link between the restrictive covenants and the stock purchase option negates the additional features of the contract that tie Karsten's employment to his agreement to abide by the covenants. The fact that the contract ties the restrictive covenants to the stock purchase option does not mean that the restrictive covenants are not *also* a condition of Karsten's employment.

b. Whether Evidence Extrinsic to the Contract Creates a Factual Dispute Regarding the Applicability of WIS. STAT. § 103.465

¶23 All of Terra's remaining arguments as to the applicability of WIS. STAT. § 103.465 are based on evidence that is extrinsic to the contract. In particular, Terra points to separate documentation addressing Karsten's option to purchase stock, to statements by Terra witnesses, and to statements by Karsten himself. As we understand it, Terra argues that this evidence creates a factual dispute as to whether Karsten agreed to the restrictive covenants for any purpose other than to obtain the stock purchase option and that, if *that* was the only purpose or even the primary purpose, then this case is just like ***Selmer*** and we should, similarly, conclude that § 103.465 does not apply.

¶24 The Midwest defendants respond that we cannot consider extrinsic evidence in the face of unambiguous contract language. They point to the general rule of contract construction that courts construe contracts based on the written provisions of the contract unless those provisions are ambiguous. *See*, *e.g.*, ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476.

¶25 We agree with the Midwest defendants that we must apply this general rule of contract construction here. This is clear from ***Farm Credit Services of North Central Wisconsin, ACA v. Wysocki***, 2001 WI 51, ¶¶9-12, 243 Wis. 2d 305, 627 N.W.2d 444, where our supreme court applied the "standard rules of contract interpretation" to the interpretation of restrictive covenants.

¶26 This brings us to the reason that this argument by Terra is ultimately a ***Selmer***-based argument. Terra correctly points out that in ***Selmer*** we relied on extrinsic evidence. *See* ***Selmer***, 328 Wis. 2d 263, ¶21. Apparently Terra means to

argue that, because we considered extrinsic evidence in ***Selmer***, we must likewise consider extrinsic evidence here. We are not persuaded.

¶27 First, it is not apparent from our ***Selmer*** decision *why* we thought it permissible to consider extrinsic evidence. Based on the ***Selmer*** decision alone, the agreement in ***Selmer*** may have been silent or ambiguous as to whether the restrictive covenants were a condition of employment, or the parties for some other reason may have agreed that such evidence should be considered. *See* ***id.***, ¶4 & n.2 (quoting limited parts of the ***Selmer*** agreement).

¶28 Second, and more importantly, we are bound by the general rule of contract construction, established by our supreme court, prohibiting the consideration of extrinsic evidence for purposes of construing a contract when the contract terms are unambiguous. *See* ***Farm Credit Servs.***, 243 Wis. 2d 305, ¶12 (stating, in the restrictive covenant context, that the limit on extrinsic evidence is one of the standard rules of contract interpretation that apply). Indeed, ***Selmer*** itself acknowledges that "covenants not to compete are contracts, subject to common law contract principles," *see* ***Selmer***, 328 Wis. 2d 263, ¶23, which, obviously, includes limitations on the consideration of extrinsic evidence.

¶29 Moreover, although we do not dwell on the topic, the Midwest defendants persuasively point out, with no significant response from Terra, that the contract here contains a merger clause providing that the terms of the contract constitute the "entire agreement," and further providing that there have been no other "agreements" or "representations" between the parties. We agree with the Midwest defendants that this merger clause is yet another fact that differentiates this case from ***Selmer***, so far as we can tell from the face of ***Selmer***.

¶30 In sum, Terra's ***Selmer***-based argument fails to persuade us that the circuit court erred in concluding, on summary judgment, that WIS. STAT. § 103.465 applies to the restrictive covenants here. We proceed to the question of whether the restrictive covenants are reasonable and, therefore, enforceable.[2]

B. Whether the Restrictive Covenants Are Reasonable

1. Whether the Three Restrictive Covenants at Issue Here Are Divisible

¶31 As an initial matter, the parties dispute whether the restrictive covenants are "divisible." When restrictive covenants are divisible, the unreasonableness of one covenant does not automatically render the others unenforceable. *See* ***Star Direct***, 319 Wis. 2d 274, ¶¶4-5, 66, 76-78, 82-83. If covenants are *not* divisible, then the covenants are treated as one covenant for purposes of enforceability and all will fall if even one is unreasonable. *See* ***id.***[3]

[2] Terra asserts that Karsten fabricated and destroyed evidence to support his position. Terra argues in passing that, based on this conduct, "it would have been an appropriate exercise of [the circuit court's] discretion to ... grant summary judgment to Terra" as a sanction. Although Terra provides a string cite of cases in support of this briefly stated argument, we do not address the merits of the argument because Terra does not lay out how and when it directed this argument to the circuit court. That is, this is an argument that is properly directed to a circuit court exercising its fact-finding and discretionary authority. The circuit court could have determined factually whether Karsten fabricated or destroyed evidence and, if so, could have exercised its discretion regarding the appropriate sanction. Terra does not direct our attention to a place in the record where Terra asked the circuit court to address the topic and impose sanctions.

[3] The court in ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898, thus apparently interpreted the statute's reference to "[a] covenant" as including any divisible covenant within a single contract. *See* ***id.***, ¶¶65-66, 76-77. Were it otherwise, ***Star Direct*** would appear inconsistent with the statutory language requiring that "*[a]ny covenant* … imposing an unreasonable restraint is … unenforceable *even as to any part of the covenant* … that would be a reasonable restraint." *See* WIS. STAT. § 103.465 (emphasis added). Similarly, were it otherwise, ***Star Direct*** would appear to be internally inconsistent insofar as ***Star Direct*** states that the statute was enacted in response to prior court decisions "authorizing courts to modify unreasonable covenants to make them reasonable and enforceable." *See* ***Star Direct***, 319 Wis. 2d 274, ¶65.

¶32 Here, Terra argues that the restrictive covenants, which are set forth in full below, are divisible into three distinct covenants even though there is introductory language applicable to all three covenants. We will assume, in Terra's favor, that there are three divisible covenants. Thus, as Terra does in its briefing, we analyze each covenant individually on its own merits.

2. The Contractual Language That Makes Up the Three Covenants

¶33 The three covenants at issue here are found in subsections designated (a), (b), and (c). As noted, they share introductory language. Generally speaking, covenant (a) relates to territories in which Terra has marketed its business; covenant (b) relates to the sale of products or services similar to Terra's products and services; and covenant (c) relates to confidential information as defined in the contract. The pertinent contract language states as follows:

> During the term of his employment with the Company and for a period of twenty-four (24) months thereafter (the "Noncompetition Period"), … the Employee shall not, directly or indirectly, render services to, assist, participate in the affairs of, or otherwise be connected with, any person or business enterprise which is engaged in, or is planning to engage in, any business that is in any respect competitive with the business of the Company, with respect to any products or services of the Company that were within the Employee's management responsibility at any time within the twelve (12) month period immediately prior to the termination of the Employee's employment with the Company, in any capacity which
>
> (a) would utilize the Employee's services with respect to such business within any state of the United States, or any substantially comparable political subdivision of any other country, wherein the Company sold or actively attempted to sell its products or services within the twelve (12) month period immediately prior to the termination of the Employee's employment with the Company, irrespective of where the Employee renders such services,

> (b) would utilize the Employee's services in selling any products or services similar to those of the Company to any person or entity to which the Company sold or actively attempted to sell its products or services during the twelve (12) month period immediately prior to the termination of the Employee's employment with the Company, irrespective of where the Employee renders such services, or
>
> (c) would reasonably be expected to utilize any Confidential Information acquired by the Employee during the term of his employment by the Company ….

¶34 Before addressing these covenants individually, we pause to make four points that apply to all three.

¶35 First, Terra does not seriously argue that there is any material factual dispute that might affect our analysis of the reasonableness of any covenant. Rather, Terra's only developed arguments as to reasonableness appear directed at persuading us, based on the contractual language and other undisputed facts, that the covenants are reasonable and, thus, enforceable, as a matter of law. To the extent that Terra might mean to make a back-up argument that there are disputed facts bearing on reasonableness, we consider the argument undeveloped and we do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

¶36 Second, in deciding whether restrictive covenants are reasonable, we must bear in mind that restrictive covenants are disfavored. "Restrictive covenants in Wisconsin are prima facie suspect as restraints of trade that are disfavored at law, and must withstand close scrutiny as to their reasonableness." ***Star Direct***, 319 Wis. 2d 274, ¶19. Such covenants are regarded with suspicion because "the law seeks to 'encourage[] the mobility of workers.'" *See* ***Farm Credit Servs.***, 243 Wis. 2d 305, ¶9 (quoted source omitted).

¶37 Third, courts often say that the reasonableness of a restrictive covenant depends on five requirements. The covenant must "(1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy." *See, e.g.*, ***Star Direct***, 319 Wis. 2d 274, ¶20; *see also* ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 470, 309 N.W.2d 125 (Ct. App. 1981). Here, however, the parties do not systematically address all five requirements. Rather, they focus on overall reasonableness, comparing and contrasting the covenants here with those in other cases while at the same time occasionally referencing specific requirements. The parties' approach mimics discussions in several restrictive covenant cases similarly failing to address the five requirements individually and, instead, discussing overall reasonableness. We thus follow the parties' approach in our analysis below.

¶38 Fourth, the parties' disputes as to the covenants' reasonableness include differing interpretations of some specific language. But we need not resolve these sub-disputes over interpretation. Rather, without deciding whether such interpretations are correct, we will adopt Terra's interpretations of the covenants. Even accepting an interpretation of all three covenants most favorable to Terra, we reject Terra's argument that all three are reasonable.

a. Covenant (a)—The Territories-Where-Terra-Marketed-Its-Business Restriction

¶39 As just noted, we accept Terra's reading of covenant (a) and conclude that, even under that reading, covenant (a) is unreasonable. According to Terra, covenant (a) "prohibits Karsten from working for a competitor ... *in those*

states or comparable foreign political subdivisions in which Terra sold or actively attempted to sell its products or services" during the 12 months prior to Karsten's termination (emphasis added).[4] Terra does not give us any indication of the number of states or, for that matter, countries in which Terra might have marketed its business during the last 12 months of Karsten's employment with Terra. Thus, as best we can tell, Terra does not seriously argue that covenant (a) contains a meaningful territorial restriction.

¶40 Terra argues that covenant (a) is reasonable for two main reasons. First, Terra points out that covenant (a) prohibits Karsten from working for Terra competitors "only in a capacity that would use Karsten's services with respect to the products or services over which he had management control." Second, Terra argues that Karsten "was not a run-of-the-mill employee, but was a high level executive, board member and shareholder of Terra," and that, "[g]iven the breadth of Karsten's responsibilities and depth of information he had about Terra" in this position, covenant (a) is reasonable.

¶41 These arguments do not persuade us that covenant (a) is reasonable. Rather, for the reasons we now explain, we agree with the circuit court that covenant (a) is exceedingly broad and unreasonable even as to a high-level employee like Karsten.

[4] Covenant (a) limits Karsten's activities until 24 months following Karsten's departure from Terra. This two-year period, at least standing alone, is not unreasonable. *See* ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 479, 309 N.W.2d 125 (Ct. App. 1981) ("two-year limitations have previously been upheld and are therefore not unreasonable per se").

i. "Management Responsibility" Limitation

¶42 Although we agree with Terra that the "management responsibility" language provides a limitation, Terra points to no facts suggesting that the limitation is a significant one. We note that, even with this limitation, covenant (a) effectively prohibits Karsten from performing similar work for *anyone* in *any* state or other territory in which Terra has customers or has *attempted* to obtain even one customer within the specified time period. Thus, for example, covenant (a) would prevent Karsten from performing similar work in Iowa or Illinois, or even a larger state such as California or a Canadian province, as long as Terra had, during the year prior to Karsten's termination, briefly and unsuccessfully solicited just one potential customer in that state or province.

¶43 We agree with the Midwest defendants that covenant (a) suffers from similar flaws to those that led the court to strike down a restrictive covenant in ***Sysco Food Services of Eastern Wisconsin, LLC v. Ziccarelli***, 445 F. Supp. 2d 1039 (E.D. Wis. 2006). First, like the covenant in ***Sysco Food Services***, covenant (a) lacks a meaningful territorial limitation, at least as far as we can tell from Terra's arguments. *Compare* ***id.*** at 1041-42, 1048. Second, like the covenant in ***Sysco Food Services***, covenant (a) prohibits Karsten from competing with Terra not only as to Terra's actual customers but also as to non-Terra customers that Terra unsuccessfully solicited. *Compare* ***id.*** at 1041-42, 1048-49. Further, here the covenant is broader than the one in ***Sysco Food Services*** because it covers companies that are merely located in states and provinces where there has been a solicitation. *Compare* ***id.*** at 1041-42.

¶44 While there are factual differences between ***Sysco Food Services*** and the instant case, Terra points to no other case that appears more analogous as

to the breadth of covenant (a), and we consider ***Sysco Food Services*** to be persuasive. Terra relies on cases that are easily distinguished because they involved restrictive covenants limited to the employer's *actual customers*. *See* ***Henderson***, 615 F. Supp. 2d at 812-13; ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 462-63, 304 N.W.2d 752 (1981); *see also* ***Farm Credit Servs.***, 243 Wis. 2d 305, ¶¶1, 4, 15-16. Obviously, such covenants are far narrower than covenant (a) here, which goes well beyond actual customers to include all potential customers in any territory where Terra has marketed its business, even if Terra has no interest in soliciting those customers.

¶45 That covenant (a) is extreme, even as compared with the covenants in the cases *Terra* relies on, is underscored by the nature of the dispute in one of those cases, ***Rollins***. Specifically, in ***Rollins***, the pertinent dispute was whether the covenant was unreasonable because it included employer *customers* with whom the employees in ***Rollins*** had no *direct* contact. *See* ***Rollins***, 101 Wis. 2d at 462, 465, 467. The ***Rollins*** court apparently viewed that direct contact question as a close call, requiring further factual development. *See* ***id.*** Here, in contrast, covenant (a) is plainly far broader than the ***Rollins*** covenant for the reasons that we have explained.

ii. Karsten's High-Level Position with Terra

¶46 We agree with Terra that Karsten's high-level position is a valid consideration, but Terra points to no case in which a restrictive covenant as broad as covenant (a) has been upheld with respect to *any* type of employee. Rather, Terra relies on cases we have already addressed above that involve restrictive covenants more narrowly tailored to actual customers.

¶47 We acknowledge Terra's concern that an executive-level employee such as Karsten may be especially well positioned to take advantage of strategic or other confidential information, but covenant (a) applies regardless whether Karsten actually takes advantage of his knowledge of that sort of information. Further, given the suspicion with which we must regard restrictive covenants, and the underlying policy of worker mobility, we fail to see how it would be reasonable to conclude that covenant (a) is reasonable simply because Karsten was an executive-level employee. Terra cites no authority for the proposition that it is generally more reasonable to place greater restrictions on executive-level employees than on mid-level managers or sales staff, both of whom may also be well positioned to take advantage of specialized information gained through their employment.

b. Covenant (b)—The-Sale-of-Similar-Products-or-Services Restriction

¶48 Turning to covenant (b), the same 24-month and "management responsibility" limitations apply as in covenant (a). Subject to those limitations, Terra interprets covenant (b) as prohibiting Karsten from working "in any capacity which would utilize [his] services in selling any products or services similar to those of Terra" to any company to which Terra sold or attempted to sell its products in the previous 12 months.

¶49 Karsten's arguments in support of covenant (b) add nothing to arguments that we have already rejected in discussing covenant (a), and we again agree with the circuit court and the Midwest defendants that covenant (b) is overly broad and unreasonable. It is true that covenant (b) is more limited than covenant (a) insofar as it is limited to the sale of certain products or services. However, covenant (b) is *broader* than covenant (a) insofar as covenant (b) does not even

purport to provide any territorial limitation. Further, like covenant (a), covenant (b) effectively prevents Karsten from seeking out customers that Terra has solicited unsuccessfully.

c. Covenant (c)—The Confidential Information Restriction

¶50 We turn finally to covenant (c), which prohibits Karsten for 24 months following separation of employment from performing similar work that "would reasonably be expected to utilize any Confidential Information acquired by the Employee during the term of his employment by the Company."

¶51 The parties' dispute over the enforceability of covenant (c) focuses on whether covenant (c) and its corresponding definition of "Confidential Information" is similar to a provision upheld as reasonable in ***Star Direct***. Because we reject Terra's argument that covenant (c) is similar to the provision in ***Star Direct***, we reject Terra's argument that covenant (c) is reasonable. Terra makes no other developed argument as to covenant (c).

¶52 The contract here defines "Confidential information" broadly as follows:

> "Confidential information" shall mean any and all ideas, suggestions, innovations, conceptions, discoveries, inventions, improvements, technological developments, methods, processes, specifications, formulae, methods, compositions, techniques, systems, machines, devices, computer software and programs, notes, memoranda, work sheets, lists of actual or potential customers and suppliers, works of authorship, products, data and information in any form (whether or not readable by a human without the aid of a machine or device) that concern or relate to any aspect of the actual or contemplated business of the Company, including without limitation market research and technical or scientific research and development, or are, for any reason, treated as confidential by the Company ....

¶53 For purposes here, we will assume, as Terra argues, that there is no meaningful distinction between this quoted *definitional* language in covenant (c) and the definitional language in the ***Star Direct*** covenant. *See* ***Star Direct***, 319 Wis. 2d 274, ¶11. We will further assume that, under ***Star Direct***, this type of broad definitional language is permissible.[5]

¶54 Nonetheless, as the Midwest defendants point out, covenant (c) includes two provisions that go beyond the definitional language in ***Star Direct***. Terra fails to develop an argument as to either of these two provisions.

¶55 First, the definition of confidential information here, unlike the definition in ***Star Direct***, includes any information "treated as confidential by" Terra and then goes on to make an exception for information that Karsten can prove "beyond a reasonable doubt" is public. This latter language, while couched as an exception favorable to Karsten, appears to effectively place the highest burden known to law on Karsten as to whether any given information was confidential. The burden runs contrary to the usual civil standards of proof and places a heavy burden on Karsten on a topic for which it is more reasonable to expect *Terra*, as the party seeking to enforce a restrictive covenant, to carry the burden. *Cf.* ***id.***, ¶20 (stating that the *employer* has the burden of proof to prove a covenant's reasonableness); ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶4, 318 Wis. 2d 488, 770 N.W.2d 727 (same); ***Geocaris v. Surgical Consultants, Ltd.***, 100 Wis. 2d 387, 388, 302 N.W.2d 76 (Ct. App. 1981) (same).

[5] In ***Star Direct***, the court upheld the language as permissible only after giving it a narrowing construction. *See* ***Star Direct***, 319 Wis. 2d 274, ¶¶59, 62-63.

¶56 Second, unlike the covenant in ***Star Direct***, covenant (c) does not require *actual* use of confidential information. It goes farther by prohibiting Karsten from performing similar work that "would reasonably be expected to" use such information. Absent argument from Terra, we see this provision as problematic because, as compared to an actual use standard, as in ***Star Direct***, covenant (c) provides a malleable standard likely to deter Karsten from performing work that does not actually use confidential information and does not infringe on any reasonably protectable interest of Terra.

Conclusion

¶57 For the reasons above, we affirm the circuit court's order dismissing Terra's tortious interference claim against the Midwest defendants.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.