STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0421

John H. Witzke,
Respondent,

vs.

Mesabi Rehabilitation Services Inc.,
Appellant.

Filed February 5, 2008
Reversed and remanded
Ross, Judge

St. Louis County District Court
File No. 69DU-CV-06-1546

Mitchell J. Brunfelt, Colosimo, Patchin, Kearney & Brunfelt, Ltd., 301 Chestnut Street, Virginia, MN 55792 (for appellant)

John D. Kelly, Catherine E. Martineau, Hanft Fride, 1000 U.S. Bank Place, 130 West Superior Street, Duluth, MN 55802-2094 (for respondent)

Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Mesabi Rehabilitation Services, Inc., appeals from the district court's summary judgment decision in favor of a former employee upon the court's holding that restrictive covenants in the parties' employment contract are void for lack of consideration. John

Witzke worked for Mesabi for several months before Mesabi asked him to sign an employment contract containing the restrictive covenants, including a noncompetition agreement and a nonsolicitation agreement. Witzke then received support, training, and promotions at Mesabi. But seventeen years after he signed the contract, Witzke left Mesabi to start his own rehabilitation services company. Because the postagreement professional enhancements Mesabi afforded Witzke constitute sufficient consideration, we reverse the district court's summary judgment decision and remand for further proceedings.

FACTS

Mesabi Rehabilitation Services, Inc., provides vocational rehabilitation services to injured persons who qualify for services under the Worker's Compensation Act. Mesabi receives client referrals primarily from attorneys representing worker's compensation claimants. Its service area includes roughly all parts of Minnesota north of the Twin Cities. Its principal office is in Embarrass and its other offices are in Duluth, Hibbing, and Bemidji.

Jim Jackson, a qualified rehabilitation consultant (QRC), founded Mesabi in March 1988 and hired John Witzke two months later to serve part time as a job-placement specialist. Witzke had previously been a delivery truck driver for a soft-drink distributor. Jackson had met Witzke and became his rehabilitation consultant after Witzke suffered a work-related back injury. At the time Mesabi hired Witzke, he had left his truck driving job and was working as a security guard, and Jackson was concluding his services as Witzke's rehabilitation consultant. Witzke, who was not a QRC and had

no background or training in rehabilitation services, was hired to call employers to determine whether they had suitable work for which Mesabi clients could be referred for employment. Mesabi paid him $15 an hour without benefits. Witzke provided no rehabilitation services.

In January 1989, approximately eight months after Witzke began working at Mesabi, Jackson presented him with a draft employment agreement, which Witzke signed after the parties modified one of its provisions in handwriting. The employment agreement contained two restrictive covenants: one regards solicitation, and the other regards competition. The nonsolicitation provision prohibits Witzke from soliciting Mesabi's clients. The noncompetition provision bars Witzke from "performing any rehabilitation, placement, or consulting professional services" within a 150-mile radius of Virginia, Minnesota, for three years after Witzke leaves Mesabi. This area includes most of Minnesota north of the Twin Cities.

Witzke excelled at Mesabi and transitioned into a QRC after he signed the agreement. With Mesabi's support, Witzke began working as a QRC intern in 1990 while he pursued his master's degree. Jackson reviewed and signed Witzke's internship reports and provided him with hands-on training. Mesabi paid Witzke's attendance fees for professional conferences and paid some of his tuition. Witzke became a licensed QRC after he completed his QRC internship, and he received his master's degree in 1992. Mesabi paid his annual QRC registration fees and his continuing education expenses. Mesabi also bought Witzke's professional liability insurance. Witzke worked out of Mesabi's Duluth office as a QRC and Mesabi also paid expenses for him to maintain an

office in his home outside Duluth. During this time, Witzke kept contact with many attorneys in the area, who were Mesabi's primary referral source. Clients from these referrals worked directly with Witzke as their QRC.

In May 2006 Witzke left Mesabi to start his own rehabilitation services company. On the day he gave Mesabi his two-weeks' notice of his intention to quit, he also sent letters to the clients he had served notifying them that he was leaving Mesabi and that they could choose to continue working with him or to stay with Mesabi. At least thirty-four of Witzke's thirty-eight clients left Mesabi. Witzke's new company, called Witzke and Associates Vocational Rehabilitation Services, competes directly with Mesabi to provide QRC services to clients in the same geographic area.

Witzke brought an action in district court seeking a declaration that the noncompetition clause in his employment agreement with Mesabi is invalid and unenforceable. Mesabi filed counterclaims for breach of the noncompetition and nonsolicitation clauses of the contract and misappropriation of trade secrets under Minnesota Statutes section 325C.01 (2006). The district court granted Witzke's motion for summary judgment upon deciding that the agreement is invalid and unenforceable for lack of consideration. The district court ruled in Witzke's favor on that basis without discussing Mesabi's counterclaims. This appeal follows.

D E C I S I O N

Mesabi challenges the district court's summary judgment decision. In reviewing a grant of summary judgment, we consider de novo the application of law when there are no issues of material fact. *80 Designs, Inc. v. Rollerblade, Inc.*, 620 N.W.2d 48, 53

(Minn. App. 2000), *review denied* (Minn. Feb. 21, 2001). Mesabi raises multiple issues on appeal, asking us to decide on the merits whether Witzke violated the nonsolicitation agreement and whether he misappropriated Mesabi's trade secrets. But Mesabi accurately acknowledges that the district court never addressed these questions. Neither will we. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)). It is clear to us that the principal question on appeal is whether the district court erred by ruling that the employment agreement's restrictive covenants were unenforceable for lack of consideration. There are no disputed facts regarding this issue, and whether a contract is supported by consideration is a question of law. *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999).

Contracts generally are valid only if they include consideration. *Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976). Employment agreements are contracts. *Kvidera v. Rotation Eng'g & Mfg. Co.*, 705 N.W.2d 416, 421 (Minn. App. 2005). When an employment agreement includes a restrictive covenant, such as a clause prohibiting an employee to solicit the employer's clients or to compete with the employer's business, and the restrictive covenant is not ancillary to an employment agreement, there must be independent consideration for the covenant. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993). A restrictive covenant is not ancillary to an employment agreement when it is presented to an employee after the employee begins working. *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740

(Minn. 1982). Because Mesabi already employed Witzke when they entered the employment agreement, the agreement's restrictive covenants are not ancillary to Witzke's employment. *See Sanborn Mfg. Co.*, 500 N.W.2d at 164. The restrictive covenants therefore require consideration. *Id.*

Mesabi contends that Witzke's continuation of employment after entering the employment agreement constitutes sufficient consideration to validate the restrictive covenants. In some situations, the continuation of employment can serve as consideration. *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980). In *Davies*, the supreme court found sufficient consideration in support of a noncompetition agreement because the employee had continued in employment ten years after the agreement, advanced to a sales position that would not have been available to him had he not signed the agreement, received training from the company, received the company's support in his professional license applications, and was given sole responsibility for many of the company's customers. *Id.* at 131. We later applied *Davies* and explained that the continuation of postagreement employment can be consideration for the agreement if the employee is employed for many years, advances within the company, and is given increased responsibilities. *Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635, 639 (Minn. App. 1986), *review denied* (Minn. Jan. 21, 1987).

This case is materially indistinguishable from *Satellite Industries*. In *Satellite Industries*, an employee, Keeling, was already working when he signed a restrictive covenant. *Id.* at 637. Keeling read and signed the agreement without discussion. *Id.* Although Keeling began as a sales representative, over the next eleven years he was

promoted to sales manager and eventually to vice president of sales. *Id.* at 638–39. Keeling's employer provided him with product, industry, and marketing training. *Id.* at 639. We held that these long-term career advantages, which occurred after Keeling signed the employment agreement, constituted consideration for the restrictive covenant included in the posthire agreement. *Id*. We reiterated the general rule that "[c]ontinuation of employment alone can be used to uphold coercive agreements, but the agreement must be bargained for and provide the employee with real advantages." *Id.*

The bargaining in *Satellite Industries* was merely implied and assumed based on the various benefits the employee later received. Here, the bargaining is both express and implied. Witzke's employment contract includes a hand-written exception to the noncompetition agreement to allow Witzke to be employed by a local school district to perform rehabilitation services. This exception to the typed contract demonstrates bargaining and shows that Witzke and Mesabi contemplated that Witzke would advance beyond his extant role as job-placement specialist into the role of a QRC to perform rehabilitation services. Witzke did advance within Mesabi, gaining significant professional advantages through the company. After signing the agreement, Witzke not only continued employment with the company for seventeen years, he was professionally supported by Mesabi and advanced within it both in salary and responsibility. He moved from job-placement specialist earning $15 hourly to QRC earning approximately $41 hourly. Mesabi maintains that it relied on the restrictive covenants when promoting Witzke and Witzke offers neither evidence to refute this claim nor persuasive argument

that these professional advances did not qualify as valuable advantages. We hold that Witzke's restrictive covenants are supported by consideration.

Witzke argues that the restrictive covenants are nonenforceable regardless of consideration because they are unnecessary to protect Mesabi's legitimate business interests and are of a scope and duration that are unreasonable as a matter of law. Witzke also contends that Mesabi failed to identify any genuine trade secret that was misappropriated by Witzke in violation of the Uniform Trade Secrets Act. In granting summary judgment, the district court did not address these issues, and we offer no opinion concerning them. We reverse the decision and remand for further proceedings, including consideration of the remaining questions presented at summary judgment.

Reversed and remanded.