

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP1323

Cir. Ct. No. 2005CV1529

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JAMES J. GENDE II,

PLAINTIFF-APPELLANT,

V.

CANNON & DUNPHY, S.C.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. James Gende appeals from a judgment dismissing his complaint against Cannon & Dunphy, S.C. (hereafter CD) seeking compensatory damages, punitive damages, and declaratory relief under employment and separation agreements. He argues that the agreements violate

public policy and are therefore unenforceable, that CD breached the separation agreement and that he has a viable cause of action on post-agreement conduct. We reject his claims and affirm the judgment.

¶2 In May 2000, Gende was employed by CD as an associate attorney. In August 2000, Gende signed a confidential “Employment Agreement.” A description of the terms of the employment agreement relating to the allocation of client fees in the event Gende left the firm and CD clients elected to leave CD can be found in *Markwardt v. Zurich American Insurance Co.*, 2006 WI App 200, ¶2, 296 Wis. 2d 512, 724 N.W.2d 669, *petition for review denied*, 2004AP3236, 2005AP1292/1856/1857/2543 (Wis. Mar. 16, 2007).

¶3 On March 31, 2004, Gende gave CD thirty days notice that he was terminating his employment. Gende and CD entered into a “Separation Agreement” with terms more favorable to Gende than the terms in the employment agreement with respect to allocating fees from existing clients of the firm who retained him after he left. *Id.*, ¶4. In addition to the more favorable terms, the separation agreement includes Gende’s acknowledgement that the 2000 employment agreement is fair, valid and binding and Gende’s agreement not to initiate any challenge to the validity of the employment agreement. Gende also releases CD from any claims to the date of execution of the agreement, April 8, 2004. Finally, the agreement provides that an agreed upon client letter would be sent to all CD clients serviced by Gende on the last day of his employment advising the client of Gende’s departure and informing the client that if there was an election to have Gende continue representation, a written directive was needed to authorize CD to turn the client’s file over to Gende. The letter also advised the client that if the client went elsewhere, CD had the right to assert a claim against

ultimate recovery for costs and attorney fees pursuant to the retainer agreement signed by the client.

¶4 Numerous clients followed Gende to his new law practice and settlement proceeds were obtained in many cases. Gende disputed the amount of costs and fees CD claimed in several cases. *Markwardt*, ¶¶5-7, illustrates the nature of the disputes. Gende commenced this action seeking declaratory relief that the employment and separation agreements are void as against public policy for interfering with an attorney's right to practice law and a client's right to be informed and choose counsel without restraint. He also alleges that CD breached the separation agreement by not sending to clients the exact letter agreed upon and attached to agreement, breached a covenant of fair dealing and good faith by misrepresenting to some clients that Gende was "working out of his car," breached a fiduciary duty of loyalty to Gende and clients, interfered with Gende's business opportunity, and failed to make required disclosures to clients about representation options upon the termination of Gende's employment and the lack of experience of attorneys assigned to handle cases for CD formerly handled by Gende.

¶5 Without filing an answer to the complaint, CD moved to dismiss the action under WIS. STAT. § 802.06(2)(a) (2005-06),¹ and for a protective order staying discovery. The circuit court stayed discovery. Several months later the circuit court indicated that the motion to dismiss would be treated as a motion for summary judgment and the parties were given an opportunity to submit additional materials within a sixty day period. *See* § 802.06(2)(b). By a written decision, the

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

circuit court dismissed Gende's action concluding that Gende lacked standing to assert claims for unnamed clients of CD, the business practices of CD were not unethical, illegal or contrary to public policy, Gende was estopped to reap the benefits of the contracts he signed and then challenge them as unenforceable, and the letter sent to clients was not materially different from the agreed upon letter. The circuit court found the terms of the employment contract as well as the covenant not to sue and the release to be binding and enforceable.

¶6 When reviewing a grant of summary judgment, we apply the same methodology as the circuit court and decide de novo whether summary judgment was appropriate. *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or material facts are in dispute. *Coopman*, 179 Wis. 2d at 555.

¶7 We first address Gende's overriding claim that the employment and separation agreements are unenforceable because they violate public policy by restricting the right of an attorney to practice law. Gende first identifies the fee restrictions in both agreements as an unreasonable restraint on his ability to practice. *Markwardt* determined that only the fee allocations in the separation agreement must be examined because that agreement modified the fee allocation terms of the employment agreement. *Id.*, 296 Wis. 2d 512, ¶30. Recognizing that a law firm and departing attorneys do not violate public policy by contracting for a method to allocate between them fees on cases that have not been completed,

Markwardt held there was nothing inherently unreasonable in the separation agreement between Gende and CD. *Id.*, ¶¶28, 31. We are bound by that decision.² See *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 261, 500 N.W.2d 339 (Ct. App. 1993); *Ranft v. Lyons*, 163 Wis. 2d 282, 299, n.7, 471 N.W.2d 254 (Ct. App. 1991). We need not address the nuances of Gende’s contention that the fee allocation violates public policy.³

¶8 We strongly reject Gende’s contention that the agreements restrict or impede the client’s ability to choose a lawyer or otherwise visit a greater financial obligation on the client. In *Markwardt*, 296 Wis. 2d 512, ¶26, the court recognized that there was no indication that any client paid more because Gende and CD agreed upon a formula for dividing the fee. Clients were informed of the right to choose new counsel, either Gende or someone else.

¶9 Gende also suggests that the provisions in the employment agreement barring a departing attorney from hiring experts, independent contractors, and employees used by CD offend public policy and SCR 20:5:6,

² Despite a discussion of cases from other jurisdictions, Gende’s argument omits that the issue was addressed and decided in *Markwardt v. Zurich American Insurance Co.*, 2006 WI App 200, 296 Wis. 2d 512, 724 N.W.2d 669, *petition for review denied*, 2004AP3236, 2005AP1292/1856/1857/2543 (Wis. Mar. 16, 2007).

³ We agree with the observation made in *Markwardt*, 296 Wis. 2d 512, ¶24 n.10, that Gende’s appellant’s brief inappropriately and repeatedly “spins” the facts and editorializes in his description of the facts contrary to the requirement in WIS. STAT. RULE 809.19(1)(d) and (e) for an objective and completely accurate recitation of the facts. See *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶5 n 2, 281 Wis. 2d 173, 696 N.W.2d 194. The hyperbole in the appellant’s brief is distracting and misleading. For example, in making broad arguments that the agreements violate ethic rules, Gende repeatedly cites to an affidavit of an ethics expert. However, that affidavit was struck by the circuit court as untimely filed. Gende only mentions in his procedural history of the case that the affidavit was struck and ignores that ruling when he cites the affidavit in his brief. We question Gende’s lack of candor with the tribunal as required by SCR 20:3.3. See *Black v. Metro Title, Inc.*, 2006 WI App 52, ¶15 n.2, 290 Wis. 2d 213, 712 N.W.2d 395.

which prohibits an employment agreement that “restricts the rights of a lawyer to practice after termination of the relationship”⁴ We need not decide whether those provisions violate public policy. As observed in *Markwardt*, 296 Wis. 2d 512, ¶30 n.11, Gende has not alleged that he wished to hire a person from the CD staff or that he suffered any difficulty because of the expert witness restriction. Further, before the circuit court CD agreed to permanently waive the enforcement of those provisions. Gende did not object to the stated waiver. Gende cannot for the first time on appeal argue that the provisions are not severable from the employment contract and therefore invalidate the entire contract.⁵

¶10 We turn to Gende’s contention that because the release in the separation agreement only applies to claims existing on the date the separation agreement was signed, April 8, 2004, the release does not bar his claims for tortious interference with prospective economic opportunity and breach of fiduciary duty occasioned by CD’s misrepresentation to clients after Gende’s

⁴ The *Markwardt* court declined to address such a claim because those provisions did not have anything to do with the fee allocation issue. *Markwardt*, 296 Wis. 2d 512, ¶30 n.11.

⁵ At the December 16, 2005 hearing where the circuit court decided that the motion to dismiss would be treated as a motion for summary judgment, the court expressed reservations about the provisions restricting Gende’s hiring of CD employees, independent contractors, and experts. The court questioned whether the entire contract would be void if only some of the terms were contrary to public policy. Gende’s subsequent submission to the circuit court made no response to the invitation to address the severability of those provisions. In his reply brief Gende asserts that he expressly addressed severance. The record citation he provides does not support that contention. The citation is to Gende’s reply brief but that brief was stricken because it was not timely filed. The circuit court did not address the restrictions on hiring employees, independent contractors or experts or severability. Gende first contends that the provisions cannot be severed in his reply brief in this court. We do not address an issue which is raised for the first time on appeal or for the first time in the reply brief. *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, 942, 274 Wis. 2d 719, 615 N.W.2d 154; *Schaeffer v. State Pers. Comm’n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

departure from CD. He asserts that his claims are based on acts committed by CD after April 8, 2004. We reject his attempt to avoid the terms of the release.

¶11 A release operates to settle claims between parties. Thus, it is a contract and its interpretation is a question of law that this court reviews independent of the circuit court. *American Nat. Property & Cas. Co. v. Nersesian*, 2004 WI App 215, ¶14, 277 Wis. 2d 430, 689 N.W.2d 922. A release is construed to give effect to the intent of the parties based on the whole instrument and the surrounding conditions and circumstances. *Gielow v. Napiorkowski*, 2003 WI App 249, ¶14, 268 Wis. 2d 673, 673 N.W.2d 351. The release must be read in conjunction with the covenant not to sue contained within the same agreement—Gende’s promise not to challenge the validity of the employment agreement. CD’s conduct, even after April 8, 2004, arose out of Gende’s employment and the terms of the employment agreement. Gende’s claims stem from the restrictions and obligations set forth in the employment agreement and are claims he released.⁶

¶12 Gende argues that the separation agreement is void because it lacked valid consideration. He contends that the only consideration for the agreement was the employment agreement which violates public policy. *Markwardt*, 296 Wis. 2d 512, ¶31, concluded that valid consideration for the separation agreement existed in that the parties sought to save time and expense required to litigate the exact division of each fee at the conclusion of each case. Additionally, Gende

⁶ The only possible claim not governed by the release is Gende’s claim that CD breached the separation agreement with respect to the agreed upon client letter.

received a more favorable compensation package in return for his agreement not to initiate a challenge to the validity of the employment agreement.

¶13 We reject Gende’s repeated characterization that he was coerced into signing contracts of adhesion. An adhesion contract is “a contract entirely prepared by one party and offered to another who does not have the time or the ability to negotiate about the terms.” *Wisconsin Auto Title Loans v. Jones*, 2006 WI 53, ¶52, 290 Wis. 2d 514, 714 N.W.2d 155. It is undisputed that Gende is a knowledgeable and accomplished lawyer. The separation agreement reflects the renegotiation of separation provisions in the employment agreement. We agree with the self-evident answer to the circuit court’s query: “If an individual with Mr. Gende’s skills cannot be held to the terms of a contract that he freely and voluntarily entered into, I don’t know who could be held to the terms of a contract.” Adequate consideration supports the separation agreement, which in turn reaffirms the employment agreement.

¶14 We note that Gende accepted the benefits of the separation agreement by taking his share of fees under that agreement. “His subsequent challenge to the validity of the very agreement from which he benefited suggests, at a minimum, a certain disingenuousness.” *Markwardt*, 296 Wis. 2d 512, ¶8 n.5. The circuit court ruled that Gende was estopped from attempting to set aside a contract that he has already received a benefit from. CD characterizes Gende as coming to court with “unclean hands” and that his acceptance of fees under the separation agreement constitutes an accord and satisfaction of any claim for more fees. We need not address these legal concepts in detail because the separation agreement is enforceable without resort to these alternative grounds for rejecting Gende’s attempt to void the agreement. However, we summarily conclude that the concepts of estoppel, unclean hands, and accord and satisfaction operate to bar

Gende's challenge to the separation agreement, and consequently, the employment agreement.

¶15 What remains after cutting through the foliage of Gende's broad assertions that the agreements violate public policy is a potential breach of contract claim because the client letter CD sent out did not exactly match the agreed upon letter attached to the separation agreement. Gende contends that whether the breach was material was a question for a jury to determine. Whether a breach of a condition or a contract has occurred, and, if so, whether the breach is material are generally questions of fact reserved for a jury or the court to decide after a trial. See *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 184, 557 N.W.2d 67 (1996); *Shy v. Industrial Salvage Material Co.*, 264 Wis. 118, 125, 58 N.W.2d 452 (1953); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 459, 405 N.W.2d 354 (Ct. App. 1987). However, that alone does not preclude summary judgment. A question of disputed facts exists as to materiality only if the record reveals competing inferences that could be considered reasonable. See *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 189-90, 260 N.W.2d 241 (1977).

¶16 The contents of the letters are not disputed.⁷ The letter attached to the separation agreement provides:

The purpose of this letter is to notify you that Attorney James Gende has decided to voluntarily leave Cannon & Dunphy and practice on his own. We all wish him well and success in his new business.

⁷ CD disputes that the sent letter was not the agreed upon letter. However, that dispute is not material to the determination of whether there was a difference in the letters.

Cannon & Dunphy will gladly continue to represent you pursuant to the retainer contract you signed with our firm and will use the full resources we have available. If you choose to keep your case with Cannon & Dunphy we will reassign your case to another attorney in the firm. That attorney will have you in immediately to discuss your file in detail and answer any questions you might have.

We want to advise you that you are free to have Attorney Gende represent you from his new office. If that is your desire, we will need a written directive from you to turn your file over to him.

You have a third option of seeking counsel with another firm. If that is your choice, then we will need a written directive to turn your file over to the new firm, as well as the name and address of the firm.

If you elect to go elsewhere, you should know that because Cannon & Dunphy have expended time and money in advancing your case, the firm does have the right under Wisconsin law to assert a claim against your ultimate recovery for its costs and attorney's fees pursuant to the original retainer contract you signed with Cannon & Dunphy.

We can assure you that the transition will be a smooth one and will not prejudice your case in any way.

If you have any questions, please call William Cannon at (262) 796-3700 or Patrick Dunphy at (262) 796-3701. We will be happy to address any concerns or questions you may have. If you would like to call Attorney Gende at his new office, you can reach him at 262-893-5683.

The text of the letter actually sent by CD follows with changes underlined:

The purpose of this letter is to notify you that Attorney James Gende has decided to voluntarily leave Cannon & Dunphy and practice on his own. We all wish him well and success in his new business.

Cannon & Dunphy will gladly continue to represent you pursuant to the retainer contract you signed with our firm and will use the full resources we have available. If you choose to keep your case with Cannon & Dunphy we will reassign your case to another attorney in the firm. That attorney will have you in immediately to discuss your file

in detail and answer any questions you might have. We can assure you that the transition will be a smooth one and will not prejudice your case in any way.

We want to advise you that you are free to have James represent you from his new office. His telephone number is (262) 893-5683. If that is your desire, we will need a written directive from you to turn your file over to James.

You have a third option of seeking counsel with another firm. If that is your choice, then we will need a written directive to turn your file over to the new firm, as well as the name and address of the firm.

If you elect to go elsewhere, you should know that because Cannon & Dunphy have expended time and money in advancing your case, the firm does have the right under Wisconsin law to assert a claim against your ultimate recovery for its costs and attorney's fees pursuant to the original retainer contract you signed with Cannon & Dunphy.

If you have any questions, please call William Cannon at (262) 796-3700 or Patrick Dunphy at (262) 796-3701. We will be happy to address any concerns or questions you may have.

¶17 The letters contain the exact same text. The only difference is that the phrase assuring a smooth transition and reference to Gende's phone number were moved up in the body of the letter. There is no reasonable inference that the location of that information changed the meaning of the letter or would change a client's understanding of the letter.⁸ As a matter of law, there was no material breach of the contract and summary judgment was proper.

⁸ Gende cites to an affidavit of a client suggesting that the letter intimidated her into thinking that she would receive less money if she retained Gende after he left CD. The affidavit was struck as untimely and Gende should not be citing it. See footnote 3. In any event, Gende agreed to the language asserting CD's right to recover its costs and attorney fees from ultimate recovery and the language was not changed.

¶18 Gende's final argument is that it was improper to grant summary judgment without allowing discovery.⁹ The circuit court exercises its discretion in determining if sufficient discovery has occurred before ruling on a motion for summary judgment. See *Mathias v. St. Catherine's Hospital, Inc.*, 212 Wis. 2d 540, 554-55, 569 N.W.2d 330 (Ct. App. 1997). The circuit court also exercises its discretion in granting a motion for a protective discovery order under WIS. STAT. § 804.01(3)(a), as was done on CD's motion early in the case. See *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981). The circuit court properly exercises its discretion when its decision is based on proper legal standards and consideration of legally relevant factors. *Id.*

¶19 In granting CD's motion to stay discovery at the outset of the case, the circuit court recognized that the complaint stated a broad array of indefinite claims. It also recognized that the broad discovery requests already filed would necessitate litigation over what was susceptible to discovery. It sought to have the issues narrowly defined before allowing discovery. "This is a reasonable decision based on a reasonable preference for conserving judicial resources." See *Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 773, 582 N.W.2d 98 (Ct. App. 1998). Further, summary judgment was based on the undisputed terms of the agreements. In the absence of any showing by Gende of discovery he could not proceed without, Gende was not prejudiced by the granting of summary judgment before discovery. See *Frankard v. Amoco Oil Co.*, 116 Wis. 2d 254, 267, 342

⁹ CD argues that Gende never objected to proceeding to summary judgment after discovery was stayed. In his reply brief to the motion for summary judgment Gende stated that discovery was necessary. However, that brief was struck. Gende never invoked WIS. STAT. § 802.08(4), which allows a party to seek a continuance or stay to obtain necessary affidavits to respond to a motion for summary judgment.

N.W.2d 247 (Ct. App. 1983) (failure to show prejudice ends consideration of claim that the circuit court erred by not compelling discovery).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

