SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2013AP001392

Runzheimer International, Ltd.,

Plaintiff-Appellant,

v.

David Friedlen and Corporate Reimbursement Services, Inc.,

Defendants-Respondents.

Appeal from a Final Judgment of the Circuit Court of Milwaukee County, the Honorable William W. Brash, III Presiding, Circuit Court Case No. 2012CV0859

AMICUS CURIAE BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE AND THE WISCONSIN CIVIL JUSTICE COUNCIL, INC.

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ISSUE PRESENTED FOR REVIEW

The Court of Appeals certified the following question for this Court's review and determination:

> ***Is consideration in addition to continued employment required to support a covenant not to compete entered into by an existing at-will employee?***

Wisconsin Manufacturers and Commerce ("WMC") and The Wisconsin Civil Justice Council, Inc. (the "WCJC") appear in this appeal to urge this Court to answer the question "no."

INTERST OF AMICUS CURIAE

WMC and the WCJC represent hundreds of Wisconsin employers who employ Wisconsin residents on an at-will basis. Many, if not most, of these employers utilize post-employment restrictive covenants to protect their legitimate business interests, and they update those covenants as necessary to comply with the oft-changing law in this area.

As set forth below, a "yes" answer to the certified question would not only upset current Wisconsin law regarding contracts,

consideration, at-will employment, and post-employment restrictive covenants, but it would jeopardize the interests of Wisconsin employers and employees in maintaining an orderly, workable system of ensuring such agreements comply with Wisconsin law.

INTRODUCTION

Under current Wisconsin law, a promise of at-will employment is sufficient consideration for a post-employment restrictive covenant. *Wisconsin Ice & Coal Co. v. Lueth*, 213 Wis. 42, 44, 250 N.W. 819 (1933). This Court has never drawn a distinction between a promise of at-will employment to a new employee, and a promise of continued at-will employment to an existing employee, and with good reason – because at-will employment can be altered or amended for any legal reason at any time. Each day is essentially a "new" day of employment in such a relationship. *See, e.g.*, *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 567, 335 N.W.2d 834 (1983); *Copeco, Inc. v. Caley*, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992) ("As a practical matter every day is a new day for both

employer and employee in an at-will relationship."). Under current law, a workable system has been established for updating and amending restrictive covenant agreements for at-will employees, with employers conditioning continued at-will employment on the execution of new post-employment restrictive covenants, and willing employees accepting such a benefit to continue employment and forego termination.

Thus, in the interests of Wisconsin employers and their at-will employees, the Court should answer the certified question "no."

ARGUMENT

This Court long-ago rejected the notion that a promise of at-will employment was "illusory" simply because the employment was terminable at any time thereafter. *See Lueth*, 213 Wis. at 44. This Court has never drawn a distinction between initial at-will employment and continued at-will employment. Indeed, courts in most states have recognized that there is no basis for such a

distinction as, in either case, the employment can be terminated at any time thereafter. *See Posselius v. Springer Publishing Co., Inc.*, 2014 WL 1514633 (Michigan Ct. App. Aril 17, 2014) ("For purposes of identifying legally-adequate consideration, we can discern no relevant difference between a promise of at-will employment at the commencement of employment, which could be terminated on a whim the next day, and a promise of continued at-will employment."). Thus, most courts have concluded that a promise of continued at-will employment – or, put another way, an employer's forbearance of its right to immediately terminate an at-will employee – is valid consideration. *Id.*; *Zellner v. Conrad*, 183 A.D.2d 250, 256 (N.Y. App. Div. 1992) (forbearance of right to discharge at-will employee "is a legal detriment which can stand as consideration for a restrictive covenant"); *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 628 (Fla. App., 1982) ("[W]here employment was a continuing contract terminable at the will of either the employer or

employee, the Florida Courts have held continued employment constitutes adequate consideration to support a contract."); *Bleil v. Williams Prod. RMT Co.*, 911 F. Supp. 2d 1141, 1151 (D. Colo. 2012) ("An employer's forbearance of the right to terminate an existing at-will employee constitutes adequate consideration to support a noncompetition agreement"), *quoting Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1062 (Colo. 2011); *Summits 7, Inc. v. Kelly*, 886 A.2d 365, 373 (Vt. 2005). For the reasons set forth in Runzheimer's briefs in this appeal, we believe this is the correct result under Wisconsin law.

We also believe, however, that departing from this law, drawing a distinction between initial and continued at-will employment, and requiring Wisconsin employers to provide *additional* consideration beyond continued at-will employment, would harm both Wisconsin employers and employees.

First, such a distinction creates perverse incentives for employers that are not in the best interest of Wisconsin employers or employees. As the Seventh Circuit Court of Appeals noted, drawing such a distinction would incentivize employers to engage in mass termination of their at-will employees, simply to rehire them again as "initial" at-will employees:

> In the case of employment at will, . . . continued employment for a substantial period is good consideration for the covenant and the only effect of drawing a distinction between pre-hire and post-hire covenants would be to induce employers whose employees had signed such a covenant after they started working *to fire those employees and rehire them the following day with a fresh covenant not to compete.*

Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947 (7th Cir. 1994) (emphasis added). There is no logical reason to force a Wisconsin employer to incur the time and expense of such a termination – or to force an employee who wishes to continue his or her employment to undergo the process of termination – simply to effectuate an agreement both of them want to make in the first instance.

Second, imposing a requirement of additional consideration places Wisconsin employers at a competitive disadvantage. If Wisconsin employers are forced to offer additional benefits to existing at-will employees in order effectuate new restrictive covenant agreements (whether in the form of cash payments or other value), they will incur an additional cost of doing business to protect their proprietary information and reasonable business interests not borne by their counterparts in most other states.

Third, imposing such a requirement impedes the ability of Wisconsin employers to narrow or alter their restrictive covenant agreements to comply with existing law. Often, when a new ruling is issued by a court in this area, existing restrictive covenant agreements are rendered unenforceable by their terms. And, because Wisconsin does not recognize the so-called "blue pencil" rule (*See* Wis. Stat. § 103.446.), Wisconsin employers cannot simply rely on a Court to narrow or alter the agreement to comply with the

law. Thus, Wisconsin employers have an even greater need to periodically update their restrictive covenant agreements than their counterparts in "blue pencil" states, who can largely rely on courts to do it for them. Imposing a requirement of additional consideration simply makes it more difficult for Wisconsin employers to comply with the law and retain enforceable restrictive covenants as do their out-of-state competitors.

CONCLUSION

For the foregoing reasons, WMC and the WCJC respectfully request that this Court reverse the decision of the circuit court and remand for further proceedings.

Dated this 2nd day of September, 2014.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief (exclusive of cover, tables of contents and authorities, signature block and certifications) is 1,164 words.

I further certify that, pursuant to WIS. STAT. § 809.19(12)(f), I have caused to be submitted an electronic copy of this brief which complies with the requirements of § 809.19(12), and that this electronic brief is identical to the printed form of the document being filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 2nd day of September, 2014.

By: *s/ Andrew C. Cook*
Andrew C. Cook

CERTIFICATION OF SERVICE

I certify that I filed the ***Amicus Curiae*** **Brief of Wisconsin Manufacturers and Commerce and the Wisconsin Civil Justice Council, Inc.** in the above-captioned appeal with the Clerk of the Supreme Court and served a copy on counsel of record this 2nd day of September, 2014 by U.S. Mail as designated below:

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