STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

BORGWARNER,

Plaintiff,

v

Case No. 24-205739-CB
Hon. Michael Warren

DAVID DEVINE, and
DANA INCORPORATED,

Defendants.

OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO DEFENDANT DAVID DEVINE AND DEFENDANTS' REQUEST FOR SUMMARY DISPOSITION IN THEIR FAVOR UNDER MCR 2.116(I)(2)

At a session of said Court, held in the
County of Oakland, State of Michigan
May 6, 2025

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

The instant action is before this Court on the Plaintiff's Motion for Partial Summary Disposition as to Defendant David Devine and Defendants' request for summary disposition in their favor under MCR 2.116(I)(2). Having reviewed the Motion, Response, and Reply, and otherwise being fully informed in the premises, oral argument is dispensed as it would not assist the Court in its decision-making process.[1]

At stake in this Motion is whether the Defendant David Devine's identity as a party to the Employment Agreement with BorgWarner is satisfactorily established by proof? Because the answer is "yes," the misnomer in the Agreement does not render it invalid or unenforceable against Devine.

Also at stake in this Motion is whether the noncompete provision in the Employment Agreement is valid under MCL 445.774a(1)? Because the provision protects a reasonable competitive business interest and there are no arguments that it is unreasonable as to duration or geographical scope, the answer is "yes."

Additionally at stake is whether a genuine issue of disputed fact exists as to whether Devine breached the noncompete clause because of his employment with the Defendant Dana Incorporated? Because the answer is "yes," the Plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) is denied.

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[1] MCR 2.119(E)(3) provides court with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously sets the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties have received the process due.

Lastly at stake is whether it is possible for BorgWarner to establish any damages as a result of any breach where the Employment Agreement has a provision for the award of reasonable attorney fees in the event of a breach? Because the answer is "yes," the Defendants' request for judgment in their favor under MCR 2.116(I)(2) is denied.[2]

The Defendant David Devine ("Devine") was employed by the Plaintiff BorgWarner from April 2019 until December 2023. BorgWarner is a Tier 1 automotive supplier. During his employment with BorgWarner Devine became the "Global Director of BorgWarner's Systems Concepts Solution Center."[3] BorgWarner alleges that Devine managed a team which was involved in cost-structuring and quoting as well as formulating, assessing and reviewing material, manpower, investment and technology capabilities.[4] BorgWarner also alleges that while employed with BorgWarner Devine was involved in strategic initiatives.[5]

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[2] This ruling is not inconsistent with the Court's ruling barring the admission of evidence regarding attorney fees at trial based on a discovery sanction against BorgWarner for failing to comply with the basic requirements of discovery. If the parties, for example, agreed to try the attorney fees issue after trial, the instant ruling would allow the claim to move forward.

[3] Complaint and Devine Answer ¶ 15. In his affidavit Devine states that from October 2020 until his departure his title at BorgWarner was "Global Director System Strategy & Platform, Driveline Engineering." Response, Exhibit A, Devine Affidavit, ¶ 7.

[4] Complaint ¶ 16.

[5] *Id.* ¶17.

A
The Employment Agreement and the Dispute

An April 2019 Employment Agreement signed by Devine[6] contains the following provisions:

CONFIDENTIAL INFORMATION

A. EMPLOYEE acknowledges EMPLOYER's lawful right to protect confidential and proprietary information covering a wide range of subject matter, including, but not limited to, technical data, new products, process information, product information, pricing and cost lists, computer disks, customer lists (including telephone numbers and electronic mail addresses), business plans and strategies, employee records, employment records and statistics, computer software, corporate identification, accounting procedures, or any other information which could be of value to a competitor, and which is not readily ascertainable except by virtue of the employment relationship or by improper means and is subject to efforts, reasonable under the circumstances, to maintain its secrecy (collectively "Confidential Information").

B. EMPLOYEE agrees that, both during the term of employment and following termination thereof, he or she will not, directly or indirectly:

   1. reveal to any person (except as required in EMPLOYEE's duties to EMPLOYER or unless authorized in writing to do so by EMPLOYER) any Confidential Information, or any other information relating to EMPLOYEE's work not known generally to the trade and to the public, which either belongs to EMPLOYER, an affiliate of EMPLOYER (that is, an entity which controls, is controlled by, is under control of or is under common control with EMPLOYER), or to third parties with whom EMPLOYER or any of its affiliates, directly or indirectly, has contractual obligations in regard to confidentiality;

[6] The Agreement states that it is between Borg Warner, Inc. and "Wibke Kraemer of 831 Bird Ave, Birmingham, MI 48009 ('EMPLOYEE')." *Id.* at p 1. As will be discussed, the Defendants argue that the "misnaming" of EMPLOYEE means there is no Employment Agreement between BorgWarner and Devine.

2. use any such Confidential Information other than for EMPLOYER's benefit,

3. disclose to EMPLOYER any information which EMPLOYEE is obligated to maintain in confidence, whether under agreement with a former employer or otherwise,

and

4. do work for any other person or concern that in any way may conflict with his or her obligation hereunder.[7]

NON-COMPETITION

A. For two (2) years after the date upon which EMPLOYEE's employment with EMPLOYER terminates, EMPLOYEE shall not, directly or indirectly, engage or participate in any business, active in the automotive industry, regardless of geographical area, that develops, manufactures or markets products, processes or equipment the same as or similar to the products, processes or equipment made, used or sold by any business segment or segments of EMPLOYER in which EMPLOYEE was actively engaged within the three (3) years preceding the date of such termination of employment.

B. For two (2) years after the date upon which EMPLOYEE's employment with EMPLOYER terminates, EMPLOYEE shall not directly or indirectly, regardless of geographical area, (i) solicit or attempt to solicit any customers of EMPLOYER; (ii) solicit or attempt to solicit for any business endeavor any employee of EMPLOYER; or (iii) otherwise divert or attempt to divert from EMPLOYER any business whatsoever or interfere with any business relationship between EMPLOYER and any other person.[8]

[7] Complaint, Exhibit A, Agreement, pp 1-2.
[8] Complaint, Exhibit A, Agreement, p 2.

Devine submitted his resignation to BorgWarner in December 2023 and began working for the Defendant Dana Incorporated ("Dana") in January 2024 in a director level position.[9] BorgWarner alleges that "Dana is a direct competitor of BorgWarner. Specifically, Dana and BorgWarner both provide drivetrain and propulsion solutions, including components for electric vehicles, such as electric propulsion systems and motors. The two companies operate in the same market segments, competing for contracts from a variety of automotive manufacturers."[10] Dana "admits that Dana and Borg Warner are competitors in certain segments of their businesses and are not competitors in other areas."[11] Devine "admits that BorgWarner is a competitor of Dana in certain business and market segments unrelated to Devine's position at Dana."[12]

In a letter dated January 4, 2024, counsel for BorgWarner wrote to Devine to address his "improper conduct" following his separation from BorgWarner.[13] Specifically, counsel informed Devine that his Employment Agreement with BorgWarner included both a non-competition and a non-solicitation clause as well provisions regarding confidential information. Additionally, it was stated that:

> Despite these clear obligations, we have information that you are currently employed or about to start employment with Dana and that, by the very nature of such employment, you will be improperly utilizing BorgWarner's confidential information to BorgWarner's detriment and assisting Dana in

[9] Complaint and Devine Answer, ¶ 33.
[10] Complaint, ¶ 34.
[11] Dana Answer ¶ 34.
[12] Devine Answer ¶ 34.
[13] Complaint, Exhibit B, January 4, 2024 correspondence.

> soliciting BorgWarner's customers. Such actions blatantly violate your Agreement and place you in an actionable position under Michigan law.[14]

BorgWarner demanded that Devine immediately resign from Dana and sign an affirmation attesting that he has done so.[15]

Apparently, no such affirmation was received by BorgWarner and the instant Complaint was filed on February 21, 2024. BorgWarner alleges a claim of Breach of Contract against Devine (Count I) and a claim of Tortious Interference with Contractual/Business Relationship against Dana (Count II). BorgWarner now seeks summary disposition under MCR 2.116(C)(10) as to Count I. The Defendants argue that the Motion should be denied, and that judgment should be granted in their favor under MCR 2.116(I)(2) on both Counts I and II because BorgWarner has not presented any evidence of damages resulting from the alleged breach of contract and that "without a breach of contract claim, there can be no claim for tortious interference against Dana."

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[14] *Id.*

[15] Complaint, Exhibit B, January 4, 2024 correspondence.

II
Standard of Review

A
MCR 2.116(C)(10)

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto,* 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto,* 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id*. at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575

(2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

B
MCR 2.116(I)(2)

MCR 2.116(I)(2) states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." Summary disposition under MCR 2.116(I)(2) may be granted "if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washurn v Michailoff*, 240 Mich App 669, 672 (2000). The word "'may' used in MCR 2.116(I)(2) indicates that the trial court has discretion to consider granting summary disposition for the non-moving party." *Dept of Licensing and Regulatory Affairs v Proteccion Plenitiud, Inc*, unpublished per curiam decision of the Michigan Court of Appeals, issued January 17, 2025 (Docket No. 366778) at 2.

"The existence of a genuine issue of material fact precludes summary disposition under MCR 2.116(I)(2)." *Save Our Downtown v City of Traverse City*, 343 Mich App 523, 541 (2022). Additionally, summary disposition under MCR 2.116(I)(2) is not available where a response exceeds the scope of the moving party's motion. *See Allen Park Retirees Ass'n* , *Inc v City of Allen Park*, 347 Mich App 1, 17 (2023) (because plaintiff's motions were limited to the breach of contract claim, the trial court did not err by limiting its disposition to that particular claim and declining to address the defendant's response, which requested summary disposition in its favor under MCR 2.116(I)(2), as to the plaintiff's other claims),

III
The Arguments

A
BorgWarner's Argument

BorgWarner argues that summary disposition is proper under MCR 2.116(C)(10) as to liability on the breach of contract claim against Devine because the Employment Agreement is a valid and enforceable contract and there is no question of fact that Devine breached the agreement.

BorgWarner asserts that the non-compete provision "is designed to protect Plaintiff's legitimate interests in protecting its confidential information, as well as its legitimate interest in pursuing and continuing to compete for customer's business." BorgWarner also argues that the Employment Agreement is reasonable in not limiting the geographic scope of the non-compete provision because BorgWarner has customers located "not just nationwide but globally." It also argues that the two-year duration of the restriction is reasonable. Lastly, BorgWarner argues that it has been damaged by

Devine's knowing and intentional breach of contract and the full nature and extent of damages will be demonstrated at trial.

B
The Defendants' Argument[16]

The Defendants argue that the Employment Agreement is not a valid and enforceable contract. First, the Defendants argue that the Employment Agreement relied on by BorgWarner is not between Devine and BorgWarner because another person's name appears in the contract as "Employee." The Defendants also argue that the non-compete provision is not enforceable because BorgWarner has failed to establish a legitimate business interest that justifies the blanket non-compete. Furthermore, BorgWarner cannot demonstrate that Devine is engaged in activity that threatens any alleged competitive business interest of BorgWarner and cannot demonstrate that Devine breached the non-solicitation or confidentiality provisions. The Defendants also argue that BorgWarner cannot establish that it has suffered any damages as the result of the claimed breach. Lastly, the Defendants seek summary disposition in their favor under MCR 2.116(I)(2).

[16] Although the Response is entitled "David Devine's Response" summary disposition under MCR 2.116(I)(2) is sought as to both of the Defendants.

IV
The Law

A
The Law of Contracts

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178 (2014). "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 101 (2016). "[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415 (1980); *Wright v Genesee Cnty*, 504 Mich 410, 419 (2019).

A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144 (2016). "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200 (2008).

B
The Law of Noncompetition Agreements

"As a general matter, courts presume the legality, validity, and enforceability of contracts. But noncompetition agreements are disfavored as restraints on commerce and are only enforceable to the extent they are reasonable." *Coates v Basitan Bros, Inc*, 276 Mich App 498, 507 (2007) (citations omitted). See also MCL 445.772 ("A contract . . . between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful").

However, certain agreements not to compete are authorized by Section 4a(1) of the Michigan Antitrust Reform Act ("MARA") which provides:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.
>
> [MCL 445.774a(1).]

This section "represents a codification of the common-law rule 'that the enforceability of noncompetition agreements depends on their reasonableness.'" *St Clair Med, PC v Borgiel*, 270 Mich App 260, 265-266 (2006) (citation omitted). "[A] restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable." *Id.* at 266.

The party seeking to enforce a noncompetition clause has the burden of demonstrating its validity. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508 (2007). When the relevant facts are not disputed, the reasonableness of a noncompetition clause is a question of law. *Id.* at 506.

V
Summary Disposition in Favor of BorgWarner is Not Proper as to Count I - Breach of Contract (Devine)

In Count I BorgWarner alleges the following:

> 46. The [Employment Agreement] is a valid, enforceable contract between Devine and BorgWarner.
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> 47. BorgWarner has satisfied all of its obligations under the terms and conditions of the [Employment Agreement].
>
> 48. By working for a competitor of Borg Warner (i.e. Dana) within two (2) years of Devine ending his employment with BorgWarner and working in a position that has similar duties and responsibilities to those he had with BorgWarner, Devine breached the Agreement.
>
> 49. In addition, because Devine is working for a direct competitor in the same business area, Devine's insider knowledge of BorgWarner's confidential, proprietary, and trade secret information is bound to have a significant adverse impact on BorgWarner's business.
>
> 50. Thus, Devine has caused and continues to cause BorgWarner immediate and irreparable harm for which BorgWarner has no adequate remedy at law.
>
> 51. Devine will continue such wrongful conduct unless enjoined.

> 52. As a result of this breach, BorgWarner is entitled to preliminary and permanent injunctive relief enforcing the terms of the [Employment Agreement] together with damages in an amount to be proven at trial.[17]

A
The Employment Agreement and its Restrictive Covenants are Valid and Enforceable Against Devine

1
The Misnomer in the Employment Agreement Does Not Render it Invalid or Unenforceable Against Devine

As was indicated, the introductory paragraph of the Agreement states that it is between Borg Warner, Inc. and "Wibke Kraemer of 831 Bird Ave, Birmingham, MI 48009 ('EMPLOYEE')." Devine argues that the "misnaming" of "Employee" mandates the finding there is no Employment Agreement between BorgWarner and Devine. This Court disagrees.

"It is an old rule, and a sensible one, that the misnomer of a person or corporation in a written instrument will not defeat a recovery thereon, if the identity sufficiently appears from the name employed in the writing or is satisfactorily established by proof." *St Matthew's Evangelical Lutheran Church v US Fidelity & Guaranty, Co*, 222 Mich 256, 262 (1923). See also *PIM, Inc v Steinbicher Optical Technologies USA, Inc*, 468 Mich 896, 896 (2003); *Duncan v Tricho Salon & Spa, LLC,* unpublished per curiam opinion of the Court of Appeals, issued December 6, 2011 (Docket No. 300446), at 4. In this case, there is sufficient

[17] Complaint, ¶¶ 46-52.

support for the conclusion that Devine and BorgWarner entered into the Employment Agreement attached to the Complaint as Exhibit A. On the last page of the Agreement Devine's name is handprinted above the line for "Employee (Print Name)."[18] Additionally, Devine admits that he signed the Agreement and understood that he was entering into a contract with BorgWarner.[19] This is more than sufficient for a jury to determine that the Devine is bound by the Agreement.

2
The Noncompete Agreement is Valid under MCL 445.774a(1)

As was explained, under MCL 445.774a(1) "a restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable." *St Clair Med*, 270 Mich App at 266. The restrictive covenant in this case provides:

> For two (2) years after the date upon which EMPLOYEE's employment with EMPLOYER terminates, EMPLOYEE shall not, directly or indirectly, engage or participate in any business, active in the automotive industry, regardless of geographical area, that develops, manufactures or markets products, processes or equipment the same as or similar to the products, processes or equipment made, used or sold by any business segment or segments of EMPLOYER in which EMPLOYEE was actively engaged within the three (3) years preceding the date of such termination of employment.[20]

[18] Complaint, Exhibit A, Agreement, p 5.
[19] Answer to Complaint, ¶ 18; Response, Exhibit A, Devine Affidavit ¶ 6; Reply, Exhibit B, Devine Deposition, p 180.
[20] Complaint, Exhibit A, Agreement, p 2.

a
The Restrictive Covenant Protects a Reasonable Competitive Business Interest

"Under Michigan law, preventing the anticompetitive use of confidential information is a legitimate business interest." *Rooyakker & Sitz v Plante & Moran, PLLC*, 276 Mich App 146, 158 (2007). "To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill.[21] *Coates,* 276 Mich App at 506–507, quoting *St. Clair Medical,* 270 Mich.App at 266 (quotation marks and block quote omitted).

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[21] BorgWarner's assertion that the noncompete is reasonable "per se" and need not be independently evaluated is unpersuasive. BorgWarner argues that the noncompete provision is reasonable "per se" for two reasons. The first, is that Paragraph D on page 5 of the Agreement states, in pertinent part that

> It is expressly understood and agreed that although *EMPLOYEE and EMPLOYER consider the restrictions contained in this Agreement to be reasonable for the purpose of preserving EMPLOYER'S good will and other proprietary rights*, if any part or provision of this Agreement shall at any time be held to be contrary to law by a court or tribunal of competent jurisdiction, such paragraph shall be void or modified and deemed reformed or deleted, but only to the extent necessary to comply with such law and considered to be reasonable by such court or tribunal. However, all other paragraphs and provisions of this Agreement shall continue in full force and effect.
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> [Complaint, Exhibit A, ¶ D, pp 4-5. Emphasis added.]

Relying on this Court's Findings of Fact, Conclusions of Law and Judgment in *Best Team Ever, Inc v Prentice*, Case No. 12-127444-PD, BorgWarner argues that because in the above-quoted provision Devine agreed that the restrictions in the Agreement were reasonable he is bound by such agreement and the noncompete restrictions need not be independently evaluated. However, as the Court of Appeals explained in affirming this Court in *Best Team Ever, Inc v Prentice*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2015 (Docket No. 319026) "[a]lthough the trial court reasoned that [defendant] should be bound by this unambiguous language . . . it also independently determined that the noncompetition provision was reasonable." *Id.* at p 3.

BorgWarner also argues that the noncompete provisions at issue in this case are "pe se" reasonable "because a different officer of this very Court previously ruled it so on an ex parte basis against another senior employee." The case referred to by BorgWarner is *BorgWarner, Inc v Joel Wiegert*, Case No. 19-174747-CB (Alexander, J.). The "ruling" relied on by BorgWarner is a June 21, 2019, order on a motion for a

The noncompete provision is not overly broad and is reasonable in relation to BorgWarner's competitive business interest. Contrary to the Defendants' argument, the provision does not prohibit Devine from working for any business that is in remote competition with BorgWarner. Under the Agreement, Devine is prevented from participating "in any business, active in the automotive industry . . . that develops, manufactures or markets products, processes or equipment the same as or similar to the products, processes or equipment made, used or sold by any business segment or segments of EMPLOYER in which EMPLOYEE was actively engaged within the three (3) years preceding the date of such termination of employment." The restriction is tailored to a specific industry ("automotive") and to specific ("the same or similar") products, processes or equipment. Moreover, the restriction is specific as to Devine's position with BorgWarner and the business segment or segments in which he was actively engaged during the three years before his termination.[22]

The conclusion that the noncompete provision is reasonable is consistent with relevant legal authority. In *Coates* the Court of Appeals found language broadly restricting employment to "include any enterprise in competition with the Company"

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temporary restraining order and preliminary injunction. BorgWarner has cited no authority which binds this Court to follow the order in *Wiegert*. Moreover, to the extent that BorgWarner cites the order as "persuasive" this Court cannot reach such conclusion because the order has no substantive discussion on the reasonableness of the noncompete provision.

[22] Devine argues that BorgWarner has failed to establish that BorgWarner and Dana are competitors with regard to the specific products that Devine is now involved with at Dana. However, that argument goes to the question of whether the provisions of the noncompete have been breached through Devine's new employment, not whether the restriction is reasonable in the first instance.

reasonable as a matter of law. *Coates*, 276 Mich App at 507-508. In *Best Team Ever, Inc v Prentice*, unpublished per curiam opinion of the Court of Appeals issued June 23, 2015 (Docket No. 319026), the noncompetition provision applied to "the business of restaurants, catering, and all related goods and services or other activities engaged in by Employer at the time Employee ceases to be employed[.]" The Court of Appeals determined that "[b]ecause the provision is limited to the type of activities engaged in by [employer's] business entities, it is reasonable." *Id.* at p 4.

b
The Covenant is Otherwise Reasonable

In addition to protecting a reasonable competitive business interest, a restrictive covenant must be reasonable as to duration, geographical scope, and the type of employment or line of business.

Devine does not appear to challenge the two-year duration of the non-compete as unreasonable. See *Rooyakker & Sitz*, 276 Mich App at 158 (two-year restriction period was reasonable). Additionally, Devine does not appear to argue that the unlimited geographical scope of the non-compete Agreement is unreasonable. The Defendant has presented evidence that its customers are located across the country and the world.[23] See *Superior Consulting, Inc v Walling*, 851 F Supp 839, 847 (ED Mich, 1994) (unlimited geographical limitation can be reasonable where the employer has legitimate business

[23] Motion, Exhibit 1, Derbyshire Affidavit, ¶ 4.

interests throughout the world). Devine also does not directly address line of business/type of business restriction but incorporates it in its discussion of the reasonableness of the restriction in connection with BorgWarner's legitimates business interest.[24] As was explained above, the restriction is specific as to Devine's position with BorgWarner and the business segment or segments in which he was actively engaged in during the three years before his termination. Thus, it is reasonably limited to the type of activities actively engaged in by Devine while employed at BorgWarner. *Best Team Ever, Inc v Prentice*, unpublished per curiam opinion of the Court of Appeals issued June 23, 2015 (Docket No. 319026)

B
A Question of Fact Remains as to Whether Devine Breached the Non-Compete Restriction

In support of its breach of contract claim BorgWarner alleges that "[b]y working for a competitor of BorgWarner (i.e. Dana) within two (2) years of Devine ending his employment with BorgWarner and working in a position that has similar duties and responsibilities to those he had with BorgWarner, Devine breached the Agreement." In its motion BorgWarner argues that "there is simply no dispute Devine breached the non-

[24] Courts have combined the line of business/type of employment restriction analysis with the reasonableness in relation to competitive business interest analysis. See *Best Team Ever, Inc v Prentice*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2015 (Docket No. 319026). See also *Sawicki v Resolute Industrial, LLC*, 2024 WL 4525299 at * 6, Case No. 22-10648 (ED Mich 2024).

compete clause when he started working for a direct competitor in essentially the exact same job role as his prior role."[25]

The question of whether a breach of contract has occurred is generally a question for the trier of fact. *See State-William Partnership v Gale*, 169 Mich App 170, 176 (1988); *Maple Manor Rehabilitation Center, LLC v Great Lakes Paper Stock Corp*, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2021 (Docket No. 356258). Indeed, a genuine issue of material fact remains as to BorgWarner's breach of contract claim.

In support of its Motion, BorgWarner presented the affidavit of Antoinette Derbyshire, ("Derbyshire") Global Director, Human Services for BorgWarner PowerDrive Systems. [26] In her affidavit Derbyshire states that she has knowledge of the matters therein and was competent to testify to those matters.[27] She further stated:

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[25] Motion, p 6. BorgWarner apparently does not argue breach of the non-solicitation clause or the confidentiality clause.

[26] Devine argues that BorgWarner did not meet its initial burden under MCR 2.116(G)(3) because the Derbyshire Affidavit was not made on personal knowledge as required by MCR 2.119(B)(1). In support of this argument, Devine cites testimony from Derbyshire's subsequent deposition which Devine argues demonstrates Derbyshire's lack of personal knowledge of the details of Devine's roles at BorgWarner and Dana. Derbyshire and Devine were deposed after the motion for summary disposition was filed because although the original discovery period was extended, the dispositive motion cut off was not.

To the extent that, as Devine argues, Derbyshire's deposition testimony contradicts statements made in her affidavit or casts doubt on her knowledge of relevant facts, it is for the trier of fact to weigh conflicting evidence and determine the credibility of witnesses. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377 (2013). See also *White v Taylor Distrib Co*, 482 Mich 136, 142-143 (2008) citing *Bridwell v Segel*, 362 Mich 102, 106 (1960) (a party's inconsistent statements create issues of material fact precluding summary disposition.).

[27] Motion, Exhibit 1, Derbyshire Affidavit, ¶¶ 1-2.

> David Devine joined BorgWarner PDS as an employee in May 2019. Over the ensuing years, Mr. Devine received several promotions, ultimately becoming Global Director of BorgWarner PDS's Systems Concepts Solutions Center.
>
> In his various roles at BorgWarner PDS – including as Global Director of BorgWarner PDS's Systems Concepts Solutions Center – Mr. Devine played a key role as the point person for all of BorgWarner PDS's cost-structuring and quoting and was intimately involved in formulating, assessing, and reviewing BorgWarner PDS's confidential material, manpower, investment, and technology capabilities. As Global Director of Borg Warner PDS's Systems Concepts Solutions Center, Mr. Devine was responsible for, among other things, leading a global team of engineers who were responsible for both application and development of electrification and power technologies products.[28]

Derbyshire also referenced a Form 10-K for Dana naming BorgWarner as one of Dana's "'principal competitors,' specifically in the light vehicle and commercial vehicle business."[29] Derbyshire further stated that:

> Dana hired David Devine as its Senior Director, Global Electric Powertrain Engineering. In this role for Dana, Devine is responsible for leading a global team of Dana engineers that are responsible for both application and development of electrification and power technologies products. In other words, everything that Devine did for BorgWarner PDS fully applies to his role at Dana.[30]

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[28] Motion, Exhibit 1, Derbyshire Affidavit, ¶¶ 9-10.
[29] *Id.* at ¶ 8. However, it appears that BorgWarner does not name Dana as a major competitor on its Form 10-K. *See* Response, Exhibit C, BorgWarner Form 10-K, p 12 (for year ending 12/31/22); p 13 (for year ending 12/31/23); p12 (for year ending 12/31/24.)
[30] *Id.* at ¶ 14.

In response, Devine asserts that his position at Dana that "does not include any responsibility for the vehicle or component platforms or programs for which he had responsibility at BorgWarner. Rather, [his] position at Dana involves the high-level management of the development of components and platforms that he was not responsible for at BorgWarner."[31]

Supporting the Response is an affidavit from Devine in which he discusses the differences between the operations of BorgWarner and Dana. He states that over 80% of BorgWarner's business in the electric propulsion system space is focused on high volume passenger cars, SUV's, vans, and light trucks for OEM [automotive original equipment manufacturers]" while Dana "focuses on smaller fringe markets that BorgWarner does not focus on, including heavy duty trucks; commercial trucks; off highway applications; construction vehicles, (e.g. forklifts and boom lifts); motorcycles; and low volume, high performance sports cars."[32]

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[31] Response, p 2.

[32] Response, Exhibit A, Devine Affidavit, ¶¶ 8-9. See also Exhibit B Deposition of Guenther Raab (BorgWarner Vice President of Engineering PowerDrive Systems) at pp 178-180 agreeing that BorgWarner's electric propulsion system business is predominately (80-90%) focused on passenger car segment. Response, Exhibit B, Raab Deposition.

In its Reply, BorgWarner cites subsequent deposition testimony of Devine for the proposition that Devine does essentially the same job at Dana as he did at BorgWarner. Reply, p 1 n 2. BorgWarner in support of this statement cites large blocks of testimony from the deposition without discussing the testimony or how it is relevant. It is not this Court's responsibility to sort through the testimony and determine its significance to BorgWarner's position. A trial court has no duty to independently scour the record; rather the parties have a duty to cite evidence in support of their respective positions. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380-381 (2009) (the trial court not obligated to "scour the record to determine whether there exists a genuine issue of material fact").

Moreover, to the extent that Devine's subsequent deposition testimony varies from his affidavit, as was discussed previously with regard to Derbyshire's affidavit, it is for the trier of fact to weigh conflicting

Devine also describes his various roles (Global Chief Engineer xEV for PowerDrive Systems; Global Director of the Gear Box Teams; and Director of the System Strategy & Platform Teams) while employed with BorgWarner and compare them to his current position at Dana stating:

> At Dana, I am Senior Director, Global Electric Powertrain Engineering. I am also referred to as Senior Director Electrification Engineering. In that role, I am responsible for the motor and inverter programs. I have no gear box responsibilities like I did at BorgWarner . . . at Dana I am responsible for different subcomponents, the motor and inverter . . . Additionally, by virtue of the business segments that Dana markets and focuses . . . I am not involved with high volume passenger cars, which is the segment of the EDM market that comprises approximately 80%-90% of Borg Warner's business.[33]

Devine also states that since he has been employed with Dana he has not solicited any BorgWarner customers or employees; has not diverted customers or business or programs from BorgWarner to Dana; and has not used any confidential information of BorgWarner in his position with Dana.[34]

Based upon the foregoing analysis, a genuine issue of material exists as to whether Devine breached the Agreement by, as BorgWarner claims, working for a direct

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evidence and determine the credibility of witnesses. *Pioneer State Mut Ins Co*, 301 Mich App at 377. See also *White*, 482 Mich at 142-143 (a party's inconsistent statements create issues of material fact precluding summary disposition.).

[33] Response, Exhibit A, Devine Affidavit, ¶¶ 11-14; 16.
[34] *Id.* at ¶ 21.

competitor in the same role as he had while at BorgWarner. There is conflicting evidence regarding the similarity and/or differences of the "products, processes or equipment made, used, or sold" by BorgWarner and Dana. Additionally, there is a question of fact regarding the similarities/differences as to the products, processes or equipment made, used or sold by BorgWarner in which Devine was actively engaged during the last three years of his employment compared to his current responsibilities at Dana. Accordingly, summary disposition is denied under MCR 2.116(C)(10).

VI
The Request for Entry of Judgment in Favor of Defendants under MCR 2.116(I)(2) is Denied

In support of their argument for entry of judgment in their favor under MCR 2.116(I)(2) Defendants argue that there can be no breach of contract claim against Devine and no claim of tortious interference by Dana because BorgWarner cannot establish that it has suffered any damages as a result of any breach of the restrictive covenants by Devine.[35]

The Agreement provides:

> In the event of a breach or threatened breach by EMPLOYEE of the provisions of this Agreement, EMPLOYEE understands and agrees that money damages would be inadequate and the EMPLOYER shall be entitled to an injunction issued by a court of competent jurisdiction restraining EMPLOYEE from such breach. In the event of such a breach, in addition to any other remedies, EMPLOYER shall be entitled to receive from

[35] BorgWarner asserts that this is an improper argument under MCR 2.116(I)(2) because it is outside the scope of the motion for summary disposition. Such assertion is not persuasive because the issue of damages was raised by BorgWarner in its motion. Motion, p 8.

> EMPLOYEE payment of, or reimbursement for, its reasonable attorneys' fees and disbursements incurred in enforcing any such provision. . . .[36]

Contractual provisions for the payment of reasonable attorney fees are valid and judicially enforceable. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589 (2007). "And attorney fees awarded under [such] contractual provisions are considered damages, not costs." *Id.* Accordingly, if a breach of the Agreement is established BorgWarner is entitled to damages in the form of reasonable attorney fees and the elements of a breach of contract claim will be satisfied.

In addition, BorgWarner seeks injunctive relief.

Based on the foregoing, the Court denies the Defendants' request for judgment in their favor under MCR 2.116(I)(2).

[36] Complaint, Exhibit A, Agreement, ¶ F, p 5.

ORDER

Based upon the foregoing Opinion, the Plaintiff's Motion for Partial Summary Disposition as to Defendant David Devine and the Defendants' Request for Summary Disposition in their favor under MCR 2.116(I)(2) are both DENIED.

IT IS SO ORDERED.

This Order DOES NOT resolve the last pending claim and DOES NOT close the case.

/s/ Michael Warren
____
HON. MICHAEL WARREN
CIRCUIT COURT JUDGE