THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 22, 2022.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in upholding the trial court's decision finding that the restrictive covenant contained in the parties' employment agreement was unenforceable as it was not necessary for the protection of the legitimate interest of the employer and was unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood?

STATEMENT OF THE CASE

The Respondent, Dr. Gregory A. May, commenced this civil action against the Petitioners, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, on March 20, 2019 by filing alleging in his pleadings causes of action for: 1). breach of contract; 2). tortious interference with contract; 3). promissory estoppel; and 4). a declaratory judgment pursuant to S.C. Code Ann. § 15-53-10 *et seq.* (R. p. 21-25). Respondent was formerly employed at Advanced Cardiology Consultants ("ACC"), a private medical practice specializing in cardiology located in Florence, South Carolina, as a board-certified cardiologist from May 1, 2007 until his resignation from the Practice effective on March 19, 2019. (R. p. 61, lines 7-10; R. p. 21; R. p. 35). Petitioner Lew A. Rowe is the President and sole shareholder of ACC and the Petitioner Theresa Rowe serves as the Practice Administrator. (R. p. 125; R. p. 60, lines 8-14, p. 67 lines 24-25, p. 68, lines 1-9).

During his employment with ACC, the Respondent operated under a series of physician employment agreements that varied in duration but that all contained substantially the same terms, including a post-employment restrictive covenant provision. This covenant not to compete restrains Respondent from engaging in the practice of cardiology within a twenty-five mile radius

of McLeod Regional Medical Center in Florence, South Carolina, for a period of two years after the termination of the agreement[1]. (R. pp. 31-32). The dispute in this appeal centers around that portion of the restrictive covenant which states Respondent "will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a

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[1] The non-compete, in its entirety reads:

> **Restrictive Covenant; Liquidated Damages**. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.
>
> The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is $500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician' s breach of the provisions of this Paragraph 9. Without limiting the generality of the forgoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(*Id.*).

period of two years from the date of such termination." (R. p. 31-32). By entering into the employment agreement, Respondent acknowledged that the restrictive covenant and liquidated damages provision "represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon." (*Id.*).

Since the founding of the Practice in 1994, the physicians at ACC have maintained their own individual privileges to practice cardiology at various regional hospitals, located both inside and out of Florence, South Carolina, including Carolinas Hospital and McLeod Regional Medical Center. (R. p. 151, lines 24-16, p. 153, lines 19-5, p. 154, lines 21-25). During the time that Respondent was employed by ACC, he and the other physicians at the Practice maintained privileges at two hospitals in Florence, South Carolina, McLeod Regional Medical Center and Carolinas Hospital. (Transcript p. 4:7-24) (R. p.61, lines 7-24). The hospital privileges maintained by each of ACC's physicians that allow the physician to provide call coverage to that hospital are maintained between each individual physician and the respective hospital, not between the Practice and the hospital. (R. p. 170, line 23). Respondent alleges in this action that to practice his specialty of interventional cardiology requires the use of cardiac catheterization labs that are present in both of the area hospitals but not in an office-based cardiology practice. (R. p. 184, lines 22-8). Respondent was employed by the Practice, according to the terms of the employment agreement, as a "Board Certified cardiologist," and the agreement did not guarantee Respondent employment as an "interventional cardiologist." (R. p. 29).

After Petitioner Rowe informed the physicians at ACC that he would be resigning his privileges at McLeod and Carolinas Hospital and shifting the focus of his own practice to seeing patients in an office-based setting, Respondent began to seek alternate employment as a cardiologist in the Florence area within the radius of the restrictive covenant. (R. p. 178, lines 3-

13; R. p. 18; R. pp. 18-20; R. p. 78, lines 18-25, p. 79, lines 1-8). Respondent ultimately sought a job opportunity with Carolinas Hospital, a facility located inside the geographic radius of the non-compete, while still employed by the Practice, contacting the recruiter at Carolinas, who reached out to Theresa Rowe to inquire about the possibility of Carolinas Hospital employing Dr. May. (R. p. 172, line 1-p. 173, line 14; R. p. 20). Carolinas Hospital offered Dr. May a position practicing interventional cardiology conditioned on Dr. May obtaining a written promise not to enforce the restrictive covenant from Dr. Rowe. (R. p. 20). The Practice declined to waive the non-compete and the Respondent thereafter filed suit on March 20, 2019, seeking, in part, a declaration that the restrictive covenant was unenforceable. (R. pp. 25-26).

After the parties cross-filed opposing motions for summary judgment on the issue of the enforceability of the restrictive covenant, the trial court held a hearing and heard oral arguments on the parties' respective motions for summary judgment on October 2, 2019, with the Honorable Michael G. Nettles presiding. (R. pp. 58-92). After hearing oral arguments from parties' counsel and considering proposed orders submitted by both parties, the trial court on October 21, 2019 issued its order granting Respondent's Motion for Summary Judgment on the declaratory judgment cause of action and finding the restrictive covenant to be unenforceable. (R. p. 8). Petitioners on October 30, 2019 filed a Motion for Reconsideration, requesting that the trial court reconsider its grant of summary judgment to the Respondent, which was denied by the trial court on November 20, 2019. (R. p. 10-12, 190, 199).

On December 19, 2019, Petitioners served their Notice of Appeal to the Court of Appeals, appealing the trial court's grant of partial summary judgment to the Respondent finding the restrictive covenant to be unenforceable. The Court of Appeals in its May 18, 2022 decision affirmed the trial court's grant of summary judgment to the Respondent, finding that the restrictive

covenant was overbroad and unenforceable as a matter of law. Petitioners subsequently filed a Petition for Rehearing with the Court of Appeals on June 1, 2022, which was denied by the Court of Appeals on June 22, 2022.

ARGUMENT

I. The Court of Appeals Erred in Affirming the Trial Court's Grant of Summary Judgment to the Respondent.

In denying Petitioners' Petition for Rehearing, the Court of Appeals held:

> We hold the Covenant was unenforceable because by its plain language, it restrained Dr. May from having any position with a business entity, including a hospital, engaged in the practice of cardiology; such a restriction was not necessary to protect Advanced Cardiology's interests and was unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

(May 18, 2022 Order at 2). In affirming the grant of summary judgment, however, the Court failed to properly apply the standard for summary judgment because it failed to require Respondent as the moving party to carry his burden in showing the non-compete was unduly harsh and oppressive in curtailing the legitimate efforts of Respondent to earn a livelihood as a cardiologist.

"Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). *See also* Rule 56(c), SCRCP. "To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). *See also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most

favorable to the non-moving party below."). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case . . . the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (internal citation omitted). When a lower court grants summary judgment on a question of law, on appeal the ruling is reviewed *de novo*. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). *See also Owens v. Crabtree,* 425 S.C. 513, 518, 823 S.E.2d 224, 227 (Ct. App. 2019). "[A]ppellate courts review questions of law *de novo*, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 (2018).

Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (internal citation omitted). *See also Fay v. Total Quality Logistics, LLC,* 419 S.C. 622, 629, 799 S.E.2d 318, 322 (Ct. App. 2017). While covenants not to compete are generally disfavored and therefore strictly construed against the employer, South Carolina courts have also recognized the right of parties to enforce contracts freely entered into and the legitimate interest a business has in protecting its clientele and goodwill. *See Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983); *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 338 (1980); *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 221 (Ct. App. 1992).

In South Carolina, a restrictive covenant that arises out of an employment relationship between the contracting parties will only be enforceable if it meets the following five requirements:

(1). is necessary for the protection of the legitimate interest of the employer;

(2). is reasonably limited in its operation with respect to time and place;

(3). is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;

(4). is reasonable from the standpoint of sound public policy; and

(5). is supported by a valuable consideration.

Id. at 675-76. Only the first and third requirements are at issue in the present case, and the Court of Appeals erred in finding these requirements were not met. This Court has held that the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245-246, 717 S.E.2d 103, 107 (Ct. App. 2011) (citing *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). However, "*[c]onstruing* the terms of a contract is not the same as changing the terms of a contract by reformation." *Herring v. Lapolla Indus.*, 2013 U.S. Dist. LEXIS 195826, at *4 (D.S.C. Nov. 26, 2013) (applying South Carolina law to determine enforceability of non-compete agreement). "Blue penciling" does not refer to "a cannon of contract construction but a directive to . . . explicitly rewrite the terms of a contract." *Id.* at *5. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)).

The decision affirming the grant of summary judgment to Respondent stands contrary to the Court of Appeals' earlier decisions in *Baugh v. Columbia Heart Clinic, P.A* and *Faces Boutique v. Gibbs*, and is likely to result in greater confusion for both South Carolina employers and employee alike entering into restrictive covenants relying upon this earlier case law. The

Petitioners respectfully request that this Court exercise its discretion to clarify the state of the law in light of the Court of Appeals' decision.

A. The Covenant More Closely Resembles *Baugh* than *Faces Boutique.*

The trial court and the Court of Appeals in striking down the restrictive covenant relied upon the Court's earlier decision in *Faces Boutique v. Gibbs*, a decision in which the Court struck down the covenant as impermissibly overbroad. The Court of Appeals in its May 18, 2022 Order cited *Baugh v. Columbia Heart Clinic, P.A*, a case in which a noncompetition agreement restricting cardiologists from practicing in the immediate geographical area was upheld by the Court of Appeals, for a variety of propositions related to the general governing law of non-compete agreements. However, the Court of Appeals failed to examine the critical distinctions between the language of the *Faces* covenant and the covenant at issue, while at the same time ignoring precedent in *Baugh.* The result of the Court of Appeals' decision is to inappropriately expand the scope of *Faces Boutique v. Gibbs* and make *Baugh v. Columbia Heart Clinic, P.A* an unreliable precedent. A cursory review of all three restrictive covenants makes clear that the restrictive covenant at issue holds much more in common with those upheld as enforceable in *Baugh* than in *Faces Boutique*.

Although a full analysis of the *Faces* and *Baugh* covenants and their application to the instant case is detailed in Petitioners' Initial Brief, Petitioners respectfully request that the Court consider several critical points omitted from the Court of Appeals' opinion. In *Faces Boutique*, a facial spa brought suit to enjoin the defendant from being employed at a competing business in a wholly different profession than the one defendant was previously engaged in with her previous employer. 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995). The covenant at issue in *Faces* restrained defendant for a period of three years from "directly or indirectly, own, manage, operate, control,

be employed by, participate in, *or be connected in any manner* with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces]." *Id.* at 41 (emphasis added). The court in *Faces Boutique* held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of Faces' legitimate business interests and was unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. *Id.* at 43-44. The court relied on the fact that the owner of Faces admitted at trial that the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [Faces'] business would not be threatened." *Id.*

In *Baugh v. Columbia Heart Clinic, P.A.*, the Court of Appeals upheld a restrictive virtually indistinguishable from the one at issue here that purported to prevent physicians from engaging or "assisting any [p]erson to engage" in the practice of cardiology for a period of one year within a twenty-mile radius of the defendant's offices. 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). The *Baugh* non-compete purported to restrain interventional cardiologists who departed the practice and sought to practice cardiology within the radius of a restrictive covenant from "assisting any person . . . to engage in the [practice of medicine in the field of cardiology][2]." *Id.* at

[2] The relevant portions of the *Baugh* restrictive covenant included:

> Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart . . .
>
> "Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lendor, lessor or otherwise) to engage in the Business in the Territory.

7-8. The Court of Appeals, in finding the activity restriction to be reasonable, recognized the legitimate interest that the cardiology practice had in enforcing the covenant:

> Here, the record evidences that Columbia Heart's patients, referral sources, and other goodwill would be at risk if Respondents were able to assist others to engage in the practice of cardiology. Patients stay with and follow their doctors, and general practitioners refer patients to cardiologists based upon both the reputation of the doctor and the doctor's practice, current and past. If the Agreements did not prohibit Respondents from assisting another person to engage in the practice of medicine in the field of cardiology, Respondents could treat Columbia Heart's patients and use Columbia Heart's referral sources and goodwill simply by staying one step from the medical services provided. Therefore, the restriction is necessary to protect a legitimate interest of Columbia Heart.

Id. at 16. A key distinction between the *Faces Boutique* and *Baugh* covenants is that the *Baugh* covenant, like the one between Dr. May and the Practice, does not contain the "any capacity restrictions" prohibiting the physician from being associated "*in any capacity*" that the court in *Faces Boutique* had found was overbroad. *Id.* at 19-20.

The *Baugh* court, in refusing to stretch the restrictive covenant to its broadest possible meaning to encompass a wide variety of positions in, was fully cognizant of the fact that a sense of reality must always influence the interpretation of contract language. Had the court in *Baugh* intended to read the noncompetition agreement to its broadest possible sense and far beyond what the parties clearly intended, the restraint in *Baugh* against "indirectly . . . assisting" another person as an agent or employee "to engage in the practice of . . . cardiology" could conceivably prohibit a wide range of activities that take place in a medical practice or in hospital facilities that the

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> "Business" is defined as "the practice of medicine in the field of cardiology." "Territory" is defined as "the area within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement."

Id. At 4-5.

interventional cardiologists in *Baugh* did not perform—including office administrators or cardiac nurses.

Unlike the court in *Baugh*, the Court of Appeals opinion affirming summary judgment to Respondent stretched the language of the covenant prohibiting Respondent from being "employed by or associated (with) ... ... another business entity[] engaged in the practice of cardiology," or "otherwise engag[ing] directly or indirectly in the practice of cardiology" to its broadest possible meaning and far beyond the clear intent of the parties to restrain Respondent's post-employment activities *as a cardiologist*. (R. pp. 31-32). The agreement at issue here does not prohibit Respondent from being employed "in any capacity" for an entity practicing cardiology, nor was it intended by the parties to have that meaning. The inclusion of the phrase "nor will he otherwise engage directly or indirectly in the practice of cardiology" immediately following the prohibition against Respondent being "employed by or associated (with) ... ... another business entity[] engaged in the practice of cardiology" makes the parties' intent clear in this respect. The Court of Appeals' finding, insofar as it is inconsistent with the parties' clear intent, fashions a new agreement between the parties that was never intended. *See Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (declining to add geographical limitation to restrictive covenant because it would bind the parties to a "term that does not reflect the parties' original intention.").

The upholding of the covenant in *Baugh* and the overturning of the present noncompetition agreement cannot be reconciled. If, as the Court of Appeals found, a hospital is to be deemed a business entity engaged in the practice of cardiology, then any individual employed by that hospital is "assisting it to engage in the practice of cardiology," and the *Baugh* decision was wrongly decided. As a result of the Court of Appeals' May 18, 2022 Order, where cardiology services are

provided by a hospital, being employed at that hospital could now be deemed as synonymous with being employed by "another business entity, engaged in the practice of cardiology"—no matter what role or position the individual fills at that hospital wholly unconnected with cardiology. This is an incongruous result that lies at odds with the intent and meaning of the covenant approved in *Baugh*. The restrictive covenant restraining Respondent was intended to prohibit Respondent from being employed by another cardiology practice, or "*otherwise* engag[ing] directly or indirectly in the practice of cardiology." (R. pp. 31-32).

Unlike the present covenant and the *Baugh* noncompete, the agreement in *Faces* fails to even suggest a relationship between the activities of the employee while employed by Faces and the employee's prohibited post-employment activities. As the Petitioners noted in moving the Court of Appeals for a Petition for Rehearing:

> Reconciling Faces with both *Baugh* and the case currently before this Court is easily accomplished by acknowledging the difference between the phrases "employed at" and "employed by." The *Faces* opinion interprets a phrase: "employed by" or "becoming connected in any manner with" any business in direct competition with the type of business conducted by Faces. The *Faces* interpretation is that such a relationship constitutes being "employed at" the business - regardless of what relationship there may be between the actual employment and the competitive activities of the business. Indeed, as the *Faces* opinion notes, and the *Faces* employer conceded, such employment may involve no participation whatsoever in properly prohibited competitive activities. However, "employed by" a business "engaged in" a particular business activity should be read to mean "employed in service to" or "assisting" that business activity. For purposes of restraints on competition, being employed by a business engaged in the practice of cardiology is quite different from being employed at a business where your employment has nothing whatsoever to do with cardiology. The restraint on the former, permitted by the *Baugh* and the Advanced Cardiology covenants, should be upheld. The latter, struck down by *Faces*, was properly declared invalid. As this Court has held, there is no ambiguity in Dr. May's covenant, it should enforce it and reverse its May 13 Opinion.

(Pet. For Rehearing at 5) (citations omitted). Even the Respondent understood that the covenant only prohibited him from practicing cardiology at one of the hospitals in town, not from being employed in a capacity other than as a cardiologist. (R. pp. 141-42).

Perhaps the most critical distinction between the *Faces* restrictive covenant and the current one is that the restrictive covenant here does not contain the "in any capacity/manner" language that is present in the covenant in *Faces Boutique*. *See Faces Boutique*, 318 S.C. at 41. The *Baugh* court upheld the agreement at issue there because the covenant did not contain the sweeping "in any capacity/manner" language that the court in *Faces Boutique* found so objectionable. *Baugh*, 402 S.C. at 19-20. The restrictive covenant between the Practice and Respondent does not contain this language that would so clearly demonstrate an intent to prevent the Respondent from being employed or connected *in any manner* with an entity engaged in the practice of cardiology. Additionally, the defendant in *Faces Boutique* made legitimate efforts and sought employment in an entirely different profession than she had provided for her previous employer. *See Faces Boutique*, 318 S.C. at 41. The Respondent has made no such effort. Indeed, Respondent has made it clear that he intends to continue practicing the same cardiology specialty within the geographic radius of the covenant that he practiced while employed by Advanced Cardiology.

The Court of Appeals, in affirming summary judgment, has abrogated the same legitimate interests that it recognized a cardiology practice has in restraining a former cardiologist from encroaching on the patient base and goodwill by practicing the same specialty within the bounds of a restrictive covenant. *Baugh,* 402 S.C. at 16. Petitioner Rowe testified that the Plaintiff's practice of cardiology in Florence at Carolinas Hospital within the bounds of the covenant would have the grievously negative impact of "cannibalizing" the Practice's business and that a number of patients of the Practice would follow Respondent to his new practice at Carolinas Hospital. (R.

p. 162, lines 6-25; R. p. 162, lines 16-12). Petitioners respectfully request the Court to grant this petition for writ of certiorari to clarify any confusion in the law regarding restrictive covenants that the Court of Appeals' opinion may have created here.

B. The Respondent Failed to Show the Covenant is Unduly Harsh and Oppressive in Curtailing his Legitimate Efforts to Earn a Livelihood.

The Court of Appeals, affirming the trial court, found that the covenant was unenforceable "because by its plain language, it restrained Dr. May from having *any position* with a business entity, including a hospital, engaged in the practice of cardiology; such a restriction was not necessary to protect Advanced Cardiology's interests and was unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood. (Order at 2) (emphasis added). Similarly, the trial court found that the restrictive covenant "is unduly harsh and oppressive in curtailing the legitimate interests of Dr. May to earn a livelihood" and in finding the covenant prohibited him from performing "a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology." (R. p. 6) These findings were in error, as the Respondent has utterly failed to carry his burden as the party moving for summary judgment in introducing evidence showing that he has expended any effort in obtaining a position unrelated to cardiology at a regional hospital within the scope of the covenant.

Respondent, as the moving party, carries the initial burden of showing there is no genuine issue of material fact as to the burden that the covenant has placed on any efforts to seek out such alternate employment in one of these positions. *See Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). It is undisputed that if freed from the restraints of the covenant, Respondent intends to continue practicing cardiology within the radius of the covenant—not in some unrelated field or in an administrative role in the hospital. Respondent's

entire purpose in bringing this action was to free himself from the restrictive covenant to practice as a cardiologist in Florence within the bounds of the non-compete. (R. pp. 16-27). Even if the Court of Appeals' interpretation of the restrictive covenant were correct and it prohibited Respondent from seeking employment in any capacity with an entity engaged in the practice of cardiology, such as one of the hospitals located in Florence, summary judgment would still be inappropriate. Noncompetition agreements entered into with board certified cardiologists are created to restrain them from providing services related to their practice of cardiology—not services provided by employees holding positions board certified cardiologists would consider entirely unsuitable. Respondent has failed to introduce evidence that he has expended any effort in seeking employment in one of these positions unrelated to the practice of cardiology, let alone that the covenant has been unduly harsh or oppressive on these efforts.

Nor is the covenant unduly oppressive in curtailing his legitimate efforts to earn a livelihood as a cardiologist. The practical effect of the restrictive covenant is to restrain Respondent from actively practicing cardiology at either of the two local Florence hospitals that he maintained privileges with while he was employed by the Practice in Florence so that the Practice may protect its patient and referral base and goodwill in the community that it has been developing since its opening in 1994. (R. pp. 31-32). These are legitimate interests that South Carolina courts have recognized. The mere fact that Respondent is restrained from practicing cardiology within the bounds of the covenant itself does not render the agreement overly harsh or oppressive. The covenant does not have the practical effect of preventing Respondent from practicing in his field "far beyond the technical terms of the provision." *Baugh*, 402 S.C. at 25. Respondent has not even alleged that he would have difficulty in finding employment within his specialty within the state outside of Florence if the covenant were upheld, as facilities with cath

labs are located in the Grand Strand, Columbia, and Loris, South Carolina. (R. p. 158, lines 10-20; R. p. 187, lines 9-16).

Respondent has introduced no evidence showing that enforcement of the restrictive covenant would be burdensome or oppressive in curtailing his legitimate efforts to earn a livelihood as a cardiologist or in some other, unrelated field. Respondent has failed to introduce evidence that he expended any effort seeking employment as a cardiologist outside of Florence or in a field unrelated to cardiology within the geographic radius of the covenant in the Florence area. The Court of Appeals' Order granting summary judgment to Respondent on these grounds was therefore in error and the Petitioners request that this Court grant their Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Petitioners request that the Court grant the petition for writ of certiorari.

All of which is respectfully submitted.

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Dated: July 21, 2022
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