THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2019-CP-21--00777

Appellate Case No.: 2022-001023

Dr. Gregory A. May,..Respondent,

v.

Advanced Cardiology Consultants, P.A., Dr. Lew A. Rowe,
And Theresa Rowe,.. Petitioners.

RESPONDENT'S RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **DID THE TRIAL COURT PROPERLY FIND THE RESTRICTIVE COVENANT OVERLY BROAD AND UNENFORCEABLE?**

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 his Verified Summons and Complaint in the Florence County Court of Common Pleas. R. pp. 15-33. Respondent's Complaint alleged 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.* (*See generally id.*). Respondent's claim for a declaratory judgment sought an order declaring, in part, that the restrictive covenant contained in the employment agreement between the parties is an unenforceable contract at law. R. p. 26. Petitioners filed their Answer to the Complaint of Respondent on April 23, 2019, denying many of the allegations made by Respondent and positing numerous defenses, as well as asserting a counterclaim for breach of contract. R. pp. 42-45.

The Respondent filed a Motion for Restraining Order and Injunction on April 18, 2019 asking the court to issue an injunction to prevent the Petitioners from interfering with his practicing medicine in the Florence area. R. pp. 93-98. After a hearing on the motion on June 10, 2019, the lower court denied the Respondent's Motion for Temporary Injunction and entered an Order that the parties conduct expedited discovery. R. pp. 1-3.

After the parties conducted expedited discovery as ordered by the trial court, Respondent filed his Motion for Summary Judgement on September 16, 2019. R. pp. 99-121. In this Motion, Respondent moved for summary judgment on his fourth cause of action for a declaratory judgment, seeking an order from the trial court declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Respondent's ability to practice interventional cardiology within the restricted area, is unenforceable. (*Id.*). On September 26, 2019, the Petitioners filed an opposing Motion for Summary Judgment with the trial court. R. p. 122. In their Motion, Petitioners sought a judgment from the trial court that the restrictive covenant contained in the employment agreement was enforceable against the Respondent and that Petitioners had not waived the restrictive covenant or otherwise breached the employment agreement. R. p. 122; pp. 135-136.

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. 58-91. 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. pp. 4-8. The trial court in its order denied both the Respondent's and the Petitioners' opposing summary judgment motions on the breach of contract issue, finding disputed issues of materials fact existed for trial. (*Id.*). Petitioners on October 30, 2019, filed a Motion for Reconsideration, requesting that the trial court reconsider its grant of summary judgment to the Respondent. R. p. 190; R. p. 199. The

trial court denied this motion on November 20, 2019.. R. pp. 10-12. It is the trial court's grant of partial summary judgment to the Respondent finding the restrictive covenant to be unenforceable that was at issue before the Court of Appeals. On December 19, 2019, Petitioners served their Notice of Appeal. The Court of Appeals affirmed the lower court's grant of partial summary judgment on May 18, 2022.

FACTS

The Respondent Dr. May is an interventional cardiologist who has been engaged in the private practice of cardiology since 1992. He relocated to Florence from the Orlando area in April 2008 after accepting a position with Advanced Cardiology Consultants, P.C. ("ACC" or "Practice" hereinafter). R. pp. 200-203. The parties' initial employment contract was for a period of five (5) years. The parties renewed and executed a second contract for an additional 5-year term. The third contract was for a 1-year term commencing on March 30, 2018. All three contracts contained an identical restrictive covenant. R. p. 17 (¶¶ 10, 11).

The Petitioner Lew Rowe moved to Florence in 1994 after completing his cardiology training program. Dr. Rowe founded Advanced Cardiology Consultants, P.C. in March 1994 and has been the Practice President and the sole owner/operator since that time. R. p. 207, line 11 - p. 209, line 13; R. p. 151 (Page 14, lines 8-18). The Petitioner Theresa Rowe has worked as the Practice's office manager since its founding. She and Dr. Rowe married in October 2007. R. p. 210, lines 17-22. Beginning at its founding in 1994, Advanced Cardiology Consultant's physicians have maintained privileges at each of Florence's primary care hospitals. From Dr. May's hiring in 2008 until 2018/2019, Dr. Rowe and each member of the Practice provided call

and maintained privileges at both McLeod and Carolinas Hospital System until relinquishing their privileges in 2019. R. p. 151 (Page 17); R. p. 154 (Page 40, line 24-Page 41, line 12); R. p. 156 (Page 46, line 3-Page 47, line 20).

The Practice has utilized essentially the same employment agreement for all its employed physicians since its founding in 1994. R. p. 152 (Page 20, lines 1-8). Under this employment agreement, Respondent's compensation was set at fifty percent (50%) of his collections generated the preceding month. The physicians were not provided a guaranteed income. R. p. 29. Since the founding of the Practice in 1994, the physicians at Advanced Cardiology Consultants, P.C. have maintained their own privileges to practice cardiology at various hospitals in the Pee Dee region including McLeod Regional Medical Center, Carolina Pines Regional Medical Center, Williamsburg Regional Hospital, Lake City Community Hospital, and Carolinas Hospital which is now MUSC Health Florence Medical Center. R. p. 151 (Page 16, line 24-Page 17, line 16); R. p. 153 (Page 26, line 19-Page 27, line 7); R. p. 154 (Page 41, lines 21-25). While the privileges are personal between the hospital and the physicians, given the nature of the practice of cardiology it is not possible for a single physician to provide call coverage to an entire hospital. R. p. 19 (Paragraph 29). In fact, in December 2018, after Dr. Rowe and the other employed physicians of the Practice determined to relinquish their privileges at Carolinas Hospital, Dr. May explored the possibility of single coverage with Mrs. Rowe. She informed him that the Practice would not be able to obtain medical malpractice coverage for such an arrangement. R. p. 215, lines 4-22. The fact that the Practice could not obtain malpractice coverage for Dr. May foreclosed any opportunity for him to practice his specialty at the hospital.

In the Fall of 2018, Dr. Rowe informed the employed physicians of the Practice that he was removing himself from the call rotation and would no longer see patients at any of the hospitals. It was his desire to become an office-based practitioner. R. p. 205, line 17-p. 206, line 23; R. pp. 151-152 (Page 17, line 12-Page 18, line 5).

Dr. Rowe's indication that he intended to resign his hospital privileges caused Dr. May great concern about the health of the Practice as well as his personal financial wellbeing. He had several conversations with Dr. Rowe which are outlined in the Respondent's Motion for Summary Judgment. R. pp. 103-106. As a result of these conversations with Dr. Rowe, Dr. May was under the impression that Dr. Rowe had no objection to his working in the Florence area and that Dr. Rowe would not attempt to enforce the covenant at issue.

The Petitioner, verbally and in writing, encouraged Dr. May to seek employment within the 25-mile geographic range. Dr. Rowe encouraged this with the knowledge that if Dr. May was seeking an interventional cardiology position, the nearest hospitals offering these services outside the 25 mile radius are in Murrells Inlet and Columbia.[1] R. p. 158 (Page 65). Dr. Rowe testified that with regards to his discussions with Dr. May "consistently I and Theresa told him, look around. Go to other places. Interview." R. p. 159 (Page 68, lines 21-23). Dr. Rowe testified:

> Q. Did he discuss with you employment options at two local hospitals?
>
> A. Yes.
>
> Q. And what was your response to that?
>
> A. Okay. I had no response. Okay.

1 Marie Saleeby testified that there was a cath lab at the Loris Hospital. R. p. 187 (Page 6, lines 9-20)

> R. p. 160 (Page 70, lines 13-17).

> Q. … Dr. May specifically told you or asked you if you would have any objection to him going to work for McLeod?
>
> A. And I probably said, "Do whatever you want." I would have said that multiple times. This was not one conversation. This was a series of hall, parking lot, grabbing sort of things. And I would have said, "Do whatever you want." Absolutely.
>
> R. p. 160 (Page 72, lines 9-18).

Dr. Rowe acknowledges that he was aware that Dr. May was looking for alternative employment.

> Q. Now did Dr. May ask you – or, excuse me, did he tell you that he was having conversations with Marie Saleeby about employment opportunities at McLeod?
>
> A. I can't recall if he mentioned Marie Saleeby. But he definitely mentioned that one of the places he was looking at was McLeod.
>
> Q. What other places did he say he was looking at?
>
> A. Locums, Carolinas, the beach. It varied from time to time.
>
> R. p. 161 (Page 76, line 17–Page 77, line 2).

> Q. Did you ever tell Dr. May that you were not opposed to him seeking employment or accepting employment at either one of the local hospitals?
>
> A. I told him that he needs to explore his options.
>
> Q. Alright. But did you tell him –
>
> A. I never told Dr. May that he should work at McLeod Hospital or at Carolinas Hospital. I would never prohibit him from discussing

employment options with either or those entities, however.

> R. pp. 161-162 (Page 77, line 22 – Page 78, line 7).

When asked about Carolinas Hospital, Dr. Rowe testified:

> Q. And did you have any problems with him having discussions with Carolinas Hospital regarding employment?
>
> A. No, I wouldn't have a problem with it. In fact, I told him, "Look at all your options," many times.
>
> Q. Did you ever tell him to look at all of his options, including the hospitals here in Florence?
>
> A. I said, "Look at everywhere," is what I told him. "Don't limit yourself."
>
> R. p. 214, lines 6-16.

After discussions with both local hospitals, Dr. May received a conditional offer of employment from Carolinas Hospital on or about February, 2019. R. p. 204, lines 8-23. One of the conditions of hire was a written release of the employment agreement between the Practice and Dr. May. Despite the prior assurances given to Dr. May, the Practice refused to provide the hospital with a release and this action ensued.

ARGUMENTS

I. The Court of Appeals Correctly Affirmed the Trial Court's Grant of Summary Judgment to the Respondent.

The Respondent sought Summary Judgment from the trial court on its Fourth Cause of Action requesting a declaratory judgment pursuant to S.C. Code Anno. § 15-53-10 et seq.

Respondent's claim for a declaratory judgment sought an order declaring, in part, that the restrictive covenant contained in the employment agreement between the parties is an unenforceable contract at law. Both parties filed motions for summary judgment, the Respondent argued that the restrictive covenant was unenforceable. The Petitioners moved for an order declaring that the restrictive covenant was enforceable.

After hearing oral arguments from parties' counsel and considering proposed orders submitted by both parties, the trial court issued its order granting the Respondent's motion for summary judgment on the declaratory judgment cause of action and finding the restrictive covenant to be unenforceable as a matter of law. The trial court denied both the Respondent's and the Petitioners' opposing summary judgment motions on any of the remaining three (3) causes of action finding disputed issues of material fact existed for trial.

Restrictive covenants not to compete are disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley,* 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983); *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutique. Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App, 1995). A restriction against competition must be narrowly drawn to protect the legitimate interest of the employer. *Almers v. South Carolina National Bank,* 265 S.C. 48 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

(1) Necessary for the protection of the legitimate interest of the employer;

(2) Reasonably limited in its operation with respect to time and place;

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

(4) Reasonable from the standpoint of sound public policy; and

(5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

The restrictive covenant here, just as the covenant in *Faces Boutiques*, violates the requirements that a covenant must be "necessary for the protection for the legitimate interest of the employer", and "not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." The Advanced Cardiology Consultant agreement specifically states that in the event of its termination, physician will not become "employed by or associated in the capacity of an ... employee of **another business entity,** engaged in the practice of cardiology ... within a 25 mile radius of McLeod Regional Medical Center, ... for a period of two years from the date of such termination." R. pp. 31-32 (Paragraph 9). The plain construction of the covenant not to compete thus prevents Dr. May from working in any capacity with the largest and third largest employers in Florence County, South Carolina.

The covenant as written is not necessary for the protection of the legitimate interests of Advanced Cardiology Consultants, P.C. It is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood within the field of medicine. The Petitioners cannot possibly articulate a legitimate reason to prohibit Dr. May from pursuing employment with either hospital in an administrative capacity. There is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if Dr. May chooses to

pursue employment at the hospitals, for example, as a physician assistant, hospitalist, or as a general practitioner. Likewise, the blanket prohibition of Dr. May's employment with these entities is unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood.

Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the courts. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). See also, *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 799 S.E.2d 318, 322 (S.C. App. 2017). "If a covenant not to compete is defective, the covenant is totally defective and can not be saved." *Faces Boutiques*, at 709, see also *Eastern Business Forms, Inc., v. Kistler,* 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.")

The trial court ordered expedited discovery in this case which had been completed at the time of the hearing on the parties' cross motions for summary judgment. The matter had been thoroughly briefed and argued. The issues before the lower court with regards to the Respondent's request for summary judgment on the declaratory judgment cause of action were properly before the lower court. The Petitioners concede in their Petition for Writ of Certiorari that contract interpretation is a matter of law for the court. The Petitioners had sought summary judgment on the issue at the very same hearing. This legal issue was in a proper posture before the lower court to rule on the issue of enforceability.

The *Baugh* court further notes that "an injunction is an equitable remedy, an interpretation of an unambiguous contract is a question of law, as is the question or whether a non-competition clause is reasonable." *Baugh* at 486 citing *Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 467 688 S.E.2d 597, 601 (S.C. App. 2010); *Preferred Research*, 292 S.C. 545, 357 S.E.2d 489 (S.C. App. 1987).

There is nothing in the underlying record that would have required the Court of Appeals or the trial court to draw any inferences in favor of the Respondent on the issue of the plain language of the covenant. The parties in the declaratory judgment actions asked the court to make a legal ruling based on its interpretation of the plain unambiguous language of the contract between the parties. This matter was reviewed properly at the trial court level and at the Court of Appeals. This matter does not involve novel questions of law nor is the decision of the Court of Appeals in conflict with any prior decision of this court.

The Petitioners also argue that the trial court and the Appellate Court erred in finding that the restrictive covenant was unduly harsh and oppressive in curtailing the legitimate efforts of Respondent to earn a livelihood as a cardiologist. While the Respondent wholeheartedly disagrees with the Petitioners' characterization, the lower court's finding on this issue was superfluous once it found that the restriction was not necessary to protect the legitimate interests of the Petitioners.

II. The Court of Appeals' Decision is Not in Conflict With Its Earlier Decision in *Baugh v. Columbia Heart Clinic, P.A.*.

In their Petition for Writ of Certiorari, the Petitioners strain to reinterpret a restrictive covenant which Dr. Rowe acknowledged had been in the Practice's employment contracts since he opened his business in 1994. The Advanced Cardiology Consultants' agreement specifically states that in the event of its termination, physician will not become "employed by or associated in the capacity of an ... employee of another business entity, engaged in the practice of cardiology ... within a twenty-five mile radius of McLeod Regional Medical Center, ... for a period of two years from the date of such termination." The plain construction of the covenant prevents the Respondent from working in any capacity with the largest and third largest employers in Florence County, South Carolina. The Petitioners can not possibly articulate a legitimate reason to prohibit the Respondent from pursuing employment with either hospital in an administrative capacity. There is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if the Respondent chooses to pursue employment at the hospitals, for example, as a Physician Assistant or Hospitalist.

The trial court's Order granting summary judgment found as follows:

> "Dr. Rowe, the sole owner of Advanced Cardiology Consultants and the founder and practice president, testified that his physician contracts had contained this exact restriction since his founding of the business in 1994. This is noteworthy because in the last five years both of the primary care hospitals which service the Florence market and which ACC provided services have purchased private cardiology practices. Both McLeod Regional Medical Center in Florence and Carolinas Hospital System (now MUSC) are now "engaged in the practice of cardiology." Dr. Rowe further testified that until approximately five years ago all of the cardiologists in Florence were engaged in private practice and not

> employees of the hospitals. At the current time, ACC is the only private cardiology practice in the Florence area."

The trial court further found:

> "Dr. May is trained and practiced in the medical field for over 30 years. He is more than qualified to perform a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology. In this respect, the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood."

The trial court directly addressed the Petitioners' reliance on *Baugh:*

> "The Defendants cite the case of *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) as an example of South Carolina Appellate Courts upholding a similar covenant not to compete. This Court finds that the two covenants are clearly distinguishable. In *Baugh*, the sole prohibition was the physician continuing or commencing the active practice of medicine "in the field of cardiology". The covenant at issue here involves a blanket prohibition for the physician becoming "employed by or associated in (with) … … another business entity, engaged in the practice of cardiology." The restrictive covenant at issue here is similar to that found in *Faces Boutiques* which prohibited the employee from being connected "in any manner" with "any business in direct competition with the type of business conducted by [Faces]." *Faces Boutiques v. Gibbs*, 318 S.C. 39 - 41, 455 S.E.2d 707, 708 (S.C. App. 1995).

Had the parties entered into the covenant at issue in *Baugh*, the lower courts would have undoubtedly reached a different conclusion. That did not occur in this case.[2] The lower courts properly determined that they could not rewrite the terms of this restrictive covenant and ruled accordingly.

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2 The contract at issue was entered into on March 30, 2018.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that the court deny the Petition for Writ of Certiorari.

August 19, 2022

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