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S.C. SUPREME COURT

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.

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. There are Novel Questions of Law for this Court to Review.

The Petitioners respectfully submit that an examination of the novel question of law presented below is necessary to clarify the state of the law in light of the Court of Appeals' decision.

A. How Broadly Should a Restrictive Covenant be Construed Where There is No Blanket Prohibition of Employment Unrelated to Competitive Activity?

Prior to the Court of Appeals' decision affirming the grant of summary judgment in this matter, the answer to this question was clear: a restrictive covenant that prohibited an employee from being associated with a competitive entity in any capacity, regardless of whether that activity posed a competitive disadvantage to his former employer, would be struck down as overbroad and unenforceable. Where such a blanket prohibition was not present, a restrictive covenant may be upheld as necessary for the protection of the legitimate business interests of the employer.

The parties in *Faces Boutique v. Gibbs* evidenced a clear intent to prohibit a former employee from being employed with a competitor in the geographic radius of the covenant no matter what service that former employee was providing--an intent that is clearly lacking here. Not only did the restrictive covenant in *Faces Boutique v. Gibbs* prohibit the employee from "be[ing] 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]," the owner of the spa brought suit to enjoin the former employee from performing services that were wholly unrelated and unconnected to the services the employee had provided while being employed as a esthetician at Faces. *Faces Boutique v. Gibbs*, 318 S.C. 39, 41 455 S.E.2d 707 (Ct. App. 1995) (emphasis added). In *Faces Boutique*, a facial spa brought suit to enjoin the defendant from being

employed in a wholly different profession at a competing business than the employee had occupied at Faces. *Id.* at 41. The court in *Faces Boutique* held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's 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 Boutique 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.* The restrictive covenant in *Faces Boutique*, by its own terms and the parties' understanding of its meaning, could not be upheld because it contained a blanket prohibition on future employment unrelated to whether the employee was engaging in competitive activity.

The Court of Appeals' upholding of a cardiology practice's restrictive covenant in *Baugh v. Columbia Heart Clinic, P.A.*, is consistent with the decision in *Faces Boutique.* The restrictive covenant did not contain the blanket prohibition regardless of competitive activity that the *Faces Boutique* court had found so objectionable. Instead, the *Baugh* covenant 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.[1] 402 S.C. 1, 15, 738

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[1] The *Baugh* restrictive covenant further provided:

> "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 . . . C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the [practice of medicine in the field of cardiology].

Baugh, 402 S.C. at 9.

S.E.2d 480, 488 (Ct. App. 2013). The facts and language of the restrictive covenant at issue in *Baugh* are strikingly similar to the instant case and Petitioners would submit that the *Baugh* case is controlling precedent here. In *Baugh*, the defendant Columbia Heart was a comprehensive cardiology practice similar in many ways to ACC. *Id.* at 1. The plaintiffs in Baugh were interventional cardiologists who departed the practice and sought to practice cardiology within the radius of a restrictive covenant, like the Respondent. *Id.* at 2-6.

The *Baugh* court upheld the restrictive covenant, finding the activity restriction to be reasonable and necessary to protect Columbia Heart's legitimate interests—which included the practice's "patients, referral sources, and other goodwill." *Id.* at 16. "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." 402 S.C. at 16. In coming to this conclusion, the Baugh court noted that the restrictive 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.

Critically, the *Baugh* court declined to stretch the language of the restrictive covenant to its broadest possible meaning to encompass a wide variety of professions or activities unrelated to the practice of cardiology, although the language of the covenant could have permitted the court to do so if it chose. The restraint found enforceable 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 interventional cardiologists in *Baugh* did not perform. If, as the Court of Appeals

has reasoned, a hospital is to be deemed a business entity "engaged in the practice of cardiology," then *anyone* employed by the hospital is assisting it to engage in the practice of medicine in the field of cardiology, and the *Baugh* decision erred in sustaining the covenant placed at issue in that case. Stretched to its broadest possible meaning, making loans to the hospital, leasing to it, or otherwise assisting the hospital would also violate the terms of the *Baugh* covenant. With this strained interpretation, an office administrator who assists the physician with billing, scheduling, compensation, and secures the facilities for a medical practice "indirectly assists" in the practice of cardiology. A cardiac nurse who assists the physician during a diagnostic procedure could be deemed to "indirectly assist" the practice of cardiology.

The *Baugh* court did not construe the restrictive covenant in the broadest possible sense in finding that the restraint against "assisting any Person . . . to engage in [the practice of medicine in the field of cardiology]" was not as broad as the "in any capacity" prohibitions found overbroad by South Carolina courts. *Id.* (citing *Faces Boutique*, 318 S.C. at 41; *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987)). 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 and that do not contain a blanket prohibition on future employment regardless of the type of competitive activity, should be upheld. The latter, struck down by *Faces* and containing such a prohibition, was properly declared invalid.

Although restrictive covenants restraining future employment activities are construed strictly against the employer, Petitioners submit that this is not a directive to stretch the

agreement's language beyond its common sense meaning and far beyond what the parties intended. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

"'Restrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998) (citation omitted). *See also Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) ("In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract."). It was not the parties' intent to prohibit Respondent from being employed "in any capacity" by an entity engaged in the practice of cardiology as the restrictive covenant itself does not contain this prohibition. *See Moser*, 334 S.C. at 430 ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning."). In fact, Respondent testified under oath that he understood the covenant only prohibited him from practicing cardiology at one of the hospitals in town, not from working in a capacity *other* than as a cardiologist. (Deposition of Dr. Gregory A. May, p. 22:11-24:14) (R. 141-142). Additionally, the restrictive covenant between Respondent and the Practice here contains the modifying phrase "nor will he otherwise engage directly or indirectly in the practice of cardiology," that makes clear the parties' intent to prohibit Respondent from engaging in the practice of cardiology within the radius of the covenant, and not in some wholly unrelated profession. (R. pp. 31-32).

A sense of reality must always influence the interpretation of contract language. 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 acknowledged that he would not be "seeking employment as a bottle washer or dishwasher" because he is a cardiologist. (Resp't Depo. p. 23:14-16) (R. p. 177, lines 14-16). Construing the language of the restrictive covenant consistent with the parties' intent in this respect is entirely consistent with the general rules of contract construction and with the prior decisions in *Baugh* and *Faces Boutique*.

The Court of Appeals' finding that Respondent is prohibited from being employed by an entity engaged in the practice of cardiology, regardless of whether Respondent is engaged in the practice of cardiology himself, is inconsistent with the intent of the parties and 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). "[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). The Court of Appeals erred in finding that construing the covenant consistent with the parties' intent in this respect amounts to an impermissible re-writing or "blue penciling" of the agreement. (R. p. 274) (citing *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) ("[T]he 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.").

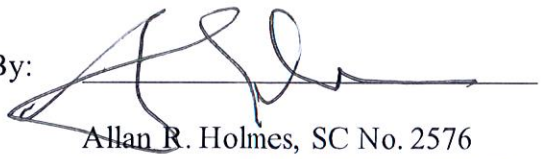
The parties clearly did not contemplate the agreement reaching a variety of Respondent's post-employment activities wholly unrelated to the practice of cardiology. The terms "employed by" a business "engaged in" a particular business activity should be read, and were intended by the parties, to mean "employed in service to" or "assisting" that business activity. In the restrictive covenants in *Baugh* and Advanced Cardiology, there exists a relationship between the nature of

future conduct restrained and the type of work performed by the former employee. The language of the covenant reaches that competitive conduct—the practice of cardiology—which would inherently harm a former employer if a physician were permitted to practice his same specialty within the geographic radius of the covenant. It is both necessary for the protection of the legitimate interest of the employer and not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology. The Court of Appeals' Order affirming the grant summary judgment to Respondent 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.

By: 

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