

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

May 29, 2012

Sarah Patrick Spruill
PO Box 2048
Greenville SC 29602

Joseph DuRant Thompson, III
134 Meeting St., 3rd Floor
Charleston SC 29401

Marvin I. Oberman
Harold Alan Oberman
104 Church St.
Charleston SC 29401

Re: Ophthalmology Assoc. v. Budev, Millin
Appellate Case No. 2011-187386

Dear Counsel:

This case is scheduled for oral argument at 10:00 a.m. on Wednesday, June 6, 2012. The following oral argument times have been allocated:

Appellant	15 minutes
Respondent	15 minutes
Appellant in Reply	5 minutes

Very truly yours,

Debbie M. Hopkins

ADMINISTRATIVE ASSISTANT

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH
WASHINGTON, DC

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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

April 25, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

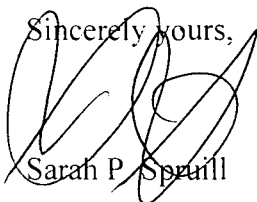
Re: *Ophthalmology Associates of Charleston, P.A. v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
HSB File No. 33590.0001

Dear Mr. Shearouse:

We are in receipt of your letter dated April 24, 2012 and are not aware of any conflicts on the listed dates.

Thank you for your attention to this matter.

Sincerely yours,



Sarah P. Spruill

SPS/ceb

RECEIVED

APR 26 2012

Greenville: 843705 v.1

S.C. SUPREME COURT



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Joseph D. Thompson, III, Esquire
From: Daniel E. Shearouse
Date: April 24, 2012
RE: June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19 and 20. Please notify this office in writing prior to May 1, 2012 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Ophthalmology Assoc. v. Budev, Millin



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

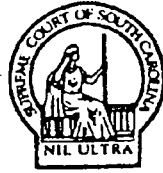
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Marvin I. Oberman, Esquire
From: Daniel E. Shearouse
Date: April 24, 2012
RE: June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19 and 20. Please notify this office in writing prior to May 1, 2012 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Ophthalmology Assoc. v. Budev, Millin



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

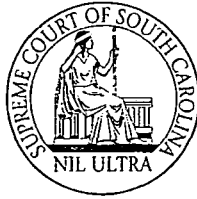
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Sarah P. Spruill, Esquire
From: Daniel E. Shearouse
Date: April 24, 2012
RE: June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19 and 20. Please notify this office in writing prior to May 1, 2012 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Ophthalmology Assoc. v. Budev, Millin



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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FAX (803) 734-1499

April 4, 2012

Joseph D. Thompson, III, Esquire
Haynsworth Sinkler Boyd, P.A.
P. O. Box 340
Charleston, SC 29402-0340

Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602

Marvin I. Oberman, Esquire
Oberman & Oberman
104 Church St.
Charleston, SC 29401

Re: Ophthalmology Assoc. v. Budev, Millin

Dear Counsel:

When the roster for the May 2012 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

This case will be placed on the June 2012 Preliminary List of Cases. Court will meet the days of June 5, 6, 7, 19 and 20.

Ophthalmology Assoc. v. Budev, Millin
Page Two
April 4, 2012

Very truly yours,



CLERK

DES/dmh

Haynsworth
Sinkler Boyd, P.A.

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COLUMBIA
FLORENCE
GREENVILLE
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WASHINGTON, DC

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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

March 26, 2012

RECEIVED

MAR 26 2012

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Ophthalmology Associates of Charleston, P.A. v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
HSB File No. 33590.0001

Dear Mr. Shearouse:

In response to your letter regarding the May preliminary list, Appellant's counsel is registered for the a mediation certification seminar in Charleston the week of May 21-25. For that reason, if at all possible, please schedule the argument in this case for May 1, 2, or 3. Thank you for your attention to this matter.

Sincerely yours,



Sarah P. Spruill

SPS/jcm

OBERMAN & OBERMAN, LLC
ATTORNEYS AND COUNSELLORS AT LAW
104 CHURCH STREET
CHARLESTON, SOUTH CAROLINA 29401

MARVIN I. OBERMAN
HAROLD A. OBERMAN

March 22, 2012

TELEPHONE (843) 577-7010
FACSIMILE (843) 722-7359
EMAIL: obermanlaw@bellsouth.net

The Honorable Daniel F. Shearouse
Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211-1130

RECEIVED
MAR 23 2012

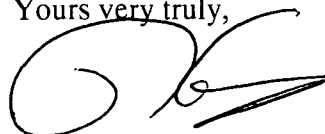
RE: Ophthalmology Associates of Charleston, P.A. v. S.B. SUPREME COURT
Civil Action Case No.: 2007-CP-10-3681
SC Court of Appeals Case No.: 2011187386

Dear Mr. Shearouse:

We just got notice that the above-captioned matter that was before the SC Court of Appeals has now been transferred to the Supreme Court of SC. We previously has written to the Court of Appeals requesting protection from March 28 through April 15, 2012 as I am planning on being out of the country on vacation during that time. Since the case has now been transferred to your court, we are now requesting that same protection from you.

If you need an official Motion or proposed Order, please let me know. With warmest personal regards, I remain

Yours very truly,

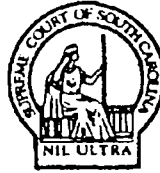


Harold A. Oberman

HAO/shb

cc: Sarah P. Spruill, Esquire
Joseph D. Thompson, Esquire

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The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

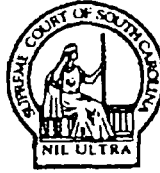
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Joseph D. Thompson, III, Esquire
From: Daniel E. Shearouse
Date: March 21, 2012
RE: May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22 and 23. Please notify this office in writing prior to March 28, 2012 as to any scheduling conflicts for the May term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Ophthalmology Assoc. v. Budev, Millin



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Marvin I. Oberman, Esquire
From: Daniel E. Shearouse
Date: March 21, 2012
RE: May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Ophthalmology Assoc. v. Budev, Millin



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Sarah P. Spruill, Esquire
From: Daniel E. Shearouse
Date: March 21, 2012
RE: May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22 and 23. Please notify this office in writing prior to March 28, 2012 as to any scheduling conflicts for the May term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Ophthalmology Assoc. v. Budev, Millin

The Supreme Court of South Carolina

Ophthalmology Associates of
Charleston, P. A.,

Respondent,

v.

Millin C. Budev, M. D.,

Appellant.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2007-CP-10-03681

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



C.J.
FOR THE COURT

Columbia, South Carolina

March 20, 2012

cc: Joseph D. Thompson, III, Esquire
Sarah P. Spruill, Esquire
Marvin I. Oberman, Esquire
The Honorable Tanya Gee

OBERMAN & OBERMAN, LLC
ATTORNEYS AND COUNSELLORS AT LAW
104 CHURCH STREET
CHARLESTON, SOUTH CAROLINA 29401

MARVIN I. OBERMAN
HAROLD A. OBERMAN

February 21, 2012

TELEPHONE (843) 577-7010
FACSIMILE (843) 722-7359
EMAIL: obermanlaw@bellsouth.net

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Ophthalmology Associates of Charleston, P.A. v. Millin C. Budev, M.D.
Civil Action Case No.: 2007-CP-10-3681
SC Court of Appeals Case No.: 2011187386

Dear Ms. Gee:

I am writing to you to request protection from March 28 through April 15, 2012 as I am planning on being out of the country on vacation during that time.

If you need an official Motion or proposed Order, please let me know. With warmest personal regards, I remain

Yours very truly,



Harold A. Oberman

HAO/shb

cc: Sarah P. Spruill, Esquire
Joseph D. Thompson, Esquire

r:\ob\seltzer-budev56.014\appeal\ltr\gee.b21

RECEIVED

FEB 22 2012

SC Court of Appeals

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
COLUMBIA
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WASHINGTON, DC

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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

November 22, 2011

South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

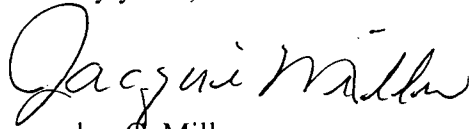
ATTN: Seth Tucker

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Seth:

As we discussed, attached is a duplicate Certificate of Compliance in this matter. The original was clocked by the Court on October 21. Please return a clocked copy to me in the envelope provided.

Sincerely yours,



Jacquelyn C. Miller
Secretary to Sarah P. Spruill
/jcm

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

RECEIVED

DEC 01 2011

SC Court of Appeals

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

November 21, 2011

The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED

NOV 22 2011

SC Court of Appeals

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Claire:

In response to your letter of November 18, 2011, we will correct the covers on the Records on Appeal within the allotted time. With respect to the Certificate of Compliance, attached please find a copy of our clocked copy dated October 20, 2011 and stamped by the Court of Appeals on October 21, 2011. Please let me know if you need anything else.

Very truly yours,



Sarah P. Spruill
SPS/jcm
Enclosure

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

The South Carolina Court of Appeals

Ophthalmology Associates of
Charleston, P. A.,

Respondent,

v.

Millin C. Budev, M. D.,

Appellant.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2007-CP-10-03681

ORDER

The Clerk of Court is requested to release the following exhibits filed in the above referenced case to Sarah P. Spruill, Esquire or her designee, for consideration by the Court of Appeals.

Respondent's Trial Exhibit 18: oversize map

Respondent's Trial Exhibit 33: oversize map

Respondent's Trial Exhibit 34: oversize map, with circles

IT IS SO ORDERED.

V. Claire Allen, Deputy Clerk
For the Court

Columbia, South Carolina
Original to: The Honorable Julie Armstrong

cc: Joseph D. Thompson, III, Esquire
Sarah P. Spruill, Esquire
Marvin I. Oberman, Esquire





The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 18, 2011

Joseph D. Thompson, III, Esquire
Haynsworth, Sinkler, Boyd, P.A.
P O Box 340
Charleston, SC 29402-0340

Sarah P. Spruill, Esquire
Haynsworth, Sinkler, Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602

Re: Ophthalmology Assoc. v. Budev, Millin
Case #2011187386

Dear Counsel:

We have received the Record on Appeal and Final Briefs for the above matter. However, the bound copies of the Record on Appeal were filed with plastic front covers and black back covers. Please be advised the Record on Appeal must be in compliance with Rule 267 of the South Carolina Appellate Court Rules before it can be accepted by the Court. Therefore, it will be necessary that all bound copies of the Record on Appeal be corrected within ten (10) days from the date of this letter.

Also, a Certificate of Compliance with Rule 211(b), of the South Carolina Appellate Court Rules, was not included with the Final Brief of the Appellant and Final Reply Brief of the Appellant. Please provide this Court with a Certificate of Compliance with Rule 211(b) for the Final Brief of the Appellant and Final Reply Brief of the Appellant within ten (10) days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK



TAG/jt

cc: Marvin I. Oberman, Esquire

OBERMAN & OBERMAN, LLC
ATTORNEYS AND COUNSELLORS AT LAW
104 CHURCH STREET
CHARLESTON, SOUTH CAROLINA 29401

MARVIN I. OBERMAN
HAROLD A. OBERMAN

November 1, 2011

TELEPHONE (843) 577-7010
FACSIMILE (843) 722-7359
EMAIL: obermanlaw@bellsouth.net

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Ophthalmology Associates of Charleston, P.A. v. Millin C. Budev, M.D.
Civil Action Case No.: 2007-CP-10-3681
SC Court of Appeals Case No.: 2011187386

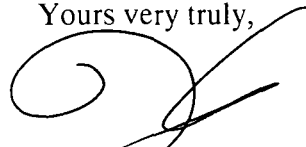
Dear Ms. Gee:

I enclose the original (unbound) and fifteen (15) copies of the Final Brief of Respondent, along with the Certificate of Counsel and Proof of Service, with regard to the above-referenced matter.

Upon filing, please return a clocked copy to our office in the enclosed self-addressed, stamped envelope.

With warmest personal regards, I remain

Yours very truly,



Harold A. Oberman

HAO/shb

Enclosures

cc: Sarah P. Spruill, Esquire (w/enclosure)
Joseph D. Thompson, Esquire (w/enclosure)

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NOV 02 2011

SC Court of Appeals

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

October 28, 2011

BY HAND DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

I submitted the Record on Appeal in this matter on October 20, 2011. There are three pages (ROA at 150-153) where the court reporter erroneously labeled the testimony of Dr. Millin Budev as that of Dr. David Vroman. The testimony is correctly labeled in the Table of Contents to the Record on Appeal. Counsel for the parties wanted to be sure the Court was aware of the discrepancy. To the best of my knowledge, the Table of Contents is accurate and in compliance with Rule 210, SCACR. Thank you for your time and attention to this matter

Sincerely yours,



Sarah P. Spruill
SPS/jcm

c: Marvin I. Oberman, Esq.
Joseph D. Thompson

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OCT 28 2011

SC Court of Appeals

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

October 19, 2011

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

As requested by your office, the following is a description of the exhibits for which we are seeking transfer.

Respondent's Trial Exhibit 18: oversized map
Respondent's Trial Exhibit 33: oversized map
Respondent's Trial Exhibit 34: oversized map, with circles

Please let me know if you have any further questions.

Sincerely yours,



Sarah P. Spruill

SPS/jlc

cc: Marvin I. Oberman, Esq.
Joseph D. Thompson, Esq. (via e-mail)

RECEIVED

OCT 20 2011

SC Court of Appeals

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
COLUMBIA
FLORENCE
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SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

October 20, 2011

BY HAND DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED
OCT 20 2011
SC Court of Appeals

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

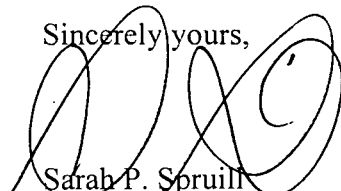
Dear Tanya:

With reference to the above matter, enclosed please find:

1. the original and 18 copies of the Record on Appeal
2. the original and four copies of the Certificate of Counsel;
3. the original and four copies of the Proof of Service for items 1-2;
4. the original and 18 copies of Appellant's Final Brief;
5. the original and 18 copies of Appellant's Reply Brief
6. the original and four copies of the Certificate of Compliance;
7. the original and four copies of the Proof of Service for items 4-6;

Please return the extra clocked copies of all via my courier.

Sincerely yours,



Sarah P. Spruill
SPS/jcm

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

The Honorable Tanya Gee

October 20, 2011

Page 2

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

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October 21, 2011

BY HAND DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Ms. Gee:

With reference to the above matter, enclosed please find the original and four copies of an amended Certificate of Compliance for Appellant's Brief and Reply Brief in the above matter which had an incorrect caption. Please replace this certificate for the one filed yesterday (a copy of which is attached) and return the extra clocked copies to me via the courier. Do not hesitate to call me at 540.7835 if you have any questions.

Sincerely yours,



Jacquelyn C. Miller
Secretary to Sarah P. Spruill
/jcm

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

SC Court of Appeals

OCT 21 2011

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October 12, 2011

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

Pursuant to Rule 210(f), SCACR, the Appellant hereby requests the issuance of an Order of Transport directing the Clerk of Court for Charleston County to gather and deliver for filing at the South Carolina Court of Appeals via the personnel of Haynsworth Sinkler Boyd, P.A., Respondent's Trial Exhibit 18, 33 and 34. These exhibits are not readily reproduced and therefore not included in the Record on Appeal.

Opposing counsel has been copied on this request and has consented to treating these items as exhibits to be filed separately from the Record on Appeal.

Sincerely yours,



Sarah P. Spruill

SPS/jlc

cc: Marvin I. Oberman, Esq.
Joseph D. Thompson, Esq. (via e-mail)

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OCT 13 2011
SC Court of Appeals



The South Carolina Court of Appeals

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October 14, 2011

Joseph D. Thompson, III, Esquire
Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
P O Box 340
Charleston, SC 29402-0340

Re: Ophthalmology Ass. v. Budev, Millin
2011187386

Dear Counsel:

We have received your Initial Brief of Appellant in the above entitled case on appeal.

According to our records, the caption of this appeal should read exactly as follows:

Ophthalmology Associates of Charleston, P.
A.,

Respondent,

v.

Millin C. Budev, M. D.,

Appellant.

All future filings in this matter must feature the caption exactly as shown above.

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ma

cc: Marvin I. Oberman, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

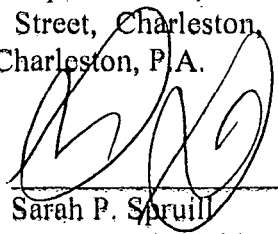
Millin C. Budev, M.D., ... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., ... Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief on Ophthalmology Associates of Charleston, P.A.; along with Proof of Service, by depositing a copy of all in the United States Mail, postage prepaid, on September 29, 2011 to Marvin I. Oberman, Esq., Oberman & Oberman, 104 Church Street, Charleston, South Carolina 29401, attorneys for Ophthalmology Associates of Charleston, P.A.



Sarah P. Spruill
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, South Carolina 29202
Attorneys for Appellant

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D. Appellant,

v.

Ophthalmology Associates of Charleston, P.A., ... Respondent.

**ADDITIONAL DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant Millin C. Budev, M.D. proposes the following matter to be included in
the Record on Appeal:

1. Asset Sale dated October 6, 2009, presented at Tr. at 254 (without
attachments).

I certify that this designation contains no matter which is irrelevant to this appeal.

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SEP 29 2011
SC Court of Appeals

Respectfully submitted,



HAYNSWORTH SINKLER BOYD, PA

Joseph D. Thompson, III
Sarah P. Spruill
Haynsworth Sinkler Boyd, P.A.
Post Office Box 340
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843-722-3366

Attorneys for Appellant

September 29, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Additional Designation of Matter to be Included in the Record on Appeal on Ophthalmology Associates of Charleston, P.A.; along with Proof of Service, by depositing a copy of all in the United States Mail, postage prepaid, on September 29, 2011 to Marvin I. Oberman, Esq., Oberman & Oberman, 104 Church Street, Charleston, South Carolina 29401, attorneys for Ophthalmology Associates of Charleston, P.A.



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September 29, 2011

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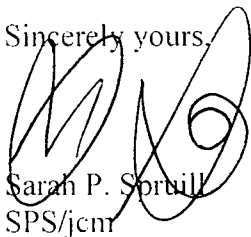
The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

Enclosed please find the original and one copy of Initial Reply Brief of Appellant. Please file the original and return a clocked copy via my courier.

Sincerely yours,



Sarah P. Spruill
SPS/jcm

c: Marvin I. Oberman, Esq. (w/encl.)
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September 29, 2011

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The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
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Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

Enclosed please find the original and one copy of Appellant's Additional Designation of Matter to be Included in the Record on Appeal. Please file the original and return a clocked copy via my courier.

Sincerely yours,



Sarah P. Spruill
SPS/jcm

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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ARGUMENT IN REPLY

The facts of this case are largely undisputed. The issues presented to this Court relate to whether the employment contract entered by the parties—Dr. Sidney Seltzer, a long-time Charleston area and ophthalmologist, and Dr. Millin Budev, a new doctor just finishing his residency—contains a valid covenant not to compete, whether it contains a valid liquidated damages provision, and whether Dr. Seltzer and his business Ophthalmology Associates of Charleston, P.A. (“OAC”) are barred by equity from asserting a claim for violation of the covenant not to compete.

I. OAC has failed to show that the covenant not to compete was enforceable as drafted.

A. The determination of whether the employment contract contained an enforceable covenant not to compete is a matter of law for the Court.

Although OAC correctly states that the determination of whether there has been a breach of a covenant not to compete is a question of fact in a law case, *see Skinner v. Elrod*, 308 S.C. 239, 242, 417 S.E.2d 599, 601 (Ct. App. 1992), the threshold question of enforceability of an unambiguous covenant not to compete is a matter of law. *See Stringer v. Herron*, 309 S.C. 529, 531-32, 424 S.E.2d 547, 548 (Ct. App. 1992) (“Our focus here need only be upon the question of whether, as a matter of law, the covenant in issue is reasonably limited in its operation with respect to place.”); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983). This Court “reviews all questions of law *de novo*.” *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

B. OAC has not established that the covenant not to compete in the employment contract is enforceable.

OAC has the burden of showing the covenant not to compete is enforceable. *Rental Uniform Serv. of Florence, Inc.*, 278 S.C. at 675-76, 301 S.E.2d at 531. If the covenant not to compete is defective in any way, the entire covenant is defective and cannot be saved. *See Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958). This is the inquiry—not whether the parties thought the restriction was reasonable at the time of contracting or how OAC subsequently chose to enforce it. Accordingly, the trial court incorrectly relied on Dr. Seltzer’s testimony regarding his intent rather than the unambiguous language of the contract.

This Court recently recognized that well-established South Carolina precedent requires covenants not to compete to be construed according to the words used, and that courts may not “blue pencil” to correct overbroad or otherwise defective components of the covenant. *Team IA, Inc. v. Lucas*, S.C. Ct. App. Order dated September 14, 2011 (Shearouse Adv. Sh. No. 32) (citations omitted). This Court held:

[A]n employer’s willingness to stipulate at trial to an interpretation of a non-competition provision that would render it proper in scope does not rectify the invalidity of the covenant as initially written. Therefore, . . . (1) a court may not ‘blue pencil’ the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable, and (2) the parties may not of their own accord convert an overly broad territorial restriction into an enforceable one by entering into a subsequent agreement that artificially limits the actual terms used in the parties’ original contract.

This language demonstrates South Carolina’s continued adherence to the tenet of critical and exacting review of non-competition covenants. This covenant does not hold up under this stringent review.

Despite the existence of this well-established case law, OAC attempts to divert this Court's attention to a 1984 Georgia case involving a breach of a covenant not to compete in a partnership agreement. *Rash v. Toccoa Clinic Med. Assocs.*, 320 S.E.2d 170 (Ga. 1984). *Rash* should not be persuasive here given the recent South Carolina decisions on point. Moreover, Georgia courts have distinguished *Rash* on facts similar to those presented in this case. For example, in *Osta v. Moran*, 430 S.E.2d 837, 839 (Ga. Ct. App. 1993), the Georgia Court of Appeals upheld a trial court's ruling that a two-year, 50 mile restriction found in a doctor's employment contract was unenforceable and unreasonable as a matter of law because the employer could not justify "the potentially extensive geographic limitation." In reaching that result, the *Osta* court found *Rash* was inapplicable because the covenant originated in an employment agreement rather than a partnership agreement.¹

1. The covenant not to compete is overbroad in scope.

As stated in the employment contract, Dr. Budev was hired "for the practice of Ophthalmology and such specialized aspects thereof . . ." (Employment contract, R. at ____). The covenant not to compete found in the employment contract provides,

The Physician agrees that upon the termination of his employment from the Practice, he shall not undertake the **practice of medicine** within a twenty-five (25) mile radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for

¹ Of course, this case arises from an employment contract, not a partnership or other business agreement. Given this distinction, it would seem to follow that, even in Georgia, *Rash* would not be of particular relevance to the issues here. Moreover, "[t]he Georgia Supreme Court has noted that covenants in the sale of a business, unlike covenants in contracts of employment, can be blue penciled to make them valid." *Osta*, 430 S.E.2d at 838, n. 1 (citations omitted). Such a rule allowing a court to "blue pencil" a covenant not to compete is patently inconsistent with South Carolina law.

a period of three (3) years from the date of such termination.

(*Id.*, R. at ____). Remarkably, the trial court readily acknowledged, “Dr. Seltzer conceded that **the express language of the covenant was broader than that for which the defendant was employed....**” (Order 1 at 11, R. at ____)(emphasis added). However, the trial court then accepted Dr. Seltzer’s testimony that “the intent of the agreement was to restrict the non-compete to the practice of ophthalmology.” (*Id.*, R. at ____). This alone warrants reversal. South Carolina law does not allow the intent of the parties to overcome the plain and unambiguous language of an impermissibly overbroad covenant not to compete.

In its brief, OAC argues that the non-compete only prevented Dr. Budev from opening an ophthalmology office within the restricted area. However, that is not what the contract says. If OAC intended the non-compete to apply only to Dr. Budev’s office location, it should have used those words. Dr. Budev “undertakes the practice of medicine” every time he sees a patient, wherever that patient may be located.²

As drafted, the subject non-compete unreasonably and unnecessarily restricted Dr. Budev 1) from the “practice of medicine”, including areas outside the specialty of ophthalmology; 2) from operating at the Trident Eye Surgery Center, where Dr. Budev was a part owner; 3) from treating his own patients should they present to an emergency room inside the restricted area; and 4) from treating patients within a twenty-five mile radius of OAC’s Orangeburg office, despite the fact that OAC opened its office after Dr. Budev began seeing patients there. Despite the fact that all of these examples represent

² Even considering the definitions presented by OAC for “undertake,” the non-compete is still overbroad. Very simply, no physician practices medicine by accident or chance. The act of seeing a patient is always an affirmative decision or undertaking.

patent breaches of the express language of the non-compete, Dr. Seltzer testified that he would not consider those activities violations of the covenant not to compete. South Carolina law does not allow Dr. Seltzer to unilaterally restrict or modify the express language of an impermissibly overbroad non-compete and this Court should reverse the trial court given its reliance of Dr. Seltzer's "intent" rather than the language of the contract. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (2010).

2. The covenant not to compete is not narrowly tailored in terms of the size of the restricted area or duration to protect any legitimate business interest of OAC.

As established in *Stringer*, 309 S.C. at 532, 424 S.E.2d at 548-49, an employer does not have a legitimate interest in protecting 100% of the area from which it draws customers. As here, *Stringer* involved professionals and involved the location of patients (albeit animal rather than human patients). The *Stringer* court reviewed the record and found that the covenant not to compete was unenforceable because the evidence showed an overwhelming majority of the employer's customers lived much closer than the restricted area of fifteen miles of any given location (84% lived within ten miles). Here, OAC failed to present any evidence supporting a twenty-five mile restricted area was necessary for the protection of any legitimate business interest of OAC at any relevant time whether it be at the time the parties entered the employment contract, the time Dr. Budev left the practice, the date of Dr. Seltzer's deposition, or even at the time of trial.³

³ By way of illustration, as of the date of trial, less than 2.25% of the ZIP codes appearing in OAC's database came from Mt. Pleasant, an area within the restricted zone. Importantly, OAC had no way of knowing when the individuals represented by those ZIP codes became patients or whether they were current patients. Even if these "zip code contacts" represented patients during some relevant time frame (for which there is not

OAC's arguments are misguidedly centered on geographic acreage and general population information. However, South Carolina law establishes that it is not the acreage or fact of population that is of concern but rather where the employer's legitimate business interest exists (here, OAC's patients). It is irrelevant to the analysis that the carved-out territory of West Ashley is populated and that there are South Carolina towns and cities falling outside the restricted area. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961) (In order to be reasonable, [the territorial restraint] must be necessary in its full extent for the protection of some legitimate interest of the employer.")(emphasis added). What is relevant and required for the enforcement of the non-compete is evidence of some legitimate business interest of OAC covering the full extent of the restricted area, including Mt. Pleasant and other areas. There is no such evidence in this record and, therefore, the trial court erred in finding the geographic limitation enforceable.

With respect to temporal restraint, there was no evidence to support a three-year restriction other than Dr. Seltzer's general statement that he thought it was reasonable. (See Order 1 at 8, ¶ 28, R. at ____). However, the evidence in the record demonstrates that the physician who immediately replaced Dr. Budev signed an employment contract with OAC with a two-year non-compete (Tr. at 260:25-262:16; R. at ____) and that Dr. Seltzer himself signed a non-compete with a two-year term following the sale of his

even a scintilla of evidence), the small percentage of OAC's patients located within that restricted area would not be a sufficient basis, given the guidance of *Stringer*, for restricting competition in that area.

practice (Asset Sale at p. 16 presented at trial Tr. at 254; R. ____).⁴ As argued previously, Dr. Seltzer's business did not suffer because of Dr. Budev's departure. Given the absence of evidence that the restriction was reasonable or necessary, the trial court erred in finding that the three-year duration of the covenant not to compete was enforceable.

II. Equity bars OAC from enforcing the terms of the covenant not to compete.

OAC appears to concede that there is a question whether Dr. Budev's practice at the Trident Eye Surgery Center is a violation of the covenant not to compete. Without question, Dr. Budev had permission to continue his surgical practice at the Trident Eye Surgery Center, which is located within the restricted area and across the street from OAC. Dr. Budev argues that this voluntary relinquishment of the right to enforce the covenant as to the Trident Eye Surgery Center triggers the doctrines of waiver and estoppel as to other scenarios in which Dr. Budev might practice medicine within the restricted area. Dr. Seltzer and OAC do not have the luxury of picking and choosing when to enforce a covenant not to compete as to Dr. Budev with respect to where or how he practices medicine within the restricted area. Inconsistent application of the covenant handicaps Dr. Budev's ability to make reasonable business decisions for the duration of the covenant not to compete.

With respect to the Orangeburg office, OAC again looks beyond the language of the covenant not to compete in an attempt to argue that the covenant as written does not cover "the practice of medicine within a twenty-five (25) mile radius of any office of

⁴ The fact that Dr. Budev's replacement had a contract with a shorter non-compete term is significant. If the second physician left OAC six months into his contract, he would have been allowed to compete sooner than Dr. Budev.

Practice.” An office of the practice is an office of the practice whether it existed at the time of contracting or not. The fact that OAC does not controvert Dr. Budev’s ability to maintain an Orangeburg office within the restricted zone of the non-compete is further evidence readily demonstrating OAC’s waiver and/or estoppel. OAC’s argument on this point also fails.

III. The employment contract does not contain an enforceable liquidated damages provision, and OAC did not prove any damages.

Should this Court find the covenant not to compete is enforceable and OAC is not barred by the doctrines of waiver and/or estoppel, OAC still failed to prove damages for any alleged breach of the covenant not to compete. The only evidence it offered as to its alleged actual damages was the purported liquidated damages provision contained within the covenant not to compete in an amount equal to Dr. Budev’s base salary for one year.

The determination of whether a purported liquidated damages provision is enforceable is a matter of law for the court. *ERIE Ins. Co. v. Winter Constr. Co.*, --- S.C. ---, ---, 713 S.E.2d 318, 320-21 (Ct. App. 2011). A liquidated damages provision will be deemed a penalty and unenforceable if “the stipulated sum . . . is so large that it is plainly disproportionate to any probable damage resulting from breach of the contract.” *Benya v. Gamble*, 282 S.C. 624, 631, 321 S.E.2d 57, 62 (Ct. App. 1984).

In its respondent’s brief, OAC outlines some hypothetical ways in which OAC could have been damaged by Dr. Budev’s departure. However, it does not attempt to tie those hypotheticals to either actual damages or the \$120,000 figure provided in the employment contract (an amount equal to one year’s base pay for Dr. Budev). Moreover, the uncontroverted evidence offered by Dr. Budev readily demonstrates that the purported \$120,000 liquidated damages provision is grossly disproportionate to any

actual damage sustained by OAC and, therefore, the liquidated damages provision is an unenforceable penalty. (*See* Def. Ex. 2-3; Tr. at 96:12-98:25; R. at ____).

CONCLUSION

For the reasons presented above and in Dr. Budev's appellant's brief, the trial court's order should be reversed and the matter remanded for entry of judgment in favor of Dr. Budev.

Respectfully submitted,



HAYNSWORTH SINKLER BOYD, PA

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Attorneys for Appellant

September 29, 2011

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-03681

RECEIVED
SEP 20 2011
SC Court of Appeals

Ophthalmology Associates of Charleston, P.A., ... Respondent

v.

Millin C. Budev, M.C., ... Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following to be included in the Record on Appeal:

- (1) Complaint of August 21, 2007
- (2) Answer of September 21, 2007
- (3) Defendant's Motion for Summary Judgment of May 5, 2009
- (4) Judge Nicholson's Order of October 8, 2009
- (5) Transcript of Hearing of August 12-13, 2010
- (6) Plaintiff's Trial Exhibit Nos. 6, 9, 10, 12, 15, 18, 21, 22, 23, 33, and 34
- (7) Plaintiff's Proposed Order
- (8) Judge Jefferson's Order of November 3, 2010
- (9) Plaintiff's Motion for Reconsideration of November 19, 2010
- (10) Judge Jefferson's Order of January 25, 2011
- (11) Judge Jefferson's Amended Order of February 16, 2011
- (12) Defendant's Notice of Appeal of March 10, 2011

I certify that this designation contains no matter which is irrelevant to this appeal.

September 19, 2011

A handwritten signature in black ink, appearing to be 'H. Oberman', written over a horizontal line.

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Millin C. Budev, M.C., ... Appellant.

PROOF OF SERVICE

I certify that I have served the Designation of Matter To Be Included in the Record on Appeal on opposing counsel by depositing one copy of it in the United States Mail, postage prepaid on September 19, 2011, addressed to Joseph D. Thompson, III, Haynsworth Sinkler Boyd, P.A., P. O. Box 340, Charleston, SC 29402 and Sarah P. Spruil, Haynsworth Sinkler Boyd, 75 Beattie Place, 11th Floor, Greenville, SC 29601.

September 19, 2011



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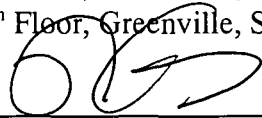
v.

Millin C. Budev, M.C., ... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on opposing counsel by depositing one copy of it in the United States Mail, postage prepaid on September 19, 2011, addressed to Joseph D. Thompson, III, Haynsworth Sinkler Boyd, P.A., P. O. Box 340, Charleston, SC 29402 and Sarah P. Spruil, Haynsworth Sinkler Boyd, 75 Beattie Place, 11th Floor, Greenville, SC 29601.

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The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Ophthalmology Associates of Charleston, P.A. v. Millin C. Budev, M.D.
Civil Action Case No.: 2007-CP-10-3681
SC Court of Appeals Case No.: 2011187386

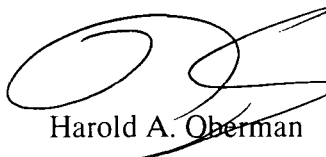
Dear Ms. Gee:

I enclose the original and one (1) copy of Initial Brief of Respondent and Designation of Matter To Be Included in the Record on Appeal, along with the Proofs of Service, with regard to the above-referenced matter.

Upon filing, please return a clocked copy of each to our office in the enclosed self-addressed, stamped envelope.

With warmest personal regards, I remain

Yours very truly,



Harold A. Oberman

HAO/shb

Enclosures

cc: Sarah P. Spruill, Esquire (w/enclosures)
Joseph D. Thompson, Esquire (w/enclosures)

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. IS THERE EVIDENCE TO SUPPORT THE TRIAL JUDGE'S FINDING THAT THE COVENANT NOT TO COMPETE IS NARROWLY TAILORED AND NEEDED TO PROTECT THE LEGITIMATE BUSINESS INTEREST OF SELTZER?
 - A. Is the Covenant Necessary for the Protection of the Legitimate Interest of the Employer?
 - B. Is the Covenant Reasonably Limited in Its Operation With Respect to Time and Place?
 - C. Is the Covenant Not to Compete Unduly Harsh and Oppressive in Curtailing the Legitimate Efforts of the Employee to Earn a Livelihood?
 - D. Is the Restriction Reasonable From the Standpoint of Sound Public Policy?
 - E. Because Covenant Not to Compete Merely States Budev "Shall Not Undertake the Practice of Medicine," A Narrower Term Than Stating Budev "Shall Not Practice Medicine," Should It Be Upheld?
- II. DESPITE TELLING BUDEV HE WOULD SUE HIM IF HE OPENED AN OFFICE NEAR HIS, DID SELTZER WAIVE HIS RIGHTS UNDER THE COVENANT, OR IS HE ESTOPPED, BY ALLOWING BUDEV TO OPERATE AT TRIDENT OR BY ALLOWING HIM TO OPEN AN ORANGEBURG OFFICE?
- III. IS THE SUM STIPULATED IN THE CONTRACT LABELED "LIQUIDATED AMOUNT" A LIQUIDATED DAMAGES CLAUSE OR AN UNENFORCEABLE PENALTY?

STATEMENT OF THE CASE

Ophthalmology Associates of Charleston, P.A. (hereinafter referred to as "Seltzer"), an entity owned by Dr. Sidney Seltzer, filed suit on August 21, 2007 against Dr. Millin C. Budev, M.D. The Complaint alleged causes of action for breach of contract and declaratory judgment and prayed for an injunction. The Complaint centered around a non-compete agreement that provided, in part:

The parties agree that, in the course of his employment with the Practice, Physician will benefit from patient contacts, doctor referral relationships, general hospital sources, and other relationships. . . . [Budev] shall not undertake the practice of medicine within a twenty-five (25) mile radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination. The parties hereby expressly agree that this Covenant Not To Compete is for a reasonable period of time, that the covenant is supported by valuable consideration and that this covenant is necessary to protect the legitimate business interests of the Practice, as a salaried associate or shareholder, for a minimum of three (3) years.

Budev filed an Answer on September 21, 2007, asserting a general denial and the defenses of failure to state a claim, waiver, estoppel, laches, and public policy. Budev filed a Motion for Summary Judgment on May 5, 2009. Judge Nicholson heard the Motion for Summary Judgment on September 10, 2009, and on October 8, 2009, he granted the Motion only as to injunctive relief because the three-year period of non-competition expired on or about July 2, 2009. Judge Nicholson denied Budev's request for a finding that the covenant not to compete was unenforceable.

The parties tried this case non-jury on August 12-13, 2010. At trial, Seltzer presented five witnesses including Dr. Millin Budev, Dr. David Vroman, Steve Johnson (as an expert), Nancy Hayes (Seltzer's office manager), and Dr. Sidney Seltzer. The Defendant, Budev, did not call any witnesses. At the closing of Plaintiff's case, no motions were made by either party.

On November 3, 2010, the trial court found for Seltzer, ruling that he had shown the covenant not to compete to be valid and enforceable and awarding him liquidated damages of \$120,000.00. Seltzer moved for reconsideration on November 19, 2010, asking the Court to correct one paragraph and asking for prejudgment interest. Budev opposed the Motion. Judge Jefferson issued an Order

of January 25, 2011, and an Amended Order of February 16, 2011, granting the relief Seltzer asked for: amending the paragraph and awarding prejudgment interest.

Budev timely served his Notice of Appeal on March 10, 2011, appealing the trial court's initial Order and the Orders granting Seltzer's Motion to Reconsider.

FACTS

I. THE PRACTICE

Dr. Sidney Seltzer entered into private ophthalmology practice in 1970. His office was initially located on Calhoun Street in Charleston across from Roper Hospital (Transcript, p. 166, lines 8-15). In 1981, he moved his practice to Medical Plaza Drive in North Charleston across from North Trident Hospital (Transcript, p. 166, lines 16-25). Dr. Seltzer's practice was known as Ophthalmology Associates of Charleston, P.A. (Transcript, p. 167, lines 3-12). Seltzer was the owner of that entity (Transcript, p. 170, lines 17-23) (hereinafter, except where it will cause confusion, this entity will be referred to as "Seltzer.>").

Dr. Seltzer practiced without any other physicians from 1970 to 2003 (Transcript, p. 169, lines 18-22). Dr. Seltzer, to secure patients, relied on, among other things, patient referrals and the referrals of optometrists. He courted these optometrists extensively (Transcript, p. 174, line 14 - p. 176, line 24). His patients came from the entire tri-county area and beyond. They specifically came from Charleston, Mt. Pleasant, Summerville, Ladson, North Charleston, Goose Creek, Ridgeville, and towns in-between. They came from as far away as Hilton Head, Orangeburg, Myrtle

Beach, and Columbia (Transcript, p. 117, line 16 - p. 119, line 12; Transcript, p. 128, line 19 - p. 129, line 15; Transcript, p. 173, line 25 - p. 174, line 13; Transcript, p. 250, lines 11-23).

II. THE EMPLOYMENT CONTRACT

Dr. Seltzer and Budev began discussions of Budev coming to work for Seltzer in late 2002 (Transcript, p. 178, line 13 - p. 179, line 2). On June 5, 2003, Seltzer and Budev entered into an employment contract, the terms of which are contained in the parties' Employment Agreement (Plaintiff's Trial Exhibit 15). Both parties freely and voluntarily entered into the Employment Agreement and both parties understood and accepted the terms of the contract (Transcript, p. 49, lines 3-10).

At the time of contracting in 2003, Seltzer had one office located at 9304 Medical Plaza Drive, Suite D, North Charleston, South Carolina 29406 (Transcript, p. 173, lines 4-23; Plaintiff's Trial Exhibit 22). At the time of contracting in 2003, Seltzer had never employed an ophthalmologist other than himself (Transcript, p. 169, line 18 - p. 170, line 1). Accordingly, Dr. Seltzer had never used an employment contract with a physician prior to the Employment Agreement with Budev (Transcript, p. 170, lines 9-16). Dr. Seltzer used the services of an accountant/health care consultant who provided him with the skeleton of the contract he presented to Budev. Seltzer was not represented by legal counsel (Transcript, p. 181, line 19 - p. 182, line 14; Transcript, p. 208, line 24 - p. 209, line 1).

Budev was represented by a health care and hospital attorney in drafting and negotiating the provisions of the Employment Agreement, and he negotiated specific changes in the Agreement. (Transcript, p. 50, line 2 - p. 54, line 23; Transcript, p. 182, line 9 - p. 183, line 5). The focus of

these changes was the land area radius to be excluded from the area in which Budev could practice if he severed his employment. The parties negotiated a geographic specific cut out that would allow Budev to undertake to practice in the West Ashley Area (Transcript, p. 52, line 24 - p. 54, line 23; Transcript, p. 185, line 14 - p. 190, line 15; Plaintiff's Trial Exhibit 33; Plaintiff's Trial Exhibit 18). At the time of contracting in 2003, Budev was a resident in ophthalmology and had never been employed in private practice (Transcript, p. 179, lines 3-25). He was represented by counsel at the time of contracting (Transcript, p. 182, line 9 - p. 183, line 5). When Budev signed the employment agreement, he was well versed in business matters (Transcript, p. 50, lines 7-15).

Under the Employment Agreement, Budev received "one hundred twenty thousand (\$120,000) dollars per year, payable in monthly installments" Additionally, "[a]t the end of each quarterly calendar period . . . a bonus will be issued . . . if [Budev] has generated a positive cumulative net income." (Plaintiff's Trial Exhibit 15 at ¶8).

The Employment Agreement contains a covenant not to compete which, in part, states:

The parties agree that, in the course of his employment with the Practice, Physician will benefit from patient contacts, doctor referral relationships, general hospital sources, and other relationships. . . . [Budev] shall not undertake the practice of medicine within a twenty-five (25) mile radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination. The parties hereby expressly agree that this Covenant Not To Compete is for a reasonable period of time, that the covenant is supported by valuable consideration and that this covenant is necessary to protect the legitimate business interests of the Practice, as a salaried associate or shareholder, for a minimum of three (3) years.

(Emphasis added) (Plaintiff's Trial Exhibit 15 at ¶15).

The trial court found Budev believed that the geographical area and three year time limitation were reasonable (Order of Jefferson, 11/3/2010, p. 3). Budev discussed the contract, including the “carve-out” area, with his attorney while in negotiations with Seltzer. Maps noting the carve-out area were used during the negotiations (Transcript, p. 113, line 3 - p. 115, line 10; Plaintiff’s Trial Exhibit 18). Budev specifically negotiated this particular carve-out area (Transcript, p. 52, line 24, - p. 54, line 23; Transcript, p. 185, line 14 - p. 190, line 15; Plaintiff’s Trial Exhibit 33; Plaintiff’s Trial Exhibit 18).

Seltzer offered Steve Johnson’s testimony as a professional expert in the area of land surveying and he was appropriately qualified as an expert. Mr. Johnson estimated that of the 25 mile radius, forty percent (40%) would be within the negotiated cutout or the Francis Marion Forest, greatly reducing the area of the restriction (Plaintiff’s Trial Exhibits 18 and 33; Transcript, p. 66, line 18 - p. 67, line 9). A lay person can observe and deduce this from the maps (Transcript, p. 191, line 24 - p. 192, line 25). The areas of the cutout are over populated (Transcript, p. 154, line 1 - p.156, line 12; Transcript, p. 186, line 17 - p. 187, line 7; Transcript, p.189, lines 10-21).

The covenant not to compete also prohibits the Defendant from directly or indirectly soliciting any patient (or member of a patient’s immediate family), employee, or vendor of the Plaintiff (Plaintiff’s Trial Exhibit 15 at ¶15). It also contains a liquidated damages clause in the amount of One Hundred Twenty Thousand (\$120,000.00) Dollars enforceable by the Plaintiff in the event of the Defendant’s breach (Plaintiff’s Trial Exhibit 15 at ¶15).

The Defendant terminated his employment with Plaintiff effective July 3, 2006 (Transcript, p. 59, lines 21-22) [Note: The transcript mistakenly labels the testimony on pages 58 through 61 as testimony of Vroman rather than Budev. The parties agree this is Budev’s testimony. When the

record is prepared, the parties will correct this] The expiration of the three-year period of non-competition occurred on or about July 2, 2009.

III. POST TERMINATION

Immediately following his employment with Seltzer, Budev opened an office for the practice of ophthalmology in the West Ashley area of Charleston. Budev Eyecare and Surgery is located at 2093 Henry Tecklenburg Drive, Suite 313 East, Charleston, South Carolina. This area was within a carve-out zone of the geographic restraint in the Employment Agreement's covenant not to compete (Transcript, p. 58, line 2 - p. 60, line 5). The West Ashley practice area was specifically negotiated and left available to Defendant so that he could practice medicine, within his chosen field, in a prime location adjacent to a medical center (Transcript, p. 58, lines 18-22) while remaining in the Charleston area. He successfully practiced there, and continues to successfully practice there (Transcript, p. 58, line 18 - p. 59, line 3). Budev testified that practicing in the West Ashley area did not impede on his ability to see or treat patients (Transcript, p. 59, lines 4-10).

Once he left Seltzer, Budev immediately began to take steps to undertake the practice of medicine within the restricted areas. Shortly after Budev terminated his employment with Seltzer, he and his partner, Dr. Vroman, went looking for property for a new office location, concentrating their efforts on finding a piece of property that was within a few miles of Dr. Seltzer's office (Transcript, p. 42, lines 8-15). They also looked at other areas outside the 25 mile radius (Transcript, p. 42, lines 16-21). Along with forming a professional association for his practice, (Transcript, p. 46, line 25 - p. 47, line 12; Plaintiff's Trial Exhibit 12), on November 8, 2006, Budev formed Mombasa Development, LLC, to formalize his agreement with Dr. Vroman (Transcript, p.

37, line 13 - p. 38, line 11; Plaintiff's Trial Exhibit 6). Budev subsequently bought land on Gateway Drive, Ladson, South Carolina on November 20, 2006, under a contract for Four Hundred Twenty-Five Thousand (\$425,000.00) Dollars (Plaintiff's Trial Exhibit 10; Transcript, p. 41, lines 4-12) and secured a construction loan for Two Million Five Hundred Thousand (\$2,500,000.00) Dollars on February 21, 2007 (Transcript, p. 40, lines 8-25; Plaintiff's Trial Exhibit 9). Budev and Vroman were represented by counsel in this purchase (Transcript, p. 41 lines 10-20). Construction on the Gateway Drive Office started in May, 2007 and the building was completed in April, 2008 (Transcript, p. 45, lines 20-25). Budev admitted that Seltzer had told him not to build the building and that it would be in violation of the non-compete (Transcript, p. 46, lines 13-17). Seltzer told him there would be a lawsuit if he built the office (Transcript, p. 102, lines 9-15).

In late April, 2008, Budev opened that office for the practice of ophthalmology at 137 Gateway Drive, Ladson, South Carolina 29456. The office was located two to three miles from Plaintiff's office and was within the restricted zone of the covenant not to compete (Transcript, p. 42, lines 1-7; Transcript, p. 202, lines 8-25; Plaintiff's Trial Exhibit 23).

During his employment with Seltzer, Budev performed surgical procedures at the Trident Eye Surgery Center located across the street from Seltzer's office location (Transcript, p. 90, line 14 - p. 91, line 20). Following his separation, Seltzer allowed Budev to continue to operate in the Trident Eye Surgery Center with the knowledge and consent of Dr. Seltzer. As a part-owner of the surgery center, Dr. Seltzer received a financial benefit from Budev's surgeries, and Budev benefitted from Seltzer's surgeries. Each, along with the other physicians, had a percentage based ownership interest in the center. It is uncontradicted that all members benefitted equally based on the number of surgeries performed. The more procedures each conducted the more money each earned based

on the percentage of their ownership interest (Transcript, p. 92, line 7 - p. 93, line 16; Transcript, p. 94, lines 9-12). Seltzer encouraged Budev to continue to operate at Trident and expressly allowed him to do so (Transcript, p. 108, line 13 - p. 109, line 8). Budev operated there with Seltzer's express permission and blessing (Transcript, p. 99, lines 13-16). Budev testified that the Trident Eye Surgery Center is not the only center at which he could operate (Transcript, p. 108, lines 2-12). Dr. Seltzer does not consider Budev's continued use of the Trident Eye Surgery Center a violation of the covenant not to compete. Likewise, at the time, the Budev did not consider use of the Surgery Center a violation of the covenant not to compete (Transcript, p. 108, line 24 - p.109, line 24; Transcript, p. 99, line 13 - p. 100, line 4). Budev testified that he did not consider Seltzer's act of letting him continue to use the surgical facility a waiver because at the time he did not know that it had anything to do with the non-compete. He never thought this courtesy had anything to do with the non-compete (Transcript, p. 60, lines 12-20).

In the fall of 2006, the Budev began seeing patients in Orangeburg, South Carolina (Transcript, p. 94, lines 19-24). In 2008, Seltzer, through his LLC, opened a new office in Orangeburg (Transcript, p. 95, line 12 - p. 96, line 11; Transcript, p. 225, lines 13-16). The parties' offices were located within a twenty-five mile (25) radius of one another. Seltzer testified the parties only intended the Employment Agreement and covenant not to compete to apply to Dr. Seltzer's practice on Medical Plaza Drive in North Charleston (Transcript, p. 223, line 22 - p. 224, line 15).

STANDARD OF REVIEW

An action for a breach of a covenant not to compete is at law. Skinner v. Elrod, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992). In an action at law, on appeal of a case tried without a jury,

the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. In other words, the judge's findings are equivalent to a jury's findings in a law action. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). Accord King v. PYV/Monarch, Inc., Op. No. 24179 (S.C. Sup. Ct. Filed January 9, 1955) (Davis Adv. Sh. No. 1 at 16). Moreover, the appellate court will not disturb the trial judge's findings of fact that depend on the credibility of witnesses. Daisy Outdoor Advertising Co., Inc. v. Abbott, 317 S.C. 14, 451 S.E.2d 394 (Ct. App. 1994).

In Rogers v. Nation, 284 S.C. 330, 326 S.E.2d 182 (Ct. App. 1985), the Court of Appeals provided the following analysis for when an equitable defense is raised in a legal action:

A distinction is also made between cases where the answer sets up merely an equitable defense, and where it also seeks affirmative equitable relief, it being held that in the former case the nature of the action is not changed, but that in the latter the action is converted into an equitable proceeding, if the affirmative matter pleaded, if true, would destroy plaintiff's case, or uproot the possibility of any future litigation of the same matter

Rogers, 284 S.C. at 332-33, 326 S.E.2d at 183.

Furthermore, the interposition of an equitable defense in an action at law does not alter the nature of the action. Wright v. Craft, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) *but see* Brown v. Chandler, 50 S.C. 385, 27 S.E. 868 (1897) (holding an equitable defense in a legal action receives equity review [“*but see*” notation used in Wright v. Craft]). Thus, this matter remains a legal action.

ARGUMENT

I. THE COVENANT NOT TO COMPETE IS NARROWLY TAILORED AND IS NEEDED TO PROTECT THE LEGITIMATE BUSINESS INTEREST OF SELTZER.

While covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer, Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983); Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct.App.1992), covenants not to compete are routinely upheld in the medical field. The cases collected at 62 ALR 3d 970 and 61 Am Jur 2d, Physicians, Surgeons, Etc. §§ 16-25 outline some of those instances. A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer. Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 217 S.E.2d 135 (1975); Stringer, 424 S.E.2d 547. 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.

Stringer, 424 S.E.2d 547, 548 (citing Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143); Collins Music Co. v. Parent, 288 S.C. 91, 340 S.E.2d 794 (Ct.App.1986).

However, each case concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on its own facts. Stringer, 424 S.E.2d 547.

“Although it has been pointed out that in determining the reasonableness of a restrictive covenant, a greater latitude is allowed when the covenant relates to the sale of the business than when a covenant is ancillary to a contract of employment, such a distinction is not observed where there is no showing that the employee-medical practitioner has been unduly taken advantage of by his employer in entering into the contract.” 61 Am Jur 2d, Physicians, Surgeons, Etc. § 21. AMA guidelines on restrictive covenants parrot the common law standards that call for reasonableness, see generally, Idbeis v. Wichita Surgical Specialists, 279 Kan. 755, 765-766, 112 P.3rd 81, 88-89 (2005).

Though South Carolina has no cases directly on point, the Supreme Court of Georgia has decided a case that is remarkably similar. In Rash v. Toccoa Clinic Medical Associates, 253 Ga. 322, 320 S.E. 170 (S.Ct. Ga. 1984), a gynecologist entered into a partnership where he agreed “not to engage in the practice of medicine or surgery within a radius of twenty-five (25) miles of the City of Toccoa, Georgia for a period of three years” The Supreme Court of Georgia upheld the restriction when the doctor tried to open an obstetrics and gynecology practice within the restricted area and time period. This case will be more fully discussed below with the individual factors, but Budev was not in an inferior bargaining position, he was not taken advantage of, and the covenant did not impair his ability to earn a living.

A. The Covenant is Necessary for the Protection of the Legitimate Interest of the Employer.

The trial court found that the practice had a legitimate business interest that this covenant not to compete protects. This finding is supported by ample evidence. The covenant itself states that it is necessary to “protect the legitimate business interests of the practice” and Budev signed this agreement (Plaintiff’s Trial Exhibit 15). Budev worked at Dr. Seltzer’s practice, learned everything about Dr. Seltzer’s practice (Transcript, p. 198, lines 5-17; Transcript, p. 178, line 24 - p.180, line 4), learned how Dr. Seltzer recruited and dealt with OD’s, learned who those and other connections were (Transcript, p. 174, line 14 - p. 176, line 24), and cultivated those connections (Transcript, p. 180, line 5 - p. 181, line 14). Budev knew both about the practice and the patients. Though he could not solicit patients, he could solicit connections. Though he could not solicit them, the patients of the practice could come to him on their own accord. These are the types of concerns envisioned by the covenant, which states, “The parties agree that, in the course of his employment with the Practice, Physician will benefit from patient contacts, doctor referral relationships, general hospital sources, and other relationships.” (Plaintiff’s Trial Exhibit 15).

Dr. Seltzer had patients in all the restricted areas (Transcript, p. 117, line 16 - p. 119, line 12; Transcript, p. 128, line 19 - p. 129, line 15; Transcript, p. 173, line 25 - p. 174, line 13; Transcript, p. 250, lines 11-23). It is important to note that the covenant did not prevent Budev from acquiring patients from within the radius, but rather only from undertaking the practice of medicine in a location close to Dr. Seltzer’s practice. He was free to solicit, advertise, and draw on the entire population of the Charleston Area and beyond with the only restriction being that he would not directly solicit the patients of the practice.

B. The Covenant is Reasonably Limited In Its Operation With Respect to Time and Place.

1. Geographic Area

The trial court found the geographic restriction reasonable and this is supported by ample evidence. Budev negotiated for and settled on a geographic restriction with a large cutout that he thought was fair (Transcript, p. 53, line 20 - p. 54, line 16). He negotiated to limit the geographic restriction to one he thought was reasonable. The restrictive geographic area is reasonable and completely distinguishable from cases where the areas have been struck down. Dr. Seltzer had only one office and the restriction has only a 25 mile radius with a substantial portion of that circle carved out by agreement. There are no multiple overlapping radii (See Plaintiff's Trial Exhibit 34; Transcript, p. 70, line 1 - p.75, line 17) to make this restriction overly broad. Because Seltzer had just one office and because of the proximity of the Atlantic Ocean, the Francis Marion National Forest, and Lake Moultrie, there is only a limited remaining land mass of which a portion is made up of marshes and wetlands.

Of that very limited land mass, Budev was allowed a very prime West Ashley location adjacent to a medical center. West Ashley is very populated and provides a sufficient patient base. Budev practiced there successfully and still practices there successfully (Transcript, p. 58, line 1 - p. 60, line 3). Additionally, the maps submitted by Seltzer show the proscribed areas (Plaintiff's Trial Exhibits 18, 21, 33, and 34). Kiawah and Seabrook Islands, Rockville, Adams Run, Parkers Ferry, Cross, St. Stephen, Awendaw, and McClellanville are only some of the adjacent locations, among many other SC townships and cities that fall outside the proscribed area. These are very

populated. Again, it is important to note that Budev could have patients from these areas, he was just restricted from undertaking the practice of medicine in those areas.

Even without a negotiated for and bargained for cutout, the Supreme Court of South Carolina has upheld a 25 mile radius in a non-compete provision. For example, in South Carolina Finance Corporation v. West Side Finance Company, 236 S.C. 109, 113 S.E.2d 329 (1960), the court found a three year, 25 mile radius from the town of Anderson, South Carolina reasonable in time and distance, where the customers of the loan business came from within and without the 25 mile radius. The trial court found that with the advent of interstate highways and the construction of expressways in the Charleston Area, 25 miles is not a daunting distance for a patient to travel, and often such a distance can be traveled in less than thirty minutes if an office is appropriately located. This finding has evidentiary support (Transcript, p. 273, line 16 - p. 274, line 13).

In Rash, 253 Ga. 322, 320 S.E.2d 170 (S.Ct. Ga. 1984), the Georgia case discussed earlier, the court points to the importance of an absolute territorial restriction as opposed to a restriction that limits a doctor from drawing patients from a certain area. Rash, 253 Ga. at 325. As in that case, the restriction “does not preclude the defendant . . . from treating *any* patient, including former clinic patients, so long as the treatment occurs outside the 25 mile limit.” The patient pool is not reduced by the 25 mile limit.

There was ample testimony that the area of the 25 mile radius was reduced by forty percent because of the cutout and the Francis Marion National Forest, and the trial court found as such. (Orders of Jefferson, 1/25/2011 and 2/16/2011; Transcript, p. 66, line 18 - p. 67, line 9). This makes the area restricted even more reasonable, especially in that Budev negotiated for the cutout.

With the West Ashley office available to him and subsequently established, Budev could remain in close proximity to all of Seltzer's patient base, and in most instances, remain even closer than Seltzer. Viewing Plaintiff's Trial Exhibits 18 and 33 and the location of Budev's West Ashley office (Plaintiff's Trial Exhibit 21), it is clear that Budev is closer to the Peninsula of Charleston and Mount Pleasant. He is closer than Seltzer to these, and other, populated areas. Unlike Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992), these patients would have to travel less to go to Budev's office than to Seltzer's office. The restriction does not deny Budev proximity to patients.

2. Time Limitation

The trial court found the time restriction reasonable (Order of Jefferson, 11/3/2010) and this conclusion is supported by the evidence. Budev himself thought the time limitation was reasonable. After extensive negotiations, the parties agreed in the contract that the time limitation is reasonable (Plaintiff's Trial Exhibit 15, ¶15). Numerous cases have found a three year restriction reasonable. E.g. Rental Uniform Services v. Dudley, 278 S.C. 674, 301 S.E.2d. 142 (S.Ct. 1983). As Dr. Seltzer testified, this gives the practice a reasonable amount of time to recover from the loss of a doctor and gives it enough leeway to deal with the competition that will come from someone intimately knowledgeable about the practice's methods, referrals, and patients. Seltzer thought he would need three years for his practice to recover from a physician such as Budev leaving his practice (Transcript, p. 196, lines 4-9). He needed the non-compete to protect his practice because Budev had learned everything about his practice (Transcript, p. 198, line 5-12). He needed time to recover. In addition to his own knowledge and beliefs, Seltzer learned of his need to protect his practice for

three years through seminars, meetings, and consultants. Three years was said to be the time needed for the practice to recover once a doctor left (Transcript p. 194 line 4 - p. 196, line 9).

C. The Covenant Not to Compete is Not Unduly Harsh and Oppressive in Curtailing the Legitimate Efforts of the Employee to Earn a Livelihood.

The trial judge found the scope of the restriction reasonable. This factual finding is supported by ample evidence. The non-compete did not prevent the Defendant from practicing medicine or ophthalmology within the Charleston area. The best evidence of this is that Defendant did in fact practice ophthalmology West of the Ashley after leaving Plaintiff's employment. It was allowed by the Agreement. He opened that West Ashley office immediately after leaving Plaintiff and still has that office along with the new office located within two or three miles of Plaintiff's office. He was not restricted from practicing medicine because he did practice medicine. He was able to earn a living in his chosen field. He did so successfully and made money. Therefore, it is difficult to argue how this clause could be overbroad.

In Rash, the Supreme Court of Georgia found that a restriction on the "practice of medicine and surgery," rather than just "obstetrics and gynecology" was not overbroad. It summarily rejected the argument that "to restrict the 'practice of medicine and surgery,' [rather than just obstetrics and gynecology] which was done in this agreement, would prevent [the doctor] practicing in other fields of medicine which would not necessarily be competitive with the practice of other physicians in the clinic." The Court found the broader restriction reasonable. Rash, 253 Ga. at 327. Here, there is even more reason to reject Budev's argument because he did in fact immediately find a job practicing medicine in his chosen field.

D. The Restriction is Reasonable From the Standpoint of Sound Public Policy.

The restrictions were reasonable. AMA guidelines on restrictive covenants parrot the common law standards that call for reasonableness so there is no overriding public policy concern in the medical field. See generally, Idbeis v. Wichita Surgical Specialists, 279 Kan. 755, 765-766, 112 P.3d 81, 88-89 (2005).

Defendant has not shown that the restriction caused any shortage of doctors in the Charleston Area or was against public policy. As pointed out in Rash:

If it be argued that the enforcement of this restrictive covenant would be contrary to public policy because it would limit the right of potential patients in the Demorest and Habersham County area to avail themselves of Dr. Rash's services, it can be argued with at least equal conviction that this would afford countless other people in other areas, both in and outside of the state, the opportunity to have a physician in their areas. There is no reason to conclude that the obstetrical and gynecological needs of persons within a 25-mile radius of Toccoa are any greater than in many other areas of this and other states, nor is there any reason to conclude that the need for the appellant's services, in the context of this case, is sufficient to outweigh the law's interest in upholding and protecting freedom to contract and to enforce contractual rights and obligations. See, e.g., Willman v. Beheler, 499 S.W.2d 770 (Mo. 1973).

Rash, 253 Ga. 322, 326; 320 S.E.2d 170 (S.Ct. Ga. 1984)

Public policy is probably more benefitted from ophthalmologists' offices in diverse locations, rather than by two adjacent to each other.

- E. The Covenant Not to Compete Merely States Budev “Shall Not Undertake the Practice of Medicine,” A Narrower Term Than Stating Budev “Shall Not Practice Medicine.”

Budev shall not “undertake the practice of medicine” by the covenant not to compete (Plaintiff’s Trial Exhibit 15). “Undertake” is defined by Collins English Dictionary - Complete & Unabridged 10th Edition as follows:

Undertake: — vb (foll by for) , -takes , -taking , -took , -taken

1. (tr) to contract to or commit oneself to (something) or (to do something): to undertake a job ; to undertake to deliver the goods
2. (tr) to attempt to; agree to start
3. (tr) to take (someone) in charge
4. archaic to make oneself responsible (for)
5. (tr) to promise

undertake. Dictionary.com. Collins English Dictionary - Complete & Unabridged 10th Edition. HarperCollins Publishers. <http://dictionary.reference.com/browse/undertake> (accessed: September 16, 2011).

“Undertake” is defined by The American Heritage College Dictionary, Third Edition (Houghton Mifflin Company) as follows:

Undertake 1. To take upon oneself; decide or agree to do. 2. To pledge or commit oneself: *undertake to care for an elderly relative* 3. To set about; begin

By saying Budev shall not “undertake the practice of medicine,” rather than saying Budev shall not “practice medicine,” the covenant puts an element of foresight and planning into the definition and removes the clause from the realm of unlikely hypotheticals that Budev puts forth. “Undertake” implies a planned endeavor, rather than a spontaneous act. Here, Budev searched out land next to Seltzer, formed a professional association, formed a corporation, bought land, borrowed money, built an office, and opened an office next door to Seltzer: There is no doubt this is an undertaking. He did not treat someone in an emergent situation next to Seltzer’s office: There is doubt that this would be an undertaking. If Seltzer tried to enforce his covenant in that emergent situation, Budev could put forth a vigorous defense especially since this term “Undertake the practice of medicine” would be construed against Seltzer.

The action that Budev is proscribed from doing is that he shall not “undertake.” “Undertake” is the verb, the action he must not do. The object is “the practice of medicine.”

Additionally, the trial court ruled that Budev’s proposed hypothetical situations did not render the covenant against public policy (Order of Jefferson, 11/3/2010, p. 21). This conclusion is supported by the evidence. Budev proposed hypothetical emergency situations which Seltzer testified had never happened in his time of practice. The trial court found as such and this is supported by the evidence (Transcript, p. 218, lines 15-23; Transcript, p. 220, lines 12-23). This court, like the trial court, need not delve into every possibility or consequence to rule this restriction sound and not against public policy.

II. SELTZER DID NOT WAIVE HIS RIGHTS UNDER THE COVENANT, NOR IS HE ESTOPPED, BY ALLOWING BUDEV TO OPERATE AT TRIDENT OR BY ALLOWING HIM TO OPEN AN ORANGEBURG OFFICE

A. Trident Surgery Center

Budev claims that, even if there was a breach of contract, Seltzer waived the right to enforce the covenant not to compete by allowing Budev to continue to perform surgery at Trident Eye Surgery Center with his express permission and encouragement. “[A] party to a contract may lose its right to enjoin another party’s breach by consenting either expressly or implicitly through words or acts inconsistent with an intention to enforce the contract’s terms.” Genesco, Inc. v. Palmetto Plaza Shopping Ctr., Inc., 274 S.C. 446, 448, 265 S.E.2d 34, 35 (1980). When a person waives a right it means that the person intentionally and voluntarily gives up that right with knowledge of all of the relevant facts. The trial court found that Seltzer did not act in a manner which made Budev believe that the Seltzer gave up the right to prosecute the breach of contract if Budev opened an office in close proximity. The trial court found Budev failed to meet his burden of proof on the affirmative defense of waiver (Order of Jefferson, 11/3/2010, p. 22) and this factual finding, Parker v. Parker, 313 S.C. 482, 433 S.E.2d. 388 (1994) is well supported by the evidence. Budev admitted that Seltzer expressly told him not to build the office and that it would be in violation of the non-compete to do so (Transcript, p. 46, lines 13-17). Budev testified that he talked to Seltzer about the non-compete and Seltzer told him that if opened an office near his, Seltzer would sue him. (Transcript, p. 105, lines 5-21). Despite this, Budev went full speed ahead (Transcript, p. 102, lines 18-21). Budev did not believe his use of the surgical suite competition (Transcript, p. 109, lines 18-21). Budev also testified he did not believe Seltzer’s action of allowing him to continue to operate

was a waiver, as he never associated Seltzer's permission to operate in the surgical suite with the non-compete provision. Budev testified that he did not consider Seltzer giving him the courtesy to continuing to use the surgical facility a waiver and at the time he did not know that it had anything to do with the non-compete. He never thought this courtesy had anything to do with the non-compete (Transcript, p. 60, lines 12-20), thus even Budev thought that this did not show an intention on Seltzer's part not to enforce the contract's terms. Because of Budev's own testimony, there can be no waiver.

Waiver is the voluntary and intentional relinquishment of a known right. Provident Life and Accident Insurance Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). Budev has presented no evidence that Seltzer, by allowing Budev to operate nearby, intended to give up his right to enforce the non-compete as to the nearby office. As noted above, the only evidence presented at trial was that Seltzer told him not to build the office or he would be sued.

Likewise, Budev also claims that the Seltzer is estopped from claiming breach of contract. The "[e]ssential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The "[e]lements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." Id. Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment. Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993).

The trial court made the factual finding, Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct.App. 1984), that Budev failed to meet his burden of proof on the defense of estoppel (Order of Jefferson, 11/3/2010, p. 23), and this is well supported by the evidence. As noted above, Seltzer told Budev not to build his new office. Budev admitted he did not think that Seltzer's allowance of letting him perform surgeries at another facility had anything to do with the non-compete. Thus, Budev did not rely on Seltzer's actions, nor did he change his position because of the action of Seltzer. Because Budev believed that the performance of surgical procedures at Trident Eye Surgery Center was not in violation of the covenant not to compete, he could not have relied on this allowance to justify the building of his new office nor could he changed his position because of it.

In addition, Budev offered no evidence as to estoppel. He did not testify he changed his position or built his building because of an act of Seltzer. He did not testify he relied on any representation of Seltzer. There is no proof of a false act or misrepresentation by Seltzer. Budev offered no proof as to the essential elements of estoppel and waiver.

Furthermore, both parties testified that they received mutual benefit from the other practicing within a surgical group of which they are both members. They receive a share of the profits derived from the surgeries. There is a question, at least in the minds of the parties, whether this is competition and therefore Budev may have had a valid defense if Dr. Seltzer tried to prevent him from operating. Thus, Dr. Seltzer has not waived the non-compete provision by allowing this. He did not want to face a potential legal matter by attempting to stop the Budev's surgeries (Transcript, p. 216, line 20 - p. 217, line 13). Seltzer should not be forced to face a potential lawsuit in order to protect his waiver defense.

B. Seltzer's Opening a Practice in Orangeburg

It is difficult to see how Seltzer allowing Budev's office in Orangeburg to remain open arises to waiver or estoppel. Budev has not shown that Seltzer's office in Orangeburg was opened prior to Budev opening his office next to Seltzer (Transcript, p. 225, lines 13-16; Budev in his Initial Brief states Seltzer's Orangeburg office was opened in 2008). Therefore, Budev cannot rely on this act to justify him opening his office and there can be no waiver or estoppel. In fact, it was September, 2008, when Seltzer opened an office in Orangeburg, S.C. This was after Budev opened his office next to Seltzer's main practice, and well after he bought the property next to Seltzer's main office.

The non-compete clause in question speaks "of any office of the practice." The Agreement was executed in 2003 when there was only one office of the practice. It is doubtful that a court would rule that this contract provision applies to an office neither in existence at the time of the contract, nor in existence during the time of Budev's employment. Fortunately, Dr. Seltzer has not tried to contort the contract and enforce the covenant against Budev's pre-existing office, and the trial court declined to throw basic contract interpretation out the window in an effort to portray the restriction as overly broad. Again, Seltzer should not be forced to bring a questionable lawsuit to protect himself against waiver and estoppel claims.

As above concerning the surgical procedures, Budev has presented no evidence as to waiver or estoppel. He did not testify he changed his position because of the acts or misrepresentations of Seltzer. He did not testify on his reliance on those acts. He did not present evidence as to most of the essential elements. He did not even present evidence to show that Seltzer's Orangeburg office was built before he built his office next to Seltzer's main practice.

Furthermore, the trial judge never addressed the Orangeburg office with regard to Budev's waiver and estoppel claim, and Budev never asked for reconsideration on this matter. Therefore, this issue is not preserved for appeal.

III. THE SUM STIPULATED IN THE CONTRACT IS A LIQUIDATED DAMAGES CLAUSE AND NOT AN UNENFORCEABLE PENALTY

The covenant not to compete contained a provision which stated, "The Practice shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000.00) Dollars enforceable by the Practice in any court of competent jurisdiction" (Plaintiff's Trial Exhibit 15). "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." Erie Ins. Co. v. Winter Constr. Co., Op. No. 4841 (S.C. Ct. App. Filed June 15, 2011 (Shearhouse Adv. Sh. No. 20)). The trial court found the damages provision to be unambiguous (Order of Jefferson, 2/6/2011) and that the designation as to "liquidated amount" is indicative of the intention of the parties that the sum stipulated to constitutes liquidated damages rather than a penalty. The covenant itself states that it is necessary to "protect the legitimate business interests of the practice" and Budev signed this agreement. Further, the covenant outlines potential damages that would be hard to measure once Budev exploited them once he left the practice: "The parties agree that, in the course of his employment with the Practice, Physician will benefit from patient contacts, doctor referral relationships, general hospital sources, and other

relationships” (Plaintiff’s Trial Exhibit 15). The express language of the contract makes it clear that this is a liquidated damages provision.

Furthermore, the touchstone question in determining whether the sum stipulated in the contract is a liquidated damage or an unenforceable penalty is whether the amount is "reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance" Erie Ins. Co. v. Winter Constr. Co., Op. No. 4841 (S.C. Ct. App. Filed June 15, 2011) (Shearhouse Adv. Sh. No. 20) citing Tate, 231 S.C. at 441, 99 S.E.2d at 46 (emphasis added); see also Restatement (Second) of Contracts § 356 (1981). Eire cites Foster v. Roach, to point out which criteria our supreme court utilize in making this determination:

In order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

Erie Ins. Co. v. Winter Constr. Co., Op. No. 4841 (S.C. Ct. App. Filed June 15, 2011) (Shearhouse Adv. Sh. No. 20) citing Foster v. Roach 119 S.C. 102, 107, 111 S.E. 897, 899 (1922).

It is easy to see how Seltzer would be greatly damaged by Budev’s breach and easy to see the difficulty in determining the damages. Budev worked at Dr. Seltzer’s practice, learned everything about Dr. Seltzer’s practice (Transcript, p. 198, lines 5-17; Transcript, p. 178, line 24 - p.180, line 4), learned how Dr. Seltzer recruited and dealt with OD’s, learned who those and other connections were (Transcript, p. 174, line 14 - p. 176, line 24), and cultivated those connections (Transcript, p. 180, line 5 - p. 181, line 14). Budev knew both about the practice and the patients. Though he could

not solicit patients, he could solicit connections. He would have an unfair advantage competing against Seltzer as he knew everything about Seltzer's practice. This would damage Seltzer and Seltzer outlines those damages. After Budev left and started practicing within the restricted area, Seltzer's referring optometrists dropped from 25 to 1 (Transcript, p.180, lines 8-25). He was receiving less cataract patients via referrals (Transcript, p. 181, lines 6-14). Seltzer thought he would need three years for his practice to recover from a physician such as Budev leaving his practice (Transcript, p. 196, lines 4-9). He needed the non-compete to protect his practice because Budev had learned everything about his practice (Transcript, p. 198, line 5-12). He needed time to recover. These are the types of difficult to quantify concerns envisioned by the covenant, which states, "The parties agree that, in the course of his employment with the Practice, Physician will benefit from patient contacts, doctor referral relationships, general hospital sources, and other relationships." (Plaintiff's Trial Exhibit 15).

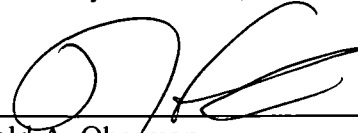
The trial court found that the liquidated damages amount of \$120,000 was "reasonable and proportionate to the probable damage resulting from the Defendant's breach" (Order of Jefferson, 11/3/2010). There is ample evidence, as outlined above, to support this finding. The amount equals Budev's one year base salary without bonuses, and Seltzer testified Budev made considerably more money than his base salary, with his compensation eventually surpassing that of Seltzer (Transcript, p. 183, line 18 - p. 184, line 16). This amount is not out of proportion with contract amount and not out of proportion with the damage caused to Seltzer's practice by a competitor with inside knowledge setting up shop in close by.

CONCLUSION

There is ample evidence to uphold the findings of the trial judge and this court should affirm that decision. The covenant allows Budev to undertake the practice of medicine in a West Ashley location for which he specifically negotiated. He did practice there successfully, but almost immediately undertook to set up another office next to Seltzer's practice. Budev should not be allowed to unfairly exploit the knowledge he gained of Seltzer's practice by opening up another office close to Seltzer's office.

September 19, 2011

Respectfully submitted,



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The South Carolina Court of Appeals

Ophthalmology Associates of
Charleston, P. A.,

Respondent,

v.

Millin C. Budev, M. D.,

Appellant.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2007-CP-10-03681

ORDER

For good cause having been shown, the time for serving and filing the Respondent's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 21, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina

cc: Joseph D. Thompson, III, Esquire
Lydia Blessing Applegate, Esquire
Sarah P. Spruill, Esquire
Marvin I. Oberman, Esquire

FILED
8/15/11

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The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Ophthalmology Associates of Charleston, P.A. v. Millin C. Budev, M.D.
Civil Action Case No.: 2007-CP-10-3681
SC Court of Appeals Case No.: 2011187386

Dear Ms. Gee:

The Respondent would request a 30-day extension of time to file his Initial Brief and Designation of Matter in this appeal which is due on August 15, 2011. Counsel for Respondent requests that the Court grant them a thirty (30) day extension, making their Initial Respondent's Brief and Designation of Matter due on September 15, 2011.

This motion is made due to the complexity of the issues expected in this appeal. Opposing counsel consents to the extension request. It is my understanding that I can make this first request for an extension via letter, but if the Court requires a formal motion, please inform me immediately.

I have enclosed the \$25.00 extension fee. With warmest personal regards, I remain

Yours very truly,



Harold A. Oberman

HAO/shb

Enclosure

cc: Sarah P. Spruill, Esquire
Joseph D. Thompson, Esquire

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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., Respondent.

AMENDED INITIAL BRIEF OF APPELLANT

RECEIVED

JUL 21 2011

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ENFORCING THE COVENANT NOT TO COMPETE FOUND IN THE PARTIES' EMPLOYMENT CONTRACT WHERE DR. MILLIN BUDEV, AN OPHTHALMOLOGIST, WAS PROHIBITED FROM THE PRACTICE OF ALL MEDICINE WITHIN A TWENTY-FIVE MILE RADIUS OF ANY OFFICE OF HIS FORMER EMPLOYER FOR A THREE-YEAR PERIOD AND WHERE THERE WAS NO EVIDENCE OF ANY LEGITIMATE BUSINESS INTEREST TO BE PROTECTED BY THE NON-COMPETE?
2. IF THE COVENANT NOT TO COMPETE IS ENFORCEABLE, DID THE TRIAL COURT ERR IN ASSESSING A PENALTY AMOUNTING TO ONE YEAR'S BASE SALARY FOR DR. BUDEV GIVEN THE ABSENCE OF ANY EVIDENCE OF DAMAGES SUSTAINED BY HIS FORMER EMPLOYER FOLLOWING DR. BUDEV'S DEPARTURE?
3. DID THE TRIAL COURT ERR IN FAILING TO FIND EQUITY BARRED OPHTHALMOLOGY ASSOCIATES OF CHARLESTON, P.A. FROM ASSERTING ITS CLAIMS BASED ON ITS APPROVAL OF DR. BUDEV'S PRACTICE OF MEDICINE WITHIN THE GEOGRAPHICALLY RESTRICTED AREA WITH RESPECT TO PROCEDURES PERFORMED AT THE TRIDENT EYE SURGERY CENTER?

STATEMENT OF THE CASE

This appeal stems from the Complaint filed on August 21, 2007 by Ophthalmology Associates of Charleston, P.A. (“OAC”) against Dr. Millin C. Budev. (Complaint). Dr. Budev worked at OAC as an ophthalmologist from June 5, 2003 until July 3, 2006 when he left to start his own ophthalmology practice. (*Id.*).

The Complaint included claims for declaratory judgment, breach of contract, and injunction all relating to a covenant not to compete contained in Dr. Budev’s employment contract with OAC dated June 5, 2003 (“Employment Contract”). The covenant not to compete reads as follows:

The Physician agrees that upon the termination of his employment from the Practice, he shall not undertake the **practice of medicine** within a twenty-five (25) mile radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination.

(Employment contract; R. at ____)(emphasis added). Dr. Budev answered on September 21, 2007, asserting a general denial, failure to state a claim, waiver, estoppel, laches, and that enforcement of the covenant not to compete was barred by public policy. (Answer). OAC never moved for temporary injunctive relief.

On May 5, 2009, Dr. Budev filed a motion for summary judgment that, on October 8, 2009, was granted as to OAC’s claim for injunctive relief.¹ (Summary Judgment Motion & Order). The remaining issues were heard in a non-jury trial on August 12-13, 2010.

¹ The three-year non-compete term expired on July 3, 2009.

On November 3, 2010, the trial court entered its Order finding that Dr. Budev breached a valid and enforceable covenant not to compete and awarding liquidated damages of \$120,000. (Order 1). OAC filed a motion for reconsideration on November 19, 2010, seeking a modification of one paragraph of the order and pre-judgment interest. (Motion for Reconsideration). Dr. Budev opposed the motion and challenged OAC's entitlement to pre-judgment interest on two grounds: (1) the case did not meet the criteria of S.C. Code Ann. § 34-31-20 for pre-judgment interest, and (2) the amount of damages provided in the employment contract constituted an unenforceable penalty. (Memorandum in Opposition to Motion to Reconsider). The trial court granted the motion to reconsider by Order dated January 25, 2011 and an Amended Order dated February 16, 2011, which specified that pre-judgment interest would run from April 30, 2008. (Order 2, Order 3). Dr. Budev received written notice of the entry of these orders on February 11, 2011 and February 22, 2011 respectively, and served his notice of appeal on March 10, 2011.

FACTS

For the most part, the facts are not disputed. The parties agree on the chronology of events and the circumstances surrounding the execution of the employment contract. The central issues are whether the covenant not to compete and damages provision contained in the employment contract are enforceable and, if so, whether OAC waived or is estopped from asserting its claims by its conduct.

From its formation until Dr. Budev joined the practice in 2003, OAC was a solo ophthalmology practice belonging to Dr. Sidney Seltzer. (Tr. at 169:18-22; R. at ____). Since 1981, the practice has been located on Medical Plaza Drive near North Trident

Hospital in North Charleston. (Tr. at 166:17-21; R. at ____). As of 2003, this was the only OAC location. Because of his advancing age, Dr. Seltzer (67 at the time) sought to hire a younger ophthalmologist with the idea that the new doctor would eventually buy the practice from him. (Tr. at 177:3-178:10; R. at ____).

In late 2002, Dr. Seltzer opened discussions with Dr. Budev, a young ophthalmologist just finishing his residency. (Tr. at 178:18-23; R. at ____). The subject Employment Contract, including a twenty-five mile radius geographic restriction in the covenant not to compete, was initially proposed by Dr. Seltzer on advice he received from his accountant/advisor. (Tr. at 181:15-182:14; R. at ____). Dr. Budev countered the proposal with a geographic "carve-out" that would allow Dr. Budev to practice in the West Ashley area of Charleston County. (Tr. at 186:4-8; R. at ____). The parties freely and voluntarily entered the employment contract on June 5, 2003. (Employment contract; R. at ____). This was the first employment agreement entered by OAC. (Tr. at 170:9-13; R. at ____).

The covenant not to compete provided that Dr. Budev "shall not undertake the **practice of medicine** within a twenty-five (25) radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination." (Employment contract; R. at ____)(emphasis added). In addition, the Employment Contract provided that Dr. Budev's base salary would be \$120,000 per year with bonus opportunities. (*Id.*; R. at ____). The Employment Contract further provided that OAC "shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000) Dollars

enforceable by Practice [OAC] in any court of competent jurisdiction.” (Employment contract; R. at ____).

In July 2006, Dr. Budev left OAC to form his own practice. (Tr. at 59:21-60:5; R. at ____). Dr. Budev opened an office for the practice of ophthalmology in the West Ashley area of Charleston County, an area within the “carve-out” of the geographic restraint in the covenant not to compete. (*Id.*; Tr. at 58:1-4; R. at ____). In 2006, Dr. Budev also began seeing patients in Orangeburg, a town where OAC did not have an office location at the time. (Tr. at 94:19-24; R. at ____).

In April 2008, Dr. Budev opened an office in Ladson within two or three miles of OAC.² (Tr. at 97:14-16; R. at ____). At the time the Complaint was filed and served in August 2007, Dr. Budev’s Ladson office was under construction. (Tr. at 45:20-25; R. at ____).

Following Dr. Budev’s departure, OAC hired another young ophthalmologist, Dr. J. S. Brody. (Tr. at 260:25-261:6; R. at ____). Dr. Brody’s contract included a covenant not to compete with a two-year term. (*Id.*; R. at ____). In 2008, OAC opened a satellite office in Orangeburg within a twenty-five mile radius of the location where Dr. Budev treated patients. (Tr. at 95:12-18; R. at ____).

During his employment with OAC, Dr. Budev performed procedures at the Trident Eye Surgery Center located across the street from OAC’s office location. (Tr. at 90:25-91:5; R. at ____). Following his separation from OAC, Dr. Budev continued to

² The Ladson office was the result of a business relationship between Dr. Budev and Dr. David Vroman. A limited liability company owned by Dr. Budev and Dr. Vroman purchased the land for the office site in November 2006, and the office construction was finished in April 2008. The pair started seeing patients at the Ladson office around the end of April 2008.

treat patients at the Trident Eye Surgery Center with the express permission and encouragement of Dr. Seltzer. (Tr. at 93:3-16; R. at ____).

Dr. Seltzer's surgical practice maintained consistent numbers following Dr. Budev's departure, with the exception of a leave of absence Dr. Seltzer took following a significant leg injury in August 2008. (Def. Ex. 2-3; Tr. at 96:12-98:25; R. at ____). For example, in 2007, the first full calendar year following his departure from OAC, Dr. Budev performed 486 surgical procedures at the Trident Eye Surgery Center. (*Id.*; R. at ____). In the same period, Dr. Seltzer performed 734 procedures, and Dr. Brody performed 293 procedures. (*Id.*; R. at ____). From May 1, 2008 through August 31, 2008, Dr. Budev performed 153 surgical procedures, five procedures less than for the same months in 2007.³ (*Id.*; R. at ____). In the same period, Dr. Seltzer performed 262 procedures, six procedures less than for the same months in 2007. (*Id.*; R. at ____). Dr. Brody, on the other hand, performed 92 procedures, ten more procedures than the same period in 2007. (*Id.*; R. at ____). From May 1, 2008 through December 31, 2008, Dr. Budev performed 329 surgical procedures (the same as for that period in 2007), and Dr. Brody performed 260 procedures (fifty more than for that period in 2007). (*Id.*; R. at ____).

In this case, OAC only complains of Dr. Budev's practice at the Ladson office location. Dr. Seltzer testified he did not believe Dr. Budev's practice at the Trident Eye Surgery Center (from which Dr. Seltzer received a share of the profits), in Orangeburg, or at hospitals within the restricted territory violated the non-compete, notwithstanding the language barring Dr. Budev from "the **practice of medicine** within a twenty-five (25)

³ May to August 2008 represents the relevant competition period following the opening of Dr. Budev's Ladson office and Dr. Seltzer's injury in August 2008.

radius of any office of Practice [OAC].” (Tr. at 216:1-4; Tr. at 213:4-25; R. at ____)(emphasis added).

ARGUMENTS

I. The covenant not to compete is unenforceable because it is overbroad as to scope, and both geographic and temporal restrictions, and it is not reasonably calculated to protect any legitimate business interest of the employer.

A. Standard of Review

Construction of an unambiguous contract is a matter of law for the court. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983). Covenants not to compete in employment contracts are generally disfavored, must be critically examined, and will be strictly construed against the employer. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995); *Stringer v. Herron*, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992). A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer. *Almers v. South Carolina Nat'l Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975); *Stringer*, 309 S.C. at 532, 424 S.E.2d at 548.

In order to be enforceable, a plaintiff has the burden of proving that a covenant not to compete 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 a valuable consideration.

Rental Uniform Serv. of Florence, Inc., 278 S.C. at 675-76, 301 S.E.2d at 531. If the covenant is defective in any one of the five requirements, the covenant is completely

defective and cannot be saved. See *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 into 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 territorial scope of the restraint is unreasonable and no inquiry need be made as to the presence or absence of other necessary requirements.”).

“[I]n South Carolina, 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.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (2010). Thus, the Court cannot “blue pencil” an overbroad clause even if the party seeking enforcement agrees to “an interpretation that artificially limit[s] the actual terms used in the contract.” *Id.*

B. The covenant not to compete is unreasonably broad in its scope and therefore unenforceable.

The express language of the covenant is broader than necessary to protect any legitimate business interest of OAC, and the trial court impermissibly narrowed the language of the covenant in order to uphold it. The covenant explicitly states that Dr. Budev may not engage in the “practice of medicine” in the restricted area, as opposed to the “practice of ophthalmology” for which Dr. Budev was employed by OAC.⁴ Remarkably, the trial court even found that “Dr. Seltzer conceded that **the express language of the covenant was broader than that for which the defendant was employed....**” (Order 1 at 11 (R. at ____))(emphasis added). However, the trial court

⁴ Throughout the employment contract, Dr. Budev’s employment is referenced as the “practice of ophthalmology” as opposed to the “practice of medicine” which was only used in the covenant not to compete. (Employment contract; R. at ____).

then accepted Dr. Seltzer's testimony that "the intent of the agreement was to restrict the non-compete to the practice of ophthalmology." (Order 1 at 11 (R. at ____)).

In narrowing the covenant to reflect what it believed to be the employer's intent, the trial court elevated the general rules of contract construction over the specific rules applicable to the construction of covenants not to compete. Therefore, the trial court's decision must be reversed. See e.g. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (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."); *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) ("We must uphold the covenant as written or not at all, it must stand or fall integrally."); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) ("Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer."). Unfortunately for OAC, this arguably "technical" violation is but the tip of the iceberg as to the invalidity of the covenant not to compete, even if the "practice of medicine" is somehow transformed into the "practice of ophthalmology."

Of critical concern to innocent patients is the practical application of the scope of the covenant. At trial, a hypothetical example illustrated the quandary Dr. Budev would face if one of his patients from his West Ashley office found him or herself with an ophthalmologic emergency within the restricted zone at the emergency room of one of the area hospitals while Dr. Budev was on call. By its terms, the covenant would prevent Dr. Budev's own patient from receiving expert ophthalmologic care by Dr. Budev in the emergency room at any hospital within the restricted geographic area. Clearly, in the

hypothetical example, the covenant does not protect any legitimate interest of OAC but, instead, prevents Dr. Budev's own patients from being treated by the physician of their choice (unless they happen to have their emergency in the "carve-out" zone).

When confronted with the hypothetical at trial, Dr. Seltzer tried to explain that the covenant simply restricted where Dr. Budev could locate an office, not where he could treat patients. (Tr. at 217:21-218:14; R. at ____). However, that is not what the covenant expressly states. In fact, if Dr. Seltzer had intended to restrict nothing more than Dr. Budev's office location, he could have easily specified such in the covenant as opposed to the covenant's express language restricting Dr. Budev's "practice of medicine" within a twenty-five mile radius. Again, a covenant not to compete is a restraint of trade and, as such, the terms of the covenant are strictly construed against the employer. *Faces Boutique, Ltd.*, 318 S.C. at 41, 455 S.E.2d at 708. Therefore, the covenant not to compete is clearly unenforceable and the trial court's decision must be reversed.

C. The geographic restriction in the covenant not to compete is not reasonably limited to protect a legitimate business interest of OAC and is therefore unenforceable.

At trial, Dr. Seltzer testified the primary business interest OAC wanted to protect through the covenant not to compete was OAC's patient contacts. (Tr. at 198:7-17; R. at ____). The question then was whether the covenant's twenty-five mile radius geographic restriction was narrowly drawn to protect that interest. Clearly, it was not.

The record is devoid of any evidence of OAC's patient contacts either when the Employment Contract was executed in 2003 or when it terminated in 2006.⁵ In fact,

⁵Dr. Seltzer admitted no survey of patient contacts was done either prior to execution of the Employment Contract or at the time when Dr. Budev left the practice. (Tr. at 225:24-226:13; Tr. at 239:7-241:16; Tr. 250:7-23; R. at ____).

OAC did not submit any evidence of the extent of its client contacts or the location of its client contacts during the time when Dr. Budev would have had access to OAC's patient contacts. Without that evidence, there is no support for any geographic restriction, much less a restriction encompassing a twenty-five mile radius from any OAC office location. OAC completely failed in its burden of proof on the reasonableness of the geographic restriction and, therefore, the covenant not to compete is unenforceable and the trial court's order must be reversed. *See Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958).

OAC attempted to demonstrate its patient contacts by offering evidence of patient contacts generated from a survey of OAC's records in 2009, three years after Dr. Budev left the practice. While the evidence bears no reasonable relevance to the period when Dr. Budev worked at OAC, it does demonstrate OAC's complete lack of understanding of its patient contacts and what it was allegedly trying to protect. For example, the survey did not identify when the patient first came to OAC for treatment nor did it reflect whether the patient was an existing patient in July 2003. (Tr. at 137:13-138:25; R. at ____).

Moreover, the 2009 survey results regarding the restricted area including the Town of Mount Pleasant further demonstrate the lack of evidentiary support for a twenty-five mile radius geographic restraint. Dr. Seltzer repeatedly conceded that he did not know how many patient contacts were derived from the Mount Pleasant area: a) in 2003, when the employment contract was signed; b) in 2006, when Dr. Budev left the practice; c) at the time of his deposition; or d) at the time of the subject trial. (*See* Tr. at 250:2-23;

R. at ____). Dr. Seltzer had, and still has, no idea of the number of patient contacts, or the location of those contacts, within the restricted area.

Remarkably, when he was first asked about restricting competition in Mount Pleasant, Dr. Seltzer specifically testified in his May 2009 deposition that “I didn’t have any” legitimate business interest in preventing competition in Mount Pleasant.⁶ (Court’s Exhibit, Dr. Seltzer depo. p. 122(R. at ____)). After consultation with his attorney, Dr. Seltzer executed an errata sheet in which he completely changed his testimony, asserting that he had an interest in preventing competition in Mount Pleasant because a “review of patient charts and addresses revealed approximately 527 patients from Mt. Pleasant.” (Court’s Exhibit, Dr. Seltzer depos. p. 128(R. at ____)). Even then, Dr. Seltzer testified that the errata sheet was also incorrect because the word “patients” was a “typo” for “zip codes.” (Tr. at 274:14-275:1; R. at ____). Assuming *arguendo* that all 527 patient contacts identified in the 2009 survey from Mount Pleasant were patients of OAC in the 2003-2006 time frame, it is still clear that the geographic restriction was unnecessarily overbroad to protect 2.25% of OAC’s more than 23,000 patient contacts.

This case compares favorably to this Court’s decision in *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992) which also involved an employment contract involving a highly trained professional providing a necessary service. In *Stringer*, Herron, a veterinarian, entered a covenant not to compete that covered all areas within

⁶ Dr. Seltzer also testified in his deposition that “[p]laces like Mount Pleasant and James Island and Johns Island, they wouldn’t make any difference, they were too far away.” (Court’s Exhibit, Dr. Seltzer depo. p. 124(R. at ____)). Following consultation with counsel, Dr. Seltzer reversed his testimony with errata sheet changes. Even with the “change” in his deposition testimony, Dr. Seltzer subsequently disavowed the “patient” counts identified in the errata sheet that presumably came from his office manager’s survey of OAC patient accounts. (Tr. at 249:22-250:6; R. at ____).

fifteen miles of any office of the employing veterinarian. Herron then left the practice and began operating a mobile practice in and around the restricted area. This Court reversed the trial court's decision to enforce the covenant because the evidence showed an overwhelming majority of the employer's customers lived much closer than 15 miles of any given location (84% lived within 10 miles) and therefore the covenant was held to be overbroad, unreasonable, and unenforceable. In the subject case, the geographic restriction unnecessarily and unreasonably extends into Mount Pleasant to protect 2.25% of OAC's patient contacts. Given this Court's decision in *Stringer*, the subject geographic restriction is similarly overbroad, unreasonable and unenforceable.

In sum, there was no evidence that the twenty-five mile geographic restriction bore any relation to OAC's stated interest of protecting patient contacts, much less that the restriction was narrowly tailored to protect that interest. If a territorial restriction is broader than necessary to protect the plaintiff's stated business interest, the covenant's geographic restraint cannot be considered reasonable and, therefore, the entire covenant is unenforceable. *Id.* at 532, 424 S.E.2d at 548-49. Quite simply, South Carolina law requires that the territorial restrictions placed by a covenant not to compete be narrowly tailored to the interest the employer seeks to protect. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961)("[I]n order to be reasonable, [the territorial restraint] must be necessary in its full extent for the protection of some legitimate interest of the employer.")(emphasis added). Accordingly, the covenant not to compete fails in its entirety and is unenforceable.

D. The three-year term of the covenant not to compete is not reasonably related to any legitimate business interest of OAC.

The only evidence offered to justify the three-year term was the testimony of Dr. Seltzer who testified that it was “generally accepted” in the medical community that a three-year term was reasonable. (Tr. at 195:25-196:9; R. at ____). Assuming that to be true, OAC failed to offer evidence as to how or why a three-year term would be reasonably tailored to protect its alleged business interest in patient contacts. (*See id.*; R. at ____). Just because a three-year term may be acceptable for other physicians in other practices does not mean that a three-year term in the greater Charleston market for ophthalmologists is reasonable. In fact, the evidence demonstrates that a two-year term is the “generally accepted” term for ophthalmologists in the greater Charleston market.

Following Dr. Budev’s departure, OAC hired another young ophthalmologist, Dr. Brody. Remarkably, Dr. Brody’s non-compete included a two-year temporal restriction. (Tr. at 260:25-262:16; R. at ____). This demonstrates the arbitrariness of OAC’s temporal restriction and/or OAC’s acknowledgement that a three-year term was one year too long for an ophthalmologist in the Charleston market. Of course, when Dr. Seltzer subsequently sold OAC and entered into his own employment contract, his covenant not to compete included a two-year term. (Asset Sale at p. 16 presented at trial Tr. at 254; R. ____). It was error for the trial court to accept Dr. Seltzer’s testimony regarding the “generally accepted” three-year non-compete term when every other non-compete in the record included a two-year term.

Moreover, the statistics from the Trident Eye Surgery Center demonstrate that from the time Dr. Budev’s office opened in late April 2008, neither Dr. Seltzer nor his associate Dr. Brody experienced any appreciable decline in the number of procedures being performed at the surgery center. (Def. Ex. 2-3; Tr. at 96:12-98:25; R. at ____). In

other words, there was no evidence that Dr. Budev's office location had any impact on OAC's practice. This evidence further demonstrates that a three-year term was unreasonable for the protection of any business interest of OAC. Accordingly, OAC failed in its burden of proof on the reasonableness of the temporal restriction and, therefore, the covenant not to compete is unenforceable and the trial court's Order could be reversed on this ground alone.

II. OAC is barred from asserting the covenant not to compete by the doctrines of waiver and/ or estoppel.

In addition to his arguments that the covenant not to compete is unenforceable as a matter of law, Dr. Budev also contends equity bars OAC from bringing a claim to enforce the covenant not to compete. Very simply, Dr. Budev continued to practice medicine within the restricted area at the Trident Eye Surgery Center with the approval of OAC from the time he left OAC. Dr. Seltzer directly profited from this practice as a part owner of the center. (Tr. at 94:9-12; R. at ____). Further, Dr. Seltzer and OAC had no complaint about Dr. Budev's Orangeburg practice, even following the establishment of an OAC location within twenty-five miles of Dr. Budev's practice. (Tr. at 213:9-25; R. at ____). OAC's only assertion of the covenant not to compete related to Dr. Budev's Ladson office.

"Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). Similarly, a party may be estopped from asserting a position if the following elements are shown:

- (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or

constructive, of the true facts. As to the party claiming estoppel, the elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.

Maheer v. Tietex Corp., 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998).

It is uncontradicted that Dr. Budev continued to perform procedures at the Trident Eye Surgery Center following his departure from OAC. This action was only brought after Dr. Budev broke ground on the Ladson office. By allowing Dr. Budev to practice ophthalmology within the restricted area when it profited Dr. Seltzer, Dr. Seltzer and OAC waived any right to enforce the covenant not to compete and/or are estopped from asserting Dr. Budev's alleged breach of the non-compete.⁷ Therefore, the trial court's order enforcing the covenant must be reversed.

III. Assuming *arguendo* that the covenant not to compete is enforceable, OAC failed to prove damages resulting from Dr. Budev's alleged breach and the employment contract does not contain an enforceable liquidated damages clause.

Should this Court find the covenant not to compete is enforceable and OAC is not barred by the doctrines of waiver and/or estoppel, OAC still failed to prove damages for any alleged breach of the covenant not to compete. In fact, the only evidence it offered as to its alleged actual damages was the purported liquidated damages provision contained within the covenant not to compete in an amount equal to Dr. Budev's base salary for one year. Otherwise, OAC offered no evidence as to any actual financial loss or other adverse effect on its practice following the opening of Dr. Budev's Ladson office

⁷ It is notable that OAC never moved for a temporary/preliminary injunction to try and stop Dr. Budev from practicing ophthalmology in the Ladson office. There is little doubt that Dr. Seltzer had no intent to pursue anything other than what he believed to be liquidated damages under the contract.

in late April 2008 or any explanation why an amount equal to one year's base pay for Dr. Budev was reasonable and appropriate.

Although South Carolina law permits parties to a contract to stipulate as to the amount of liquidated damages in the event of nonperformance, a purported liquidated damages provision will not be enforced if it constitutes a penalty as opposed to a reasonable assessment of the probable damage arising from the nonperformance. *Benya v. Gamble*, 282 S.C. 624, 631, 321 S.E.2d 57, 62 (Ct. App. 1984). A liquidated damages provision will be deemed a penalty if "the stipulated sum . . . is so large that it is plainly disproportionate to any probable damage resulting from breach of the contract." *Id.* This Court recently reiterated this rule as follows:

The dispositive test on whether a provision in a contract is for liquidated damages or is an unenforceable penalty was set forth by our supreme court in *Tate v. LeMaster*:

Implicit in the meaning of 'liquidated damages' is the idea of compensation; in that of 'penalty,' the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957); *see also Kirkland Distrib. Co. of Columbia, S.C. v. U.S.*, 276 F.2d 138, 145 (4th Cir. 1960). Moreover, "[w]hether such a stipulation is one for liquidated damages or for a penalty is . . . primarily a matter of the intention of the parties." *Tate*, 231 S.C. at 441, 99 S.E.2d at 45; *see also Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984).

ERIE Ins. Co. v. Winter Constr. Co., Op. No. 4841 (S.C. Ct. App. filed June 15, 2011) (Shearouse Adv. Sh. No. 20 at 156).

Here, the evidence offered by Dr. Budev readily demonstrates that the purported \$120,000 liquidated damages provision is grossly disproportionate to any actual damage sustained by OAC and, therefore, the liquidated damages provision is an unenforceable penalty. At the outset, the covenant contains no express agreement of the parties that OAC's actual damages would be difficult to calculate or that the stipulated sum represents the probable damage to be sustained by OAC in the event of a breach of the covenant. Additionally, the covenant does not include Dr. Budev's express agreement to a specified sum – the covenant simply states that OAC “shall have the right to pursue a claim ... for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000) Dollars....” Aside from the lack of express agreement as to a specified sum, there is no evidence that the stipulated sum was calculated by the parties in good faith to represent the actual damages that would ensue from breach of the covenant.

At the time the parties executed the employment contract, OAC had never employed an ophthalmologist other than its principal Dr. Seltzer. (Tr. at 169:18-22; R. at ____). OAC had no experience with non-compete agreements and had no historical basis from which to draw a narrowly tailored covenant or an appropriate liquidated damages provision. (Tr. at 170:9-13; R. at ____). At trial, OAC offered no evidence as to the basis for the \$120,000 figure. Without Dr. Budev's express agreement to the stated sum and, in the absence of any evidentiary support for the stated sum, the trial court could not reasonably conclude that the stated sum was an enforceable stipulated liquidated damages provision with some relationship to OAC's probable damages arising from nonperformance. Consequentially, the stated sum is nothing more than an unenforceable

penalty. This conclusion is further supported by the evidence regarding surgical procedures performed by OAC's ophthalmologists in the 2007-2008 period that show OAC's business did not suffer because of Dr. Budev's departure. (Def. Ex. 2-3; Tr. at 96:12-98:25; R. at ____).

In the end analysis, OAC failed to produce any evidence that the \$120,000 stated sum in the covenant not to compete was anything more than an unenforceable penalty bearing no relation to any harm anticipated or actually suffered by OAC. To the contrary, the evidence offered by Dr. Budev demonstrated no apparent loss in surgical procedures for OAC's physicians following Dr. Budev's office opening in late April 2008. Thus, the purported liquidated damages provision is not reasonably related to any probable loss and is out of proportion with any alleged actual damages. Consequentially, the stated sum in the covenant not to compete is nothing more than an unenforceable penalty, and the trial court's award must be reversed.

CONCLUSION

For the reasons presented above, the trial court erred in upholding the covenant not to compete. As written, the covenant is overbroad as to scope (the practice of medicine), territory (within twenty-five miles of OAC), and duration (three-years). The trial court erred in narrowing the covenant as written based on what it believed to be the parties' intent. Moreover, OAC waived and/ or is estopped from asserting this provision because of its actions in permitting Dr. Budev to practice medicine within the restricted period immediately following his departure from OAC by performing procedures at the Trident Eye Surgery Center.

Further, even if the covenant is enforceable and OAC is permitted to enforce it, the trial court erred in assessing damages of \$120,000 based on a provision of the contract that constitutes an unenforceable penalty unrelated to any actual or anticipated damages. Accordingly, the trial court's order should be reversed and the matter remanded for entry of judgment in favor of Dr. Budev.

Respectfully submitted,



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Attorneys for Appellant

July 19, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D. Appellant,

v.

Ophthalmology Associates of Charleston, P.A., ... Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Amended Initial Brief on Ophthalmology Associates of Charleston, P.A.; along with Proof of Service, by depositing a copy of all in the United States Mail, postage prepaid, on July 21, 2011 to Marvin I. Oberman, Esq., Oberman & Oberman, 104 Church Street, Charleston, South Carolina 29401, attorneys for Ophthalmology Associates of Charleston, P.A.

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JUL 21 2011

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BY HAND DELIVERY

The Honorable Tanya Gee
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SC Court of Appeals

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

Enclosed please find an Amended Initial Brief of Appellant. The only changes to the brief are additional cites to the transcript as required by Rule 208, SCACR, and updated page numbering. In addition to service by mail as shown below, the amended brief was submitted to opposing counsel on July 18, 2011. Please let me know if you have any questions.

Sincerely yours,



Sarah P. Spruill
SPS/jcm

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

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SC Court of Appeals

Millin C. Budev, M.D... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., Respondent.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant Millin C. Budev, M.D. proposes the following matter to be included in
the Record on Appeal:

1. Complaint and Attachments
2. Answer
3. 5/5/2009 Motion for Summary Judgment
4. 10/8/09 Order
5. Trial Transcript, Defendant's Exhibits 2-3, Court's Exhibits 1-2
6. 11/3/10 Order
7. 11/19/10 Motion to Reconsider
8. 11/30/2010 Opposition to Motion to Reconsider
9. 1/25/11 Order
10. 2/16/11 Amended Order

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

Robert J. Miller (SC Bar No. 3589)

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July 15, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

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SC Court of Appeals

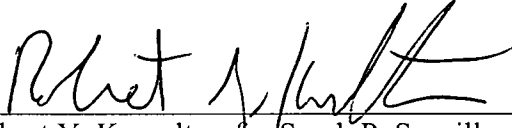
Millin C. Budev, M.D... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., Respondent.

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I certify that I have served Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Ophthalmology Associates of Charleston, P.A.; along with Proof of Service, by depositing a copy of all in the United States Mail, postage prepaid, on July 15, 2011 to Marvin I. Oberman, Esq., Oberman & Oberman, 104 Church Street, Charleston, South Carolina 29401, attorney for Ophthalmology Associates of Charleston, P.A.


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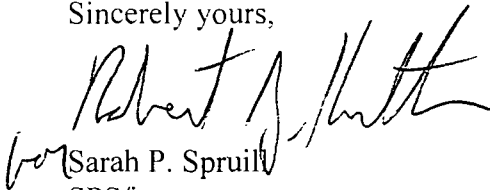
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Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

Enclosed are the originals and one copy each of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in the above matter. Please file the originals and return clocked copies to me via my courier.

Sincerely yours,


for Sarah P. Spruill

SPS/jcm

c: Marvin I. Oberman, Esq. (w/encl.)
Joseph D. Thompson (w/encl.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D... Appellant,

v.

Ophthalmology Associates of Charleston, P.A., Respondent.

INITIAL BRIEF OF APPELLANT

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JUL 15 2011

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ENFORCING THE COVENANT NOT TO COMPETE FOUND IN THE PARTIES' EMPLOYMENT CONTRACT WHERE DR. MILLIN BUDEV, AN OPHTHALMOLOGIST, WAS PROHIBITED FROM THE PRACTICE OF ALL MEDICINE WITHIN A TWENTY-FIVE MILE RADIUS OF ANY OFFICE OF HIS FORMER EMPLOYER FOR A THREE-YEAR PERIOD AND WHERE THERE WAS NO EVIDENCE OF ANY LEGITIMATE BUSINESS INTEREST TO BE PROTECTED BY THE NON-COMPETE?
2. IF THE COVENANT NOT TO COMPETE IS ENFORCEABLE, DID THE TRIAL COURT ERR IN ASSESSING A PENALTY AMOUNTING TO ONE YEAR'S BASE SALARY FOR DR. BUDEV GIVEN THE ABSENCE OF ANY EVIDENCE OF DAMAGES SUSTAINED BY HIS FORMER EMPLOYER FOLLOWING DR. BUDEV'S DEPARTURE?
3. DID THE TRIAL COURT ERR IN FAILING TO FIND EQUITY BARRED OPHTHALMOLOGY ASSOCIATES OF CHARLESTON, P.A. FROM ASSERTING ITS CLAIMS BASED ON ITS APPROVAL OF DR. BUDEV'S PRACTICE OF MEDICINE WITHIN THE GEOGRAPHICALLY RESTRICTED AREA WITH RESPECT TO PROCEDURES PERFORMED AT THE TRIDENT EYE SURGERY CENTER?

STATEMENT OF THE CASE

This appeal stems from the Complaint filed on August 21, 2007 by Ophthalmology Associates of Charleston, P.A. (“OAC”) against Dr. Millin C. Budev. (Complaint). Dr. Budev worked at OAC as an ophthalmologist from June 5, 2003 until July 3, 2006 when he left to start his own ophthalmology practice. (*Id.*).

The Complaint included claims for declaratory judgment, breach of contract, and injunction all relating to a covenant not to compete contained in Dr. Budev’s employment contract with OAC dated June 5, 2003 (“Employment Contract”). The covenant not to compete reads as follows:

The Physician agrees that upon the termination of his employment from the Practice, he shall not undertake the **practice of medicine** within a twenty-five (25) mile radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination.

(R. at ____)(emphasis added). Dr. Budev answered on September 21, 2007, asserting a general denial, failure to state a claim, waiver, estoppel, laches, and that enforcement of the covenant not to compete was barred by public policy. (Answer). OAC never moved for temporary injunctive relief.

On May 5, 2009, Dr. Budev filed a motion for summary judgment that, on October 8, 2009, was granted as to OAC’s claim for injunctive relief.¹ (Summary Judgment Motion & Order). The remaining issues were heard in a non-jury trial on August 12-13, 2010.

¹ The three-year non-compete term expired on July 3, 2009.

On November 3, 2010, the trial court entered its Order finding that Dr. Budev breached a valid and enforceable covenant not to compete and awarding liquidated damages of \$120,000. (Order 1). OAC filed a motion for reconsideration on November 19, 2010, seeking a modification of one paragraph of the order and pre-judgment interest. (Motion for Reconsideration). Dr. Budev opposed the motion and challenged OAC's entitlement to pre-judgment interest on two grounds: (1) the case did not meet the criteria of S.C. Code Ann. § 34-31-20 for pre-judgment interest, and (2) the amount of damages provided in the employment contract constituted an unenforceable penalty. (Memorandum in Opposition to Motion to Reconsider). The trial court granted the motion to reconsider by Order dated January 25, 2011 and an Amended Order dated February 16, 2011, which specified that pre-judgment interest would run from April 30, 2008. (Order 2, Order 3). Dr. Budev received written notice of the entry of these orders on February 11, 2011 and February 22, 2011 respectively, and served his notice of appeal on March 10, 2011.

FACTS

For the most part, the facts are not disputed. The parties agree on the chronology of events and the circumstances surrounding the execution of the employment contract. The central issues are whether the covenant not to compete and damages provision contained in the employment contract are enforceable and, if so, whether OAC waived or is estopped from asserting its claims by its conduct.

From its formation until Dr. Budev joined the practice in 2003, OAC was a solo ophthalmology practice belonging to Dr. Sidney Seltzer. (R. at ____). Since 1981, the practice has been located on Medical Plaza Drive near North Trident Hospital in North

Charleston. (R. at ____). As of 2003, this was the only OAC location. Because of his advancing age, Dr. Seltzer (67 at the time) sought to hire a younger ophthalmologist with the idea that the new doctor would eventually buy the practice from him. (R. at ____).

In late 2002, Dr. Seltzer opened discussions with Dr. Budev; a young ophthalmologist just finishing his residency. (R. at ____). The subject Employment Contract, including a twenty-five mile radius geographic restriction in the covenant not to compete, was initially proposed by Dr. Seltzer on advice he received from his accountant/advisor. (R. at ____). Dr. Budev countered the proposal with a geographic “carve-out” that would allow Dr. Budev to practice in the West Ashley area of Charleston County. (R. at ____). The parties freely and voluntarily entered the employment contract on June 5, 2003. (R. at ____). This was the first employment agreement entered by OAC. (R. at ____).

The covenant not to compete provided that Dr. Budev “shall not undertake the **practice of medicine** within a twenty-five (25) radius of any office of Practice, excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination.” (R. at ____)(emphasis added). In addition, the Employment Contract provided that Dr. Budev’s base salary would be \$120,000 per year with bonus opportunities. (R. at ____). The Employment Contract further provided that OAC “shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000) Dollars enforceable by Practice [OAC] in any court of competent jurisdiction.” (R. at ____).

In July 2006, Dr. Budev left OAC to form his own practice. (R. at ____). Dr. Budev opened an office for the practice of ophthalmology in the West Ashley area of Charleston County, an area within the “carve-out” of the geographic restraint in the covenant not to compete. (R. at ____). In 2006, Dr. Budev also began seeing patients in Orangeburg, a town where OAC did not have an office location at the time. (R. at ____).

In April 2008, Dr. Budev opened an office in Ladson within two or three miles of OAC.² (R. at ____). At the time the Complaint was filed and served in August 2007, Dr. Budev’s Ladson office was under construction. (R. at ____).

Following Dr. Budev’s departure, OAC hired another young ophthalmologist, Dr. J. S. Brody. (R. at ____). Dr. Brody’s contract included a covenant not to compete with a two-year term. (R. at ____). In 2008, OAC opened a satellite office in Orangeburg within a twenty-five mile radius of the location where Dr. Budev treated patients. (R. at ____).

During his employment with OAC, Dr. Budev performed procedures at the Trident Eye Surgery Center located across the street from OAC’s office location. (R. at ____). Following his separation from OAC, Dr. Budev continued to treat patients at the Trident Eye Surgery Center with the express permission and encouragement of Dr. Seltzer. (R. at ____).

Dr. Seltzer’s surgical practice maintained consistent numbers following Dr. Budev’s departure, with the exception of a leave of absence Dr. Seltzer took following a

² The Ladson office was the result of a business relationship between Dr. Budev and Dr. David Vroman. A limited liability company owned by Dr. Budev and Dr. Vroman purchased the land for the office site in November 2006, and the office construction was finished in April 2008. The pair started seeing patients at the Ladson office around the end of April 2008.

significant leg injury in August 2008. (R. at ____). For example, in 2007, the first full calendar year following his departure from OAC, Dr. Budev performed 486 surgical procedures at the Trident Eye Surgery Center. (R. at ____). In the same period, Dr. Seltzer performed 734 procedures, and Dr. Brody performed 293 procedures. (R. at ____). From May 1, 2008 through August 31, 2008, Dr. Budev performed 153 surgical procedures, five procedures less than for the same months in 2007.³ (R. at ____). In the same period, Dr. Seltzer performed 262 procedures, six procedures less than for the same months in 2007. (R. at ____). Dr. Brody, on the other hand, performed 92 procedures, ten more procedures than the same period in 2007. (R. at ____). From May 1, 2008 through December 31, 2008, Dr. Budev performed 329 surgical procedures (the same as for that period in 2007), and Dr. Brody performed 260 procedures (fifty more than for that period in 2007). (R. at ____).

In this case, OAC only complains of Dr. Budev's practice at the Ladson office location. Dr. Seltzer testified he did not believe Dr. Budev's practice at the Trident Eye Surgery Center (from which Dr. Seltzer received a share of the profits), in Orangeburg, or at hospitals within the restricted territory violated the non-compete, notwithstanding the language barring Dr. Budev from "the **practice of medicine** within a twenty-five (25) radius of any office of Practice [OAC]." (R. at ____)(emphasis added).

³ May to August 2008 represents the relevant competition period following the opening of Dr. Budev's Ladson office and Dr. Seltzer's injury in August 2008.

ARGUMENTS

I. The covenant not to compete is unenforceable because it is overbroad as to scope, and both geographic and temporal restrictions, and it is not reasonably calculated to protect any legitimate business interest of the employer.

A. Standard of Review

Construction of an unambiguous contract is a matter of law for the court. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983). Covenants not to compete in employment contracts are generally disfavored, must be critically examined, and will be strictly construed against the employer. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995); *Stringer v. Herron*, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992). A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer. *Almers v. South Carolina Nat'l Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975); *Stringer*, 309 S.C. at 532, 424 S.E.2d at 548.

In order to be enforceable, a plaintiff has the burden of proving that a covenant not to compete 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 a valuable consideration.

Rental Uniform Serv. of Florence, Inc., 278 S.C. at 675-76, 301 S.E.2d at 531. If the covenant is defective in any one of the five requirements, the covenant is completely

defective and cannot be saved. See *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 into 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 territorial scope of the restraint is unreasonable and no inquiry need be made as to the presence or absence of other necessary requirements.”).

“[I]n South Carolina, 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.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (2010). Thus, the Court cannot “blue pencil” an overbroad clause even if the party seeking enforcement agrees to “an interpretation that artificially limit[s] the actual terms used in the contract.” *Id.*

B. The covenant not to compete is unreasonably broad in its scope and therefore unenforceable.

The express language of the covenant is broader than necessary to protect any legitimate business interest of OAC, and the trial court impermissibly narrowed the language of the covenant in order to uphold it. The covenant explicitly states that Dr. Budev may not engage in the “practice of medicine” in the restricted area, as opposed to the “practice of ophthalmology” for which Dr. Budev was employed by OAC.⁴ Remarkably, the trial court even found that “Dr. Seltzer conceded that **the express language of the covenant was broader than that for which the defendant was employed....**” (Order 1 at 11 (R. at ____))(emphasis added). However, the trial court

⁴ Throughout the employment contract, Dr. Budev’s employment is referenced as the “practice of ophthalmology” as opposed to the “practice of medicine” which was only used in the covenant not to compete. (R. at ____).

then accepted Dr. Seltzer's testimony that "the intent of the agreement was to restrict the non-compete to the practice of ophthalmology." (Order 1 at 11 (R. at ____)).

In narrowing the covenant to reflect what it believed to be the employer's intent, the trial court elevated the general rules of contract construction over the specific rules applicable to the construction of covenants not to compete. Therefore, the trial court's decision must be reversed. *See e.g. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (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."); *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) ("We must uphold the covenant as written or not at all, it must stand or fall integrally."); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) ("Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer."). Unfortunately for OAC, this arguably "technical" violation is but the tip of the iceberg as to the invalidity of the covenant not to compete, even if the "practice of medicine" is somehow transformed into the "practice of ophthalmology."

Of critical concern to innocent patients is the practical application of the scope of the covenant. At trial, a hypothetical example illustrated the quandary Dr. Budev would face if one of his patients from his West Ashley office found him or herself with an ophthalmologic emergency within the restricted zone at the emergency room of one of the area hospitals while Dr. Budev was on call. By its terms, the covenant would prevent Dr. Budev's own patient from receiving expert ophthalmologic care by Dr. Budev in the emergency room at any hospital within the restricted geographic area. Clearly, in the

hypothetical example, the covenant does not protect any legitimate interest of OAC but, instead, prevents Dr. Budev's own patients from being treated by the physician of their choice (unless they happen to have their emergency in the "carve-out" zone).

When confronted with the hypothetical at trial, Dr. Seltzer tried to explain that the covenant simply restricted where Dr. Budev could locate an office, not where he could treat patients. (R. at ____). However, that is not what the covenant expressly states. In fact, if Dr. Seltzer had intended to restrict nothing more than Dr. Budev's office location, he could have easily specified such in the covenant as opposed to the covenant's express language restricting Dr. Budev's "practice of medicine" within a twenty-five mile radius. Again, a covenant not to compete is a restraint of trade and, as such, the terms of the covenant are strictly construed against the employer. *Faces Boutique, Ltd.*, 318 S.C. at 41, 455 S.E.2d at 708. Therefore, the covenant not to compete is clearly unenforceable and the trial court's decision must be reversed.

C. The geographic restriction in the covenant not to compete is not reasonably limited to protect a legitimate business interest of OAC and is therefore unenforceable.

At trial, Dr. Seltzer testified the primary business interest OAC wanted to protect through the covenant not to compete was OAC's patient contacts. (R. at ____). The question then was whether the covenant's twenty-five mile radius geographic restriction was narrowly drawn to protect that interest. Clearly, it was not.

The record is devoid of any evidence of OAC's patient contacts either when the Employment Contract was executed in 2003 or when it terminated in 2006.⁵ In fact, OAC did not submit any evidence of the extent of its client contacts or the location of its

⁵ Dr. Seltzer admitted no survey of patient contacts was done either prior to execution of the Employment Contract or at the time when Dr. Budev left the practice. (R. at ____).

client contacts during the time when Dr. Budev would have had access to OAC's patient contacts. Without that evidence, there is no support for any geographic restriction, much less a restriction encompassing a twenty-five mile radius from any OAC office location. OAC completely failed in its burden of proof on the reasonableness of the geographic restriction and, therefore, the covenant not to compete is unenforceable and the trial court's order must be reversed. *See Somerset v. Reynier*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958).

OAC attempted to demonstrate its patient contacts by offering evidence of patient contacts generated from a survey of OAC's records in 2009, three years after Dr. Budev left the practice. While the evidence bears no reasonable relevance to the period when Dr. Budev worked at OAC, it does demonstrate OAC's complete lack of understanding of its patient contacts and what it was allegedly trying to protect. For example, the survey did not identify when the patient first came to OAC for treatment nor did it reflect whether the patient was an existing patient in July 2003. (R. at ____).

Moreover, the 2009 survey results regarding the restricted area including the Town of Mount Pleasant further demonstrate the lack of evidentiary support for a twenty-five mile radius geographic restraint. Dr. Seltzer repeatedly conceded that he did not know how many patient contacts were derived from the Mount Pleasant area: a) in 2003, when the employment contract was signed; b) in 2006, when Dr. Budev left the practice; c) at the time of his deposition; or d) at the time of the subject trial. (R. at ____). Dr. Seltzer had, and still has, no idea of the number of patient contacts, or the location of those contacts, within the restricted area.

Remarkably, when he was first asked about restricting competition in Mount Pleasant, Dr. Seltzer specifically testified in his May 2009 deposition that “I didn’t have any” legitimate business interest in preventing competition in Mount Pleasant.⁶ (Court’s Exhibit, Dr. Seltzer depo. p. 122(R. at ____)). After consultation with his attorney, Dr. Seltzer executed an errata sheet in which he completely changed his testimony, asserting that he had an interest in preventing competition in Mount Pleasant because a “review of patient charts and addresses revealed approximately 527 patients from Mt. Pleasant.” (Court’s Exhibit, Dr. Seltzer depos. p. 128(R. at ____)). Even then, Dr. Seltzer testified that the errata sheet was also incorrect because the word “patients” was a “typo” for “zip codes.” (R. at ____). Assuming *arguendo* that all 527 patient contacts identified in the 2009 survey from Mount Pleasant were patients of OAC in the 2003-2006 time frame, it is still clear that the geographic restriction was unnecessarily overbroad to protect 2.25% of OAC’s more than 23,000 patient contacts.

This case compares favorably to this Court’s decision in *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992) which also involved an employment contract involving a highly trained professional providing a necessary service. In *Stringer*, Herron, a veterinarian, entered a covenant not to compete that covered all areas within fifteen miles of any office of the employing veterinarian. Herron then left the practice and began operating a mobile practice in and around the restricted area. This Court

⁶ Dr. Seltzer also testified in his deposition that “[p]laces like Mount Pleasant and James Island and Johns Island, they wouldn’t make any difference, they were too far away.” (Court’s Exhibit, Dr. Seltzer depo. p. 124(R. at ____)). Following consultation with counsel, Dr. Seltzer reversed his testimony with errata sheet changes. Even with the “change” in his deposition testimony, Dr. Seltzer subsequently disavowed the “patient” counts identified in the errata sheet that presumably came from his office manager’s survey of OAC patient accounts. (R. at ____).

reversed the trial court's decision to enforce the covenant because the evidence showed an overwhelming majority of the employer's customers lived much closer than 15 miles of any given location (84% lived within 10 miles) and therefore the covenant was held to be overbroad, unreasonable, and unenforceable. In the subject case, the geographic restriction unnecessarily and unreasonably extends into Mount Pleasant to protect 2.25% of OAC's patient contacts. Given this Court's decision in *Stringer*, the subject geographic restriction is similarly overbroad, unreasonable and unenforceable.

In sum, there was no evidence that the twenty-five mile geographic restriction bore any relation to OAC's stated interest of protecting patient contacts, much less that the restriction was narrowly tailored to protect that interest. If a territorial restriction is broader than necessary to protect the plaintiff's stated business interest, the covenant's geographic restraint cannot be considered reasonable and, therefore, the entire covenant is unenforceable. *Id.* at 532, 424 S.E.2d at 548-49. Quite simply, South Carolina law requires that the territorial restrictions placed by a covenant not to compete be narrowly tailored to the interest the employer seeks to protect. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961)("[I]n order to be reasonable, [the territorial restraint] must be necessary in its full extent for the protection of some legitimate interest of the employer.")(emphasis added). Accordingly, the covenant not to compete fails in its entirety and is unenforceable.

D. The three-year term of the covenant not to compete is not reasonably related to any legitimate business interest of OAC.

The only evidence offered to justify the three-year term was the testimony of Dr. Seltzer who testified that it was "generally accepted" in the medical community that a three-year term was reasonable. (R. at ____). Assuming that to be true, OAC failed to

offer evidence as to how or why a three-year term would be reasonably tailored to protect its alleged business interest in patient contacts. (R. at ____). Just because a three-year term may be acceptable for other physicians in other practices does not mean that a three-year term in the greater Charleston market for ophthalmologists is reasonable. In fact, the evidence demonstrates that a two-year term is the “generally accepted” term for ophthalmologists in the greater Charleston market.

Following Dr. Budev’s departure, OAC hired another young ophthalmologist, Dr. Brody. Remarkably, Dr. Brody’s non-compete included a two-year temporal restriction. (R. ____). This demonstrates the arbitrariness of OAC’s temporal restriction and/or OAC’s acknowledgement that a three-year term was one year too long for an ophthalmologist in the Charleston market. Of course, when Dr. Seltzer subsequently sold OAC and entered into his own employment contract, his covenant not to compete included a two-year term. (R. ____). It was error for the trial court to accept Dr. Seltzer’s testimony regarding the “generally accepted” three-year non-compete term when every other non-compete in the record included a two-year term.

Moreover, the statistics from the Trident Eye Surgery Center demonstrate that from the time Dr. Budev’s office opened in late April 2008, neither Dr. Seltzer nor his associate Dr. Brody experienced any appreciable decline in the number of procedures being performed at the surgery center. (R. at ____). In other words, there was no evidence that Dr. Budev’s office location had any impact on OAC’s practice. This evidence further demonstrates that a three-year term was unreasonable for the protection of any business interest of OAC. Accordingly, OAC failed in its burden of proof on the

reasonableness of the temporal restriction and, therefore, the covenant not to compete is unenforceable and the trial court's Order could be reversed on this ground alone.

II. OAC is barred from asserting the covenant not to compete by the doctrines of waiver and/ or estoppel.

In addition to his arguments that the covenant not to compete is unenforceable as a matter of law, Dr. Budev also contends equity bars OAC from bringing a claim to enforce the covenant not to compete. Very simply, Dr. Budev continued to practice medicine within the restricted area at the Trident Eye Surgery Center with the approval of OAC from the time he left OAC. Dr. Seltzer directly profited from this practice as a part owner of the center. (R. at ____). Further, Dr. Seltzer and OAC had no complaint about Dr. Budev's Orangeburg practice, even following the establishment of an OAC location within twenty-five miles of Dr. Budev's practice. (R. at ____). OAC's only assertion of the covenant not to compete related to Dr. Budev's Ladson office.

"Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). Similarly, a party may be estopped from asserting a position if the following elements are shown:

(1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. As to the party claiming estoppel, the elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.

Maier v. Tietex Corp., 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998).

It is uncontradicted that Dr. Budev continued to perform procedures at the Trident Eye Surgery Center following his departure from OAC. This action was only brought

after Dr. Budev broke ground on the Ladson office. By allowing Dr. Budev to practice ophthalmology within the restricted area when it profited Dr. Seltzer, Dr. Seltzer and OAC waived any right to enforce the covenant not to compete and/or are estopped from asserting Dr. Budev's alleged breach of the non-compete.⁷ Therefore, the trial court's order enforcing the covenant must be reversed.

III. Assuming *arguendo* that the covenant not to compete is enforceable, OAC failed to prove damages resulting from Dr. Budev's alleged breach and the employment contract does not contain an enforceable liquidated damages clause.

Should this Court find the covenant not to compete is enforceable and OAC is not barred by the doctrines of waiver and/or estoppel, OAC still failed to prove damages for any alleged breach of the covenant not to compete. In fact, the only evidence it offered as to its alleged actual damages was the purported liquidated damages provision contained within the covenant not to compete in an amount equal to Dr. Budev's base salary for one year. Otherwise, OAC offered no evidence as to any actual financial loss or other adverse effect on its practice following the opening of Dr. Budev's Ladson office in late April 2008 or any explanation why an amount equal to one year's base pay for Dr. Budev was reasonable and appropriate.

Although South Carolina law permits parties to a contract to stipulate as to the amount of liquidated damages in the event of nonperformance, a purported liquidated damages provision will not be enforced if it constitutes a penalty as opposed to a reasonable assessment of the probable damage arising from the nonperformance. *Benya v. Gamble*, 282 S.C. 624, 631, 321 S.E.2d 57, 62 (Ct. App. 1984). A liquidated damages

⁷ It is notable that OAC never moved for a temporary/preliminary injunction to try and stop Dr. Budev from practicing ophthalmology in the Ladson office. There is little doubt that Dr. Seltzer had no intent to pursue anything other than what he believed to be liquidated damages under the contract.

provision will be deemed a penalty if “the stipulated sum . . . is so large that it is plainly disproportionate to any probable damage resulting from breach of the contract.” *Id.* This Court recently reiterated this rule as follows:

The dispositive test on whether a provision in a contract is for liquidated damages or is an unenforceable penalty was set forth by our supreme court in *Tate v. LeMaster*:

Implicit in the meaning of ‘liquidated damages’ is the idea of compensation; in that of ‘penalty,’ the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957); *see also Kirkland Distrib. Co. of Columbia, S.C. v. U.S.*, 276 F.2d 138, 145 (4th Cir. 1960). Moreover, “[w]hether such a stipulation is one for liquidated damages or for a penalty is . . . primarily a matter of the intention of the parties.” *Tate*, 231 S.C. at 441, 99 S.E.2d at 45; *see also Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984).

ERIE Ins. Co. v. Winter Constr. Co., Op. No. 4841 (S.C. Ct. App. filed June 15, 2011) (Shearouse Adv. Sh. No. 20 at 156).

Here, the evidence offered by Dr. Budev readily demonstrates that the purported \$120,000 liquidated damages provision is grossly disproportionate to any actual damage sustained by OAC and, therefore, the liquidated damages provision is an unenforceable penalty. At the outset, the covenant contains no express agreement of the parties that OAC’s actual damages would be difficult to calculate or that the stipulated sum represents the probable damage to be sustained by OAC in the event of a breach of the covenant. Additionally, the covenant does not include Dr. Budev’s express agreement to

a specified sum – the covenant simply states that OAC “shall have the right to pursue a claim ... for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000) Dollars....” Aside from the lack of express agreement as to a specified sum, there is no evidence that the stipulated sum was calculated by the parties in good faith to represent the actual damages that would ensue from breach of the covenant.

At the time the parties executed the employment contract, OAC had never employed an ophthalmologist other than its principal Dr. Seltzer. (R. at ____). OAC had no experience with non-compete agreements and had no historical basis from which to draw a narrowly tailored covenant or an appropriate liquidated damages provision. (R. at ____). At trial, OAC offered no evidence as to the basis for the \$120,000 figure. Without Dr. Budev’s express agreement to the stated sum and, in the absence of any evidentiary support for the stated sum, the trial court could not reasonably conclude that the stated sum was an enforceable stipulated liquidated damages provision with some relationship to OAC’s probable damages arising from nonperformance. Consequentially, the stated sum is nothing more than an unenforceable penalty. This conclusion is further supported by the evidence regarding surgical procedures performed by OAC’s ophthalmologists in the 2007-2008 period that show OAC’s business did not suffer because of Dr. Budev’s departure. (R. at ____).

In the end analysis, OAC failed to produce any evidence that the \$120,000 stated sum in the covenant not to compete was anything more than an unenforceable penalty bearing no relation to any harm anticipated or actually suffered by OAC. To the contrary, the evidence offered by Dr. Budev demonstrated no apparent loss in surgical

procedures for OAC's physicians following Dr. Budev's office opening in late April 2008. Thus, the purported liquidated damages provision is not reasonably related to any probable loss and is out of proportion with any alleged actual damages. Consequentially, the stated sum in the covenant not to compete is nothing more than an unenforceable penalty, and the trial court's award must be reversed.

CONCLUSION

For the reasons presented above, the trial court erred in upholding the covenant not to compete. As written, the covenant is overbroad as to scope (the practice of medicine), territory (within twenty-five miles of OAC), and duration (three-years). The trial court erred in narrowing the covenant as written based on what it believed to be the parties' intent. Moreover, OAC waived and/ or is estopped from asserting this provision because of its actions in permitting Dr. Budev to practice medicine within the restricted period immediately following his departure from OAC by performing procedures at the Trident Eye Surgery Center.

Further, even if the covenant is enforceable and OAC is permitted to enforce it, the trial court erred in assessing damages of \$120,000 based on a provision of the contract that constitutes an unenforceable penalty unrelated to any actual or anticipated damages. Accordingly, the trial court's order should be reversed and the matter remanded for entry of judgment in favor of Dr. Budev.

Respectfully submitted,

Robert J. Haynsworth (SC Bar No. 3589)

HAYNSWORTH SINKLER BOYD, PA

Joseph D. Thompson, III
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July 15, 2011

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June 20, 2011

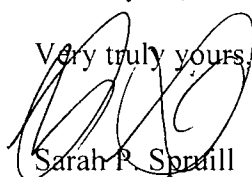
The Honorable Tanya Gee, Clerk
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.*
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Tanya:

We received the transcript in this matter on June 16, 2011. By my calculation, our initial brief is due July 18, 2011. Please let me know if that is not the case.

Very truly yours,

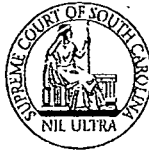


Sarah P. Spruill

SPS/jm

cc: Harriet Bennett
Court Administration
Marvin I. Oberman
Joseph T. Thompson (via-e-mail)

RECEIVED
JUN 21 2011
SC Court of Appeals



The Supreme Court of South Carolina

TITLE OF
CASE (Opthamology Associates of
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MAY 23 2011

SC Court of Appeals

NOTICE

Upon request and for good cause shown, Harriet Bennett (for Brenda Cooley), Court Reporter, is hereby granted an extension up to and including June 12, 2011 to prepare and deliver the Transcript of Record in the above case.

Desiree Allen

Court Reporter Manager
South Carolina Court Administration

Columbia, South Carolina
5/20/2011

cc: Lydia Applegate, Esq.
 Marvin I. Oberman, Esq.
 Harriet Bennett

CHARLESTON

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May 5, 2011

Ms. Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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MAY 06 2011

SC Court of Appeals

Re: Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.
Civil Action No.: 07-CP-10-3681
SC Court of Appeals Case Tracking No.: 2011187386
HSB File No.: 33590.0001

Dear Ms. Gee:

In response to your letter dated May 4, 2011, I am enclosing our letters dated March 10, 2011, and March 29, 2011, along with Ms. Harriet Bennett's letter dated March 26, 2011, all of which demonstrate our efforts to obtain a copy of the trial transcript in the subject matter. I trust your receipt of these documents are sufficient to satisfy your inquiry.

Yours very truly,



Joseph D. Thompson, III

JDT/lfh

Enclosures

cc: Marvin I. Oberman, Esq.

CHARLESTON COLUMBIA FLORENCE GREENVILLE

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LYDIA BLESSING APPEGATE
DIRECT DIAL NUMBER 843.720.4462
EMAIL lapplegate@hsblawfirm.com

March 10, 2011

Ms. Desiree Allen
Court of Appeals
1015 Sumter Street
Suite 200
Columbia, SC 29201

Re: Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.
Case No.: 07-CP-10-3681
HSB File No.: 33590.0001

RECEIVED

MAY 06 2011

SC Court of Appeals

Dear Ms. Allen:

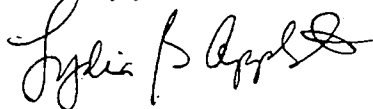
We are filing a Notice of Appeal in the above-referenced matter. As such, we must obtain a Transcript of the proceedings below. Ms. Brenda Cooley was the court reporter at the trial of this case, which occurred on August 12 – 13, 2010 before the Honorable Deadra L. Jefferson. As we understand that Ms. Cooley is no longer available, we are writing to you to request a copy of the Transcript for the trial described herein.

Please let me know if you are not the correct person to contact for this Transcript.

Thank you in advance for your assistance.

With best regards, I am

Sincerely yours,



Lydia Blessing Applegate
LBA/lfh

cc Marvin I. Oberman, Esq.
Joseph T. Thompson, Esq.

CHARLESTON

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March 29, 2011

Ms. Harriett Bennett
Reporter, SC Court Administration
PO Box 86
Ladson, SC 29456

Re: Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.
Charleston County Civil Action No.: 07-CP-10-3681
HSB File No.: 33590.0001

Dear Ms. Bennett:

Enclosed is our firm check in the amount of \$500 which represents a deposit for the preparation of the trial transcript from August 12-13, 2010, in the above matter. Upon receipt of the transcript, we will send you the balance of the invoice.

With best regards, I am

Sincerely yours,



Lydia Blessing Applegate
LBA/lfh

enc.

cc Marvin I. Oberman, Esq.
Millin C. Budev, M.D.
Joseph T. Thompson, Esq.

FAX No. 843 722 2266

HARRIET P. BENNETT
Reporter, S. C. Court Administration
P. O. Box 86
Ladson, S. C. 29456
(843 425 9644)

March 26, 2011

Lydia Applegate, Esq.
Haynsworth, Sinkler, Boyd PA
134 Meeting Street
Charleston, S. C. 29401

IN RE: Ophthalmology Associates of Charleston PA
v. Millin C. Budev, M.D.
07 CP 10 3681
Your File 33590.0001

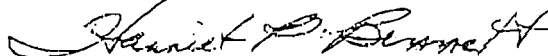
Dear Ms. Applegate:

Desiree Allen of S. C. Court Administration has forwarded to me the record in the above matter with a request that I assist them by transcribing the trial of August 12-13, 2010, in the above case.

It is my information that the record will be approximately 400 pages @3.25 per page, for a total of \$1300 if this page number is correct. I would ask that you furnish me with a deposit of \$500, and I will bill you for whatever balance is due upon delivery of the record.

The record will be delivered within two weeks of the receipt of your check. Please call me at the above number if you have any questions.

Very truly yours,



copy to Ms. Desiree Allen



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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May 4, 2011

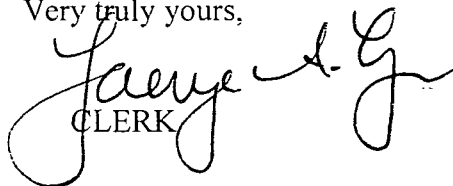
Joseph D. Thompson, III, Esquire
Lydia Blessing Applegate, Esquire
Haynsworth Sinkler Boyd, P.A.
P O Box 340
Charleston, SC 29402-0340

Re: Ophthalmology Ass. v. Budev, Millin
2011187386

Dear Counsel:

According to our records, the transcript should have been ordered by March 21, 2011 in the above case. As of today's date, we have not received a copy of the letter addressed to the court reporter requesting the transcript. Please provide this Court with a copy of the letter addressed to the court reporter requesting the transcript within ten (10) days of the date of this letter.

Very truly yours,


CLERK

TAG/mpm

cc: Marvin I. Oberman, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 15, 2011

Joseph D. Thompson, III, Esquire
Lydia Blessing Applegate, Esquire
Haynsworth Sinkler Boyd, P.A.
P O Box 340
Charleston, SC 29402-0340

Re: Ophthalmology Ass. v. Budev, Millin
2011187386

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, it has come to the Court's attention that the caption should read as follows:

Ophthalmology Associates of Charleston, P. A., Respondents,

v.

Millin C. Budev, M. D.,

Appellant.

Any future filings by any party to this appeal must feature the above caption.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of

Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,

V. Claire Allen, Deputy
Tanya A. Gee
CLERK

TAG/mpm

cc: Marvin I. Oberman, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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1015 SUMTER STREET
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March 15, 2011

Joseph D. Thompson, III, Esquire
Lydia Blessing Applegate, Esquire
Haynsworth Sinkler Boyd, P.A.
P O Box 340
Charleston, SC 29402-0340

Re: Ophthalmology Ass. v. Budev, Millin
2011187386

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/mpm

cc: Marvin I. Oberman, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:²

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall

be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

1 See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

2 This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

PM 3/10/11
2033/10/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

MAR 11 2011

SC COURT OF APPEALS

Case No. 2007-CP-10-3681

Millin C. Budev, M.D. Appellant,

v.

Ophthalmology Associates of Charleston, P.A., ... Respondent.

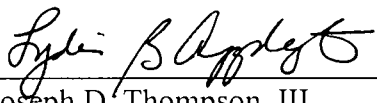
NOTICE OF APPEAL

Millin C. Budev, M.D. appeals the Order of the Honorable Deadra L. Jefferson, dated November 3, 2010, the subsequent Order Granting Plaintiff's Motion for Reconsideration, dated January 25, 2011, and the final Amended Order Granting Plaintiff's Motion for Reconsideration, dated February 16, 2011. Appellant received written notice of entry of the February 16, 2011 Amended Order Granting Plaintiff's Motion for Reconsideration on February 22, 2011.

March 10, 2011

Other Counsel of Record:
Marvin I. Oberman
Oberman & Oberman, LLC
104 Church Street
Charleston, SC 29401

Attorney for Respondent


Joseph D. Thompson, III
Lydia Blessing. Applegate
Haynsworth Sinkler Boyd, P.A.
Post Office Box 340
Charleston, SC 29402
843-722-3366

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

RI
MAR 11 2011
SC COURT OF APPEALS

Millin C. Budev, M.D... Appellant,

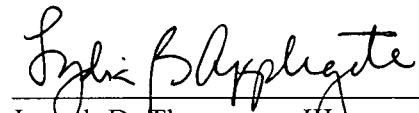
v.

Ophthalmology Associates of Charleston, P.A., Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Ophthalmology Associates of Charleston, P.A by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2011, addressed to its attorney of record, Marvin I. Oberman, Oberman & Oberman, LLC, 104 Church Street, Charleston, South Carolina 29401.

March 10, 2011


Joseph D. Thompson, III
Lydia Blessing. Applegate
Haynsworth Sinkler Boyd, P.A
Post Office Box 340
Charleston, SC 29402
843-722-3366

Attorneys for Appellant

Haynsworth
Sinkler Boyd, PA

ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, THIRD FLOOR (29401-2240)
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FACSIMILE 843.722.2266
WEBSITE www.hsblawfirm.com

LYDIA BLESSING APPELATE
DIRECT DIAL NUMBER 843.720.4462
EMAIL lapplegate@hsblawfirm.com

March 10, 2011

Ms. Tanya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M.D.
Charleston County Civil Action No.: 07-CP-10-3681
HSB File No.: 33590.0001

RECEIVED

MAR 11 2011

Dear Ms. Gee:

SC Court of Appeals

Enclosed for filing is an original and one copy of each of the following in the above matter:

- (1) Notice of Appeal;
- (2) Proof of Service of the Notice of Appeal on Respondent; and
- (3) Orders referenced in the Notice of Appeal; and

Please file the originals and return the "Filed" copies to me in the envelope provided. I have also enclosed our firm's check in the amount of \$100 for the filing fee.

With best regards, I am

Sincerely yours,



Lydia Blessing Applegate
LBA/lfh

enc.

cc Marvin I. Oberman, Esq. (w/enc.)
Millin C. Budev, M.D. (w/enc.)
Joseph T. Thompson, Esq. (w/enc.)

2

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Ms. Tanya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211



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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
OPHTHALMOLOGY ASSOCIATES)
OF CHARLESTON, P.A..)
)
Plaintiffs,)
)
vs.)
)
MILLIN C. BUDEV, M.D.,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2007-CP-10-3681

**AMENDED¹ ORDER GRANTING PLAINTIFF'S
MOTION FOR RECONSIDERATION**

Presiding Judge: Deadra L. Jefferson
Trial Date: August 12-13, 2010
Court Reporter: Brenda Cooley
Plaintiff's Attorneys: Marvin Oberman, Esquire
Harold Oberman, Esquire
Defendant's Attorneys: Joseph D. Thompson, III., Esquire

FILED
2011 FEB 16 PM 1:07
JULIE J. ARISTON
CLERK OF COURT

THIS MATTER is before the Court by way of the Plaintiff's Motion for Reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, filed November 19, 2010.² The Court received Plaintiff's Motion by mail on November 19 2010.³ The case initially came before the Court on August 12, 2010 thru August 13, 2010 for a bench trial, and the Court entered an Order awarding judgment to the Plaintiff in the amount of One Hundred Twenty Thousand Dollars and 00/100 (\$120,000.00) on November 4, 2010.

Plaintiff's Motion for Reconsideration requests that the Court reconsider its Order on the following two grounds:

¹ Plaintiff's Motion for Reconsideration was originally granted in an Order filed by this Court on January 26, 2011. This Order hereby amends the January 26, 2011 Order to reflect that pre-judgment interest shall run from April 30, 2008. The January 26, 2011 Order is amended at the request and with the consent of both parties.

² Rule 59(e), SCRCP, requires a motion to alter or amend be served not later than ten (10) days after receipt of the written order. The Court finds Plaintiff's Motion for Reconsideration was timely filed pursuant to Rule 59 of the South Carolina Rules of Civil Procedure.

³ Plaintiff's Motion for Reconsideration was timely provided to the Court pursuant to Rule 59(g), SCRCP. The issuance of this Order was delayed to give the parties an opportunity to resolve this matter.

10 of 7
2010

1. Amend Paragraph 11 of the Court's Order to state that Steven Johnson estimated the twenty-five (25) mile radius was reduced by forty percent (40%) because of the carve-out, Francis Marion Forest, lakes and ocean.
2. Amend the judgment to award pre-judgment interest on the sum certain of \$120,000.00.

Counsel for the Defendant filed a Memorandum in Opposition of Plaintiff's Motion for Reconsideration on November 30, 2010 which was received by the Court by email on the same day.⁴ In his Memorandum in Opposition to Plaintiff's Motion for Reconsideration, the Defendant opposes the Plaintiff's first request to amend Paragraph 11. as it was made without support of the transcript. As to the request for pre-judgment interest, the Defendant opposes the Motion on two grounds: (1) this is not a case of "an account stated" or one where there is an explicit agreement to a specified sum of damages as required by S.C. Code § 34-31-20, and (2) even if there was a sum certain, the amount of purported liquidated damages constitutes a penalty and is unenforceable.

STANDARD OF REVIEW

"The purpose of Rule 59, SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate

⁴ This motion is disposed of without the necessity of a hearing and decided on the record and briefs. SCRCP 59(f); Pollard v. City of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

247
219

review.” Elam v. South Carolina Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, “[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not.” Anderson Mem’l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Cl. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

As to the first ground raised in Plaintiff’s Motion for Reconsideration, the Court has reviewed the testimony of Steven Johnson and hereby amends its Order accordingly. Steven Johnson testified on behalf of the Plaintiff on August 12, 2010 and was qualified as an expert in the area of professional land surveying. When asked the percentage of the twenty-five mile radius that was taken up by the cut-out and Francis Marion Forest, Mr. Johnson testified “approximately forty percent.” Further, when asked what percentage of the twenty-five mile radius was restricted from the Defendant, he testified to sixty percent. The Court amends Paragraph 11 of its Order to state the following:

11. Steven Johnson’s testimony was offered and accepted as a professional expert in the area of land surveying. Mr. Johnson estimated that forty percent (40%) of the twenty-five mile radius is reduced by the cut-out and Francis Marion Forest.

As to the second ground raised in Plaintiff’s Motion for Reconsideration, the Defendant has raised adequate grounds for the Court to amend or reconsider its Order to provide for pre-judgment interest. “The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law.”

3017
2518

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 58, 691 S.E.2d 135, 154 (2010) (citing Historic Charleston Holdings, LLC v. Mallon, LLC, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); see S.C. Code Ann. § 34-31-20(A) (Supp. 2009) (“In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.”)).

The Defendant contends there is not an explicit agreement to a specified sum of damages as required by S.C. Code § 34-31-20, and even if there was a sum certain, the amount of purported liquidated damages constitutes a penalty and is unenforceable. “[A] stipulation will be held to constitute a penalty where the sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from [a] breach of the contract.” Benya v. Gamble, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984) (internal quotation marks omitted). “The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties.” Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999).

Here, the covenant not to compete contained a provision which stated, “The Practice shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000.00) Dollars enforceable by the Practice in any court of competent jurisdiction.” “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.” Moser, 334 S.C. at 430, 513 S.E.2d at 125. The

4017
219

Court finds a review of the damages provision to be unambiguous. The designation as to "liquidated amount" is indicative of the intention of the parties that the sum stipulated to constitutes liquidated damages rather than a penalty. Contra Benya, 282 S.C. at 631, 321 S.E.2d at 62 (where there was no designation of liquidated amount in the real estate contract, the court could not tell from reading the contract whether the provision was included to deter [Defendant] from breaching his contract and to penalize him for doing so or to specify a sum which the parties in good faith agreed on as representing the damages that would ensue from a breach). If the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages for breach, the stipulation is for liquidated damages, but where the stipulation is intended to provide punishment for breach of the contract, it is a penalty. Tate v. LeMaster, 231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957). Moreover, as stated in this Court's November 4, 2010 Order, the liquidated damages amount equates to the Defendant's yearly salary under the Employment Agreement. The provision is part of the covenant not to compete the Defendant negotiated and agreed to. The Court finds that the amount listed in the damages provision is reasonable and proportionate to the estimated damage to the Plaintiff's practice as a result of the Defendant's breach and, therefore, cannot be argued as a penalty. The Court further finds Defendant's breach of the covenant not to compete did result in a loss to the Plaintiff which is supported by Dr. Seltzer's testimony of his loss in business after the Defendant's departure from the practice.

The Court's Order awarding judgment, filed November 4, 2010, found that the covenant not to compete in issue contained a liquidated damages provision and found Plaintiff is entitled to liquidated damages in the amount of \$120,000.00. Pre-judgment interest was not specifically prayed for in Plaintiff's Complaint nor was it argued at trial; therefore, it was not granted. The

Complaint filed August 21, 2007 prayed for a declaratory judgment, injunction, damages in the liquidated amount of \$120,000.00, compensatory damages, and "for other and further relief as a judge or jury may award, including the fees and costs associated with this action." After further review of the applicable South Carolina case law, the Court now amends its order to provide for pre-judgment interest.

Generally, pre-judgment interest must be pled in the complaint in order to be received. Dixie Bell, Inc. v. Redd, 376 S.C. 361, 367, 656 S.E.2d 765, 768 (Ct. App. 2007). However, the South Carolina Supreme Court ruled in Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), "Where the law allows interest as a matter of course, it is unnecessary to make demand for it in the pleadings." Id. at 102, 529 S.E.2d at 17. Pre-judgment interest is statutorily provided in S.C. Code Ann. § 34-31-20(A) which states, "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." Thus, "pre-judgment interest must be pled absent an agreement to pay a sum certain." Dixie Bell, 376 S.C. at 367, 656 S.E.2d at 768 (citing the holding from Calhoun).

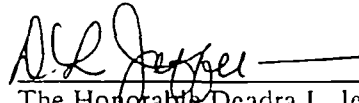
Finding the covenant not to compete contains a liquidated damages provision and the Plaintiff is entitled to liquidated damages as a result of the Defendant's breach, the Court further finds and amends its Order to reflect that the Plaintiff is entitled to pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20(A) at the rate of eight and three-fourths percent per annum. The parties consent that pre-judgment interest should run from the approximate date the Defendant opened his North Charleston Office. Therefore, by consent of the parties, pre-judgment interest shall run from April 30, 2008.

6/27/08
JHG

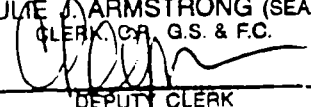
CONCLUSION

Having fully considered the Plaintiff's Motion and Memorandum, the Defendant's Responsive Memorandum, the timeliness of the Motion, the full record and applicable law, as well as the various interests balanced by the Court at the time of the ruling, the Plaintiff's Motion for Reconsideration is hereby **GRANTED**.

IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

2/16, 2011
Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF C.S. & F.C.
By 
DEPUTY CLERK

7017


JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



www3.charlestoncounty.org



41



THOMPSON, JOSEPH D III
134 MEETING ST 3RD FL
CHARLESTON SC 29401-2224

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

ORDER - AMENDED ORDER GRANTING PLNTFF'S MOT FOR
RECONSIDERATION

THIS JUDGMENT WAS ENTERED ON THE 16TH DAY OF FEBRUARY , 2011 AND A COPY MAILED
FIRST-CLASS THIS 19TH DAY OF FEBRUARY , 2011 TO ALL COUNSEL OF RECORD AND/OR
ALL PERSONS ENTITLED TO RECEIVE NOTICE.
YOU MAY VIEW AND DOWNLOAD THIS DOCUMENT AT WWW3.CHARLESTONCOUNTY.ORG

Havinsman over Boyd, P.A.
Date 2/24/11
C/A 33590.0001
Docketed
IDL *[Signature]*

THOMPSON, JOSEPH D III
134 MEETING ST 3RD FL
CHARLESTON SC 29401-2224

2007-CP-10-003681
OPHTHALMOLOGY ASSOCIATES OF CH
VS.
BUDEV, MILLIN C M D

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
OPHTHALMOLOGY ASSOCIATES)
OF CHARLESTON, P.A.,)
)
Plaintiffs,)
)
vs.)
)
MILLIN C. BUDEV, M.D.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2007-CP-10-3681

ORDER GRANTING PLAINTIFF'S
MOTION FOR RECONSIDERATION

FILED
JAN 20 2011
JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

Presiding Judge:	Deadra L. Jefferson
Trial Date:	August 12-13, 2010
Court Reporter:	Brenda Cooley
Plaintiff's Attorneys:	Marvin Oberman, Esquire Harold Oberman, Esquire
Defendant's Attorneys:	Joseph D. Thompson, III., Esquire

THIS MATTER is before the Court by way of the Plaintiff's Motion for Reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, filed November 19, 2010.¹ The Court received Plaintiff's Motion by mail on November 19 2010.² The case initially came before the Court on August 12, 2010 thru August 13, 2010 for a bench trial, and the Court entered an Order awarding judgment to the Plaintiff in the amount of One Hundred Twenty Thousand Dollars and 00/100 (\$120,000.00) on November 4, 2010.

Plaintiff's Motion for Reconsideration requests that the Court reconsider its Order on the following two grounds:

¹ Rule 59(e), SCRCP, requires a motion to alter or amend be served not later than ten (10) days after receipt of the written order. The Court finds Plaintiff's Motion for Reconsideration was timely filed pursuant to Rule 59 of the South Carolina Rules of Civil Procedure.

² Plaintiff's Motion for Reconsideration was timely provided to the Court pursuant to Rule 59(g), SCRCP. The issuance of this Order was delayed to give the parties an opportunity to resolve this matter.

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[Signature]

1. Amend Paragraph 11 of the Court's Order to state that Steven Johnson estimated the twenty-five (25) mile radius was reduced by forty percent (40%) because of the carve-out, Francis Marion Forest, lakes and ocean.
2. Amend the judgment to award pre-judgment interest on the sum certain of \$120,000.00.

Counsel for the Defendant filed a Memorandum in Opposition of Plaintiff's Motion for Reconsideration on November 30, 2010 which was received by the Court by email on the same day.³ In his Memorandum in Opposition to Plaintiff's Motion for Reconsideration, the Defendant opposes the Plaintiff's first request to amend Paragraph 11, as it was made without support of the transcript. As to the request for pre-judgment interest, the Defendant opposes the Motion on two grounds: (1) this is not a case of "an account stated" or one where there is an explicit agreement to a specified sum of damages as required by S.C. Code § 34-31-20, and (2) even if there was a sum certain, the amount of purported liquidated damages constitutes a penalty and is unenforceable.

STANDARD OF REVIEW

"The purpose of Rule 59, SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate

³ This motion is disposed of without the necessity of a hearing and decided on the record and briefs. SCRCP 59(f); Pollard v. City of Florence, 314 S.C. 397, 444 S.E.2d 534 (Cl. App. 1994).



review.” Elam v. South Carolina Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, “[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not.” Anderson Mem’l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

As to the first ground raised in Plaintiff’s Motion for Reconsideration, the Court has reviewed the testimony of Steven Johnson and hereby amends its Order accordingly. Steven Johnson testified on behalf of the Plaintiff on August 12, 2010 and was qualified as an expert in the area of professional land surveying. When asked the percentage of the twenty-five mile radius that was taken up by the cut-out and Francis Marion Forest, Mr. Johnson testified “approximately forty percent.” Further, when asked what percentage of the twenty-five mile radius was restricted from the Defendant, he testified to sixty percent. The Court amends Paragraph 11 of its Order to state the following:

11. Steven Johnson’s testimony was offered and accepted as a professional expert in the area of land surveying. Mr. Johnson estimated that forty percent (40%) of the twenty-five mile radius is reduced by the cut-out and Francis Marion Forest.

As to the second ground raised in Plaintiff’s Motion for Reconsideration, the Defendant has raised adequate grounds for the Court to amend or reconsider its Order to provide for pre-judgment interest. “The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law.”

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Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 58, 691 S.E.2d 135, 154 (2010) (citing Historic Charleston Holdings, LLC v. Mallon, LLC, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); see S.C. Code Ann. § 34-31-20(A) (Supp. 2009) (“In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.”)).

The Defendant contends there is not an explicit agreement to a specified sum of damages as required by S.C. Code § 34-31-20, and even if there was a sum certain, the amount of purported liquidated damages constitutes a penalty and is unenforceable. “[A] stipulation will be held to constitute a penalty where the sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from [a] breach of the contract.” Benya v. Gamble, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984) (internal quotation marks omitted). “The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties.” Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999).

Here, the covenant not to compete contained a provision which stated, “The Practice shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000.00) Dollars enforceable by the Practice in any court of competent jurisdiction.” “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.” Moser, 334 S.C. at 430, 513 S.E.2d at 125. The

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Court finds a review of the damages provision to be unambiguous. The designation as to "liquidated amount" is indicative of the intention of the parties that the sum stipulated to constitutes liquidated damages rather than a penalty. Contra Benya, 282 S.C. at 631, 321 S.E.2d at 62 (where there was no designation of liquidated amount in the real estate contract, the court could not tell from reading the contract whether the provision was included to deter [Defendant] from breaching his contract and to penalize him for doing so or to specify a sum which the parties in good faith agreed on as representing the damages that would ensue from a breach). If the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages for breach, the stipulation is for liquidated damages, but where the stipulation is intended to provide punishment for breach of the contract, it is a penalty. Tate v. LeMaster, 231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957). Moreover, as stated in this Court's November 4, 2010 Order, the liquidated damages amount equates to the Defendant's yearly salary under the Employment Agreement. The provision is part of the covenant not to compete the Defendant negotiated and agreed to. The Court finds that the amount listed in the damages provision is reasonable and proportionate to the estimated damage to the Plaintiff's practice as a result of the Defendant's breach and, therefore, cannot be argued as a penalty. The Court further finds Defendant's breach of the covenant not to compete did result in a loss to the Plaintiff which is supported by Dr. Seltzer's testimony of his loss in business after the Defendant's departure from the practice.

The Court's Order awarding judgment, filed November 4, 2010, found that the covenant not to compete in issue contained a liquidated damages provision and found Plaintiff is entitled to liquidated damages in the amount of \$120,000.00. Pre-judgment interest was not specifically prayed for in Plaintiff's Complaint nor was it argued at trial; therefore, it was not granted. The

Complaint filed August 21, 2007 prayed for a declaratory judgment, injunction, damages in the liquidated amount of \$120,000.00, compensatory damages, and "for other and further relief as a judge or jury may award, including the fees and costs associated with this action." After further review of the applicable South Carolina case law, the Court now amends its order to provide for pre-judgment interest.

Generally, pre-judgment interest must be pled in the complaint in order to be received. Dixie Bell, Inc. v. Redd, 376 S.C. 361, 367, 656 S.E.2d 765, 768 (Ct. App. 2007). However, the South Carolina Supreme Court ruled in Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), "Where the law allows interest as a matter of course, it is unnecessary to make demand for it in the pleadings." Id. at 102, 529 S.E.2d at 17. Pre-judgment interest is statutorily provided in S.C. Code Ann. § 34-31-20(A) which states, "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." Thus, "pre-judgment interest must be pled absent an agreement to pay a sum certain." Dixie Bell, 376 S.C. at 367, 656 S.E.2d at 768 (citing the holding from Calhoun).

Finding the covenant not to compete contains a liquidated damages provision and the Plaintiff is entitled to liquidated damages as a result of the Defendant's breach, the Court further finds and amends its Order to reflect that the Plaintiff is entitled to pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20(A) at the rate of eight and three-fourths percent per annum.

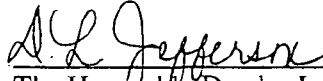
CONCLUSION

Having fully considered the Plaintiff's Motion and Memorandum, the Defendant's Responsive Memorandum, the timeliness of the Motion, the full record and applicable law, as

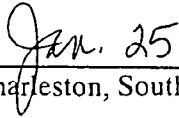
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well as the various interests balanced by the Court at the time of the ruling, the Plaintiff's Motion for Reconsideration is hereby **GRANTED**.

IT IS SO ORDERED.



The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit


_____, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
OPHTHALMOLOGY ASSOCIATES OF)
CHARLESTON, P.A.,)
)
Plaintiff,)
)
v.)
)
MILLIN C. BUDEV, M.D.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 07-CP-10-3681

ORDER

2009-10-11 11:01
JULIE J. ARYSTYCH
CLERK OF COURT

FILED

Date of hearing: August 12-13, 2010
Court Reporters: Brenda Cooley
Plaintiff's counsel: Marvin Oberman, Esq., Harold Oberman, Esq.
Defendant's counsel: Joseph D. Thompson, III, Esq.

PROCEDURAL BACKGROUND

Ophthalmology Associates of Charleston, P.A. ("Plaintiff") filed suit on August 21, 2007 against Dr. Millin C. Budev, M.D. ("Defendant"). Plaintiff's Complaint alleged a cause of action for declaratory judgment, injunction, and breach of contract. Defendant filed an Answer on September 21, 2007 asserting a general denial and the defenses failure to state a claim, waiver, estoppel, laches, and public policy. Defendant filed a Motion for Summary Judgment on May 5, 2009. The Motion for Summary Judgment was heard on September 10, 2009 by Judge Nicholson and was granted as to injunctive relief on October 8, 2009. The terms of this Order were based on the fact that the three-year period of non-competition expired on or about July 2, 2009. The Defendant's request for a finding that the covenant not to compete is enforceable was denied.

This matter came before the Court for a non-jury trial on the merits on the above dates. The Plaintiff was present and represented by Harold Oberman, Esq. and Marvin Oberman, Esq.

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The Defendant was present and represented by Joseph D. Thompson, III, Esq. At trial, Plaintiff presented five witnesses including Dr. Millin Budev, Dr. David Vroman, Steve Johnson, Nancy Hayes and Dr. Sidney Seltzer. The Defendant did not call any witnesses. At the close of Plaintiff's case, no motions were made by either party and are, therefore, waived. Having heard the testimony of the witnesses and having duly considered the admitted evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

THE PRACTICE

1. Dr. Sidney Seltzer, M.D. ("Dr. Seltzer") entered into private ophthalmology practice in 1970. His office was initially located on Calhoun Street in Charleston across from Roper Hospital. In 1981, he moved his practice to Medical Plaza Drive in North Charleston across from North Trident Hospital. Dr. Seltzer's practice was known as Ophthalmology Associates of Charleston, P.A. of which he was the sole shareholder.

2. Dr. Seltzer practiced without any other physicians from 1970 to 2003. Dr. Seltzer, to secure patients, relied on, among other things, patient referrals and the referrals of other optometrists ("OD's"). His patients came from the entire tri-county area and beyond. They specifically came from Charleston, Mt. Pleasant, Summerville, Ladson, North Charleston, Goose Creek, Ridgeville, and the small towns in-between. They came from as far away as Hilton Head, Orangeburg, Myrtle Beach, and Columbia.

THE EMPLOYMENT CONTRACT

3. Dr. Seltzer and the Defendant began discussions of the Defendant coming to work for the Plaintiff in late 2002. On June 5, 2003, the Plaintiff and the Defendant entered into an

employment contract, the terms of which are contained in the parties' Employment Agreement. (Pl.'s Ex. 15.)

4. Both parties freely and voluntarily entered into the Employment Agreement and understood and accepted the express terms of the contract.

5. At the time of contracting in 2003, Plaintiff had one office located at 9304 Medical Plaza Drive, Suite D, North Charleston, South Carolina 29406.

6. At the time of contracting in 2003, Plaintiff had never employed an ophthalmologist other than Dr. Sidney Seltzer, the sole shareholder and owner of the Plaintiff. Accordingly, Dr. Seltzer had never used an employment contract with a non-compete clause prior to the Employment Agreement with Defendant. Dr. Seltzer used the services of an accountant/health care consultant who provided him with the skeleton of the contract he presented to Defendant. Dr. Seltzer was not represented by legal counsel. Defendant was represented by a health care and hospital attorney in drafting and negotiating the provisions of the Employment Agreement, and he negotiated specific changes in the Agreement. The focus of these changes was the land area radius to be excluded from the area the Defendant could practice if he severed his employment.

7. At the time of contracting in 2003, Defendant was a resident in ophthalmology and had never been employed in private practice. He was represented by counsel at the time of contracting.

8. Under the Employment Agreement, the Defendant received "one hundred twenty thousand (\$120,000) dollars per year, payable in monthly installments" Additionally, "[a]t the end of each quarterly calendar period . . . a bonus will be issued . . . if the [Defendant] has generated a positive cumulative net income." (Pl.'s Ex. 15 at ¶ 8.)

9. The Employment Agreement contains a covenant not to compete which states that

Defendant "shall not undertake the practice of medicine within a twenty-five (25) mile radius of any office of Practice [Plaintiff], excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination." (Pl.'s Ex. 15 at ¶ 15.)

10. The Defendant believed that the geographical area and three year time limitation were reasonable. The Defendant discussed the contract, including the "carve-out" area, with his attorney while in negotiations with the Plaintiff. Maps noting the carve-out area were used during the negotiations. The Defendant specifically negotiated this particular carve-out area. He testified that at the time he believed it was a reasonable geographical restriction.

11. Steven Johnson's testimony was offered and accepted as a professional expert in the area of land surveying. Mr. Johnson estimated that forty percent (40%) of the carve-out be within the Francis Marion Forest.¹

12. The covenant not to compete also prohibits the Defendant from directly or indirectly soliciting any patient (or member of a patient's immediate family), employee, or vendor of the Plaintiff. (Pl.'s Ex. 15 at ¶ 15.)

13. The covenant not to compete also contains a liquidated damages clause in the amount of One Hundred Twenty Thousand Dollars (\$120,000.00) enforceable by the Plaintiff in the event of the Defendant's breach. (Pl.'s Ex. 15 at ¶ 15.) The Defendant agrees that the Plaintiff has the right to pursue this amount if the covenant not to compete was violated.

14. The Employment Contract provides that the Practice will "furnish adequate facilities for the practice of Ophthalmology, including building, equipment, supplies, medical library,

¹ Mr. Johnson was admitted as an expert without objection in the area of professional land surveying. At the end of Mr. Johnson's testimony, the Defendant made a Motion to Strike the witness's testimony as an expert which the Court respectfully denied.

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computer services and administrative and auxiliary personnel.” (Pl.’s Ex. 15 at ¶ 9.) The Employment Contract is void of any clause in regards to use of surgical facilities.

15. The Defendant terminated his employment with Plaintiff effective July 3, 2006.

16. The expiration of the three-year period of non-competition occurred on or about July 2, 2009.

POST TERMINATION

17. Immediately following his employment with Plaintiff, Defendant opened an office for the practice of ophthalmology in the West Ashley area of Charleston. Budev Eyecare and Surgery is located at 2093 Henry Tecklenburg Drive, Suite 313 East, Charleston, South Carolina. This area was within a carve-out zone of the geographic restraint in the Employment Agreement’s covenant not to compete. The West Ashley practice area was specifically negotiated and left available to Defendant so that he could practice medicine, within his chosen field, in a prime location adjacent to a medical center while remaining in the Charleston area. He successfully practiced there, and continues to successfully practice there. The Defendant testified that practicing in the West Ashley area did not impede on his ability to see or treat patients.

18. On November 8, 2006, the Defendant formed Mombasa Development, LLC with his partner Dr. David T. Vroman. Shortly after the Defendant terminated his employment with the Plaintiff, he and Dr. Vroman went looking for property for a new office location in or about West Ashley, Mount Pleasant, and North Charleston. Defendant subsequently bought land on Gateway Drive, Ladson, South Carolina on November 20, 2006 under a contract for Four Hundred Twenty-Five Thousand Dollars (\$425,000.00) and secured a construction loan for Two Million Five Hundred Thousand Dollars (\$2,500,000.00) on February 21, 2007. Both doctors were represented by counsel in this purchase. Dr. Vroman testified that he knew of the non-

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competent but felt it was the Defendant's issue, not his. The Defendant testified he told Dr. Vroman the non-competent was his issue, and he would deal with it.

19. In late April 2008, the Defendant opened an office for the practice of ophthalmology at 137 Gateway Drive, Ladson, South Carolina 29456. The office was located two to three miles from Plaintiff's office and was within the restricted zone of the covenant not to compete. In August 2007, the Defendant placed his first advertisement directly above Dr. Seltzer's ad in the yellow pages of the phone book. The office was opened with the Defendant's knowledge that it was in violation of the covenant not to compete.

20. During his employment with Plaintiff, Defendant performed surgical procedures at the Trident Eye Surgery Center located across the street from Plaintiff's office location. Following his separation from Plaintiff, Defendant continued to operate in the Trident Eye Surgery Center with the knowledge and consent of Dr. Seltzer. This fact is uncontradicted by the parties. As a part-owner of the surgery center, Dr. Seltzer received a financial benefit from Defendant's practice of ophthalmology at the Trident Eye Surgery Center, as did the Defendant from Dr. Seltzer's practice of ophthalmology at the Trident Eye Surgery Center. Each, along with other physicians, had a percentage based ownership interest in the center. It is uncontradicted that all members benefitted equally based on the number of surgeries performed. The more procedures each conducted the more money each earned based on the percentage of their ownership interest. The Defendant testified that the Trident Eye Surgery Center is not the only center at which he could operate. Dr. Seltzer does not consider Defendant's continued use of the Trident Eye Surgery Center a violation of the covenant not to compete. Likewise, at the time, the Defendant did not consider use of the Surgery Center a violation of the covenant not to compete.

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21. In the fall of 2006, the Defendant began seeing patients in Orangeburg, South Carolina. In 2008, the Plaintiff opened an office in Orangeburg, under the same name. The parties' offices were located within a twenty-five mile (25) radius of one another.

22. The parties testified, and the Court finds, they only intended the Employment Agreement and covenant not to compete to apply to Dr. Seltzer's practice on Medical Plaza Drive in North Charleston. There was no intent of either party to compete in Orangeburg at the time the contract was entered into. The Court finds consistent with the parties' clear intentions that the covenant not to compete does not apply to Orangeburg.

23. In October 2009, Dr. Seltzer sold his practice to Carolina Eyecare Physicians but continues to work for them on a percentage basis.²

PLAINTIFF'S BUSINESS INTEREST

24. Dr. Seltzer testified that the purpose of the covenant not to compete was to protect his specific business interests in the North Charleston location of his practice. This is reflected in paragraph 15 of the parties' contract.

25. Plaintiff contends that Defendant was intimately acquainted with both Dr. Seltzer's practice and patients in such a way that he could unfairly compete with Dr. Seltzer if allowed to do so without restriction.

26. Plaintiff has many patients in the restricted areas. Plaintiff's office administrator, Nancy Hayes, conducted a census as to patient origin which showed that the Plaintiff had Five Hundred Twenty-Seven (527) patient addresses in a Mt. Pleasant zip code; Two Hundred Eighty-Four (284) addresses in Ravenel, Hollywood, Meggett, and Johns Island zip codes; and over One

² The sale to Carolina Eyecare Physicians occurred after this suit was filed and after Defendant's non-compete provision expired in July 2009. The Defendant never raised any defenses concerning this sale in his pleadings, nor did he file a motion or attempt to join Caroline Eyecare Physicians as a party. Therefore, any potential defenses are waived. The Defendant presented no evidence that Dr. Seltzer relinquished any rights to this cause-of-action as a part of that sale.

Thousand (1000) patient addresses in additional Mt. Pleasant, James Island, and Johns Island zip codes. The Court notes that no formal survey or research was conducted to determine the breakdown of patient location at the time the contract was entered into in 2003.³

27. In his deposition testimony, taken May 2009, Dr. Seltzer denied any legitimate business interest in preventing the Defendant from the practice of ophthalmology in areas covered by the geographic restraint including areas such as Mount Pleasant, James Island, Johns Island, Ravenel, Hollywood, and Meggett. After reviewing the deposition and providing the corrections to his attorneys, Dr. Seltzer corrected his testimony on this issue through the use of an errata sheet. He testified that he misspoke in the deposition due to the fact that he had undergone several hours of questioning from Defendant's counsel and was tired. Dr. Seltzer testified that he reserved his right to correct any mistakes made in his deposition. He further testified that he completed, signed and notarized errata sheets for approximately twenty-three (23) corrections in order to correct areas where he misspoke during his deposition. The Court notes that the errata sheet is dispositive.

28. Dr. Seltzer relied on consultants as to the temporal and geographical restrictions. He believed that three (3) years was the industry standard for a practice to recover. There was no objection ever raised by the Defendant. The Defendant and his attorney agreed to and specifically negotiated the three (3) year restriction and the geographical parameters of the twenty-five (25) mile restriction with the "carve-out."

³ The parties stipulate to the population of Charleston, Berkeley, and Dorchester Counties for the year 2000. The parties stipulate that Charleston County had a population of 309, 969 people, Berkeley County had 142, 651 people, and Dorchester County had 96, 413 people.

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CONCLUSIONS OF LAW

Because the issue of injunctive relief was previously granted in the Defendant's favor by Judge Nicholson, the main cause of action remaining is the declaratory action as to whether the covenant not to compete contained within the Employment Agreement between the parties is valid and enforceable. Additionally, the Plaintiff did not present evidence of actual damages except for the liquidated damages as provided for in the contract. Thus, the Court must also determine the enforceability of the liquidated damages clause.

I. ENFORCEABILITY OF THE COVENANT NOT TO COMPETE

It is well established that covenants not to compete in employment contracts are generally disfavored, will be critically examined, and will be strictly construed against the employer. Milliken v. Morin, 386 S.C.1, 10, 685 S.E.2d 828, 833 (Ct. App. 2009) (citing Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983)); Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995); Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992). A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer. Faces, 318 S.C. at 42, 455 S.E.2d at 707 (citing Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 217 S.E.2d 135 (1975); Stringer, 309 S.C. 529, 424 S.E.2d 547)). In order to be enforceable, a plaintiff has the burden of proving that a covenant not to compete 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

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(5) supported by a valuable consideration.

Milliken, 386 S.C. at 10, 685 S.E.2d at 833 (citing Dudley, 278 S.C. at 675, 301 S.E.2d at 143). “If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved.” Faces, 318 S.C. at 42, 455 S.E.2d at 709 (citing E. Bus. 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 into 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) (“[I]f . . . the territorial scope of the restraint is unreasonable . . . no inquiry need be made as to the presence or absence of the other necessary requirements.”)). However, each case concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on its own facts. Faces, 318 S.C. at 42, 455 S.E.2d at 709 (citing Stringer, 309 S.C. 529, 424 S.E.2d 547); Wolf v. Colonial Life & Accident Ins. Co., 309 S.C. 100, 111, 420 S.E.2d 217, 223 (Ct. App. 1992).

A. THE COVENANT IS NECESSARY FOR THE PROTECTION OF THE LEGITIMATE INTEREST OF THE PLAINTIFF

As outlined in the facts, the Plaintiff's practice has a legitimate business interest that the covenant not to compete protects.⁴ The Defendant came directly after graduation to work in Dr. Seltzer's practice, learned everything about Dr. Seltzer's practice, learned how Dr. Seltzer recruited and dealt with OD's, learned who those OD's and other connections were, and cultivated those connections. The Defendant had full knowledge of both the Plaintiff's practice and its patients. Though he could not solicit patients, the patients of the practice could come to him on their own accord.

⁴ The parties concede at paragraph 15 of the agreement that the covenant is necessary to protect the legitimate business interests of the Practice.

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Dr. Seltzer had patients in all the restricted areas. It is important to note that the covenant did not prevent the Defendant from acquiring patients from within the radius, but rather only from practicing medicine in a location within a twenty-five (25) mile radius of Dr. Seltzer's practice. The Defendant was free to solicit, advertise, and draw on the entire population of the Charleston area with the only restriction being that he would not directly or indirectly solicit the patients of the Plaintiff's practice.⁵

The Defendant argues that the express language of the covenant is broader than necessary to protect any legitimate business interest of the Plaintiff's practice. Although the Defendant was employed as an ophthalmologist, the covenant not to compete in his Employment Agreement restricted him from "the practice of medicine" within the specified geographic and temporal restrictions. The Defendant contends that the Plaintiff had no legitimate business interest in prohibiting the Defendant from the broader "practice of medicine." Dr. Seltzer conceded that the express language of the covenant was broader than that for which the Defendant was employed, but the intent of the agreement was to restrict the non-compete to the practice of ophthalmology. To interpret this language in any other way would defeat the clear intentions of the parties. In interpreting contracts, you must determine the intention of the parties and put those intentions into effect. Ingram v. Kasey's Assocs., 340 S.C. 98, 110-11, 531 S.E.2d 287, 293-94 (2000); Midlands Mut. Life Ins. Co. v. Harrell, 331 S.C. 394, 396, 503 S.E.2d 189, 190 (Cl. App. 1998). Contracts should be liberally construed to carry out the intentions of the parties. It is the substance of the agreement, not the form, which must control the construction of the contract. When interpreting a contract, the court is not limited to the literal meaning of any

⁵ "[L]imitation is not unreasonable where restriction seeks only to protect existing customers without imposing a blanket prohibition against competition . . ." Wolf, 309 S.C. at 112-13, 420 S.E. at 224 (citing Almers, 265 S.C. 48, 217 S.E.2d 135). As drafted, the contract, which was fully negotiated and signed by the Defendant, allows Defendant to compete taking into consideration the scope of his competition and the consequences thereof.

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term if the literal meaning would defeat the parties' true intentions. The contract is to be interpreted by looking at its subject matter, nature, and purpose.

The Defendant also expressed concern with regard to his treatment of patients, who may have been obtained through his West Ashley practice, but who may have presented to hospitals for emergent care within the geographical restriction. At trial a hypothetical example was offered of a scenario whereby a patient of the Defendant's presented to the Trident Hospital Emergency Room with an emergent ophthalmological condition during a time the Defendant would have been on call. Pursuant to the express terms of the covenant, Defendant contends that he could not undertake the treatment of his own patient at the Trident Hospital Emergency Room as it would require him to undertake the practice of ophthalmology within the restricted area of the covenant. The same would hold true should that same patient present to an emergency room in downtown Charleston or Mount Pleasant, all of which are located in the geographically prohibited zone. It is alleged that by the express terms of the covenant, the Defendant would not be able to undertake the ophthalmologic care of his own patient in one of these emergency rooms during a time when the patient needed him the most. Dr. Seltzer testified he assumed it was his decision to enforce the non-compete, and he did not think the Defendant performing surgery at the Trident Eye Center or local hospital was in direct competition with his practice. When presented with the emergency room scenario, Dr. Seltzer testified that he would not seek to enforce the covenant, because the best interests of the patient are paramount. He further testified that the only time he would be in an emergency room to see a patient would be if he were on-call. Dr. Seltzer conceded that performing ophthalmologic care in an emergency room at a hospital within the twenty-five (25) mile radius would be within the restrictive zone, but he reiterated that the Defendant would be allowed to see the patient and did not believe this was the

parties' intentions in executing the covenant. He further testified that it would be rare if ever that an ophthalmologic patient would present to an emergency room for care as presented in the scenario.

The defense argues Dr. Seltzer's position runs afoul of clear South Carolina precedent strictly construing the express terms of a non-compete against the employer. See, e.g., Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 16 (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."); Kistler, 258 S.C. at 434, 189 S.E.2d at 24 ("We must uphold the covenant as written or not at all, it must stand or fall integrally.").

While this Court does not disagree with the contentions made by the defense, it points to "the foremost rule [] that the court must give effect to the intentions of the parties by looking to the language of the contract." Moser v. Gosnell, 334 S.C. 425, 429, 513 S.E.2d 123, 125 (Cl. App. 1999) (citing Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985)). In interpreting contracts, the Court must determine the intention of the parties and put those intentions into effect. D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). In doing this, the Court must consider only the outward expressions of the parties. The court cannot consider any undisclosed or secret intentions of the parties. Midlands, 331 S.C. at 396, 503 S.E.2d at 190. It is the substance of the agreement, not the form, which must control the construction of the contract. When interpreting a contract, the Court is not limited to the literal meaning of any term of the contract. If the Court decides that the literal meaning would defeat the parties' true intentions, the contract is to be considered by looking at its subject matter, nature, and purpose. The Court must determine the purpose of the contract

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and then examine the language of the contract in light of its purpose. See Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188–89, 107 S.E.2d 43, 47 (1958). When the contract is in writing, as in the present case, the intent of the parties must be determined from the entire agreement and not from any particular clause or provision. Parker v. Byrd, 309 S.C. 189, 191, 420 S.E.2d 850, 852 (1992). When the written contract is clear, its meaning must be determined by the contents of the document alone. White v. White, 210 S.C. 336, 342, 42 S.E.2d 537, 539 (1947). If the circumstances warrant, terms which do not contradict the written language of the contract may be implied in order to carry out the intentions of the parties. Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367–68, 147 S.E.2d 481, 484 (1966).

Here, the Defendant is a licensed ophthalmologist and is only licensed to practice medicine in the area of ophthalmology. This Court acknowledges that the practice of medicine is included in the practice of ophthalmology as ophthalmology is a sub-specialty, and to read “the practice of medicine” in any other way would be absurd. The plain language of the contract reflects the parties’ intentions, when entering into the contract, that the purpose of the covenant not to compete was to protect the Plaintiff’s ophthalmology practice at its North Charleston address. It is clear the parties did not contemplate other office locations of the Plaintiff, surgical centers, or emergency room scenarios. The Defendant testified that he did not know the non-compete had anything to do with whether he could perform surgery at the Trident Eye Surgery Center. Further, Dr. Seltzer testified that he has no control over whether a patient is admitted to the hospital. Further, he testified that he would never seek to obstruct such an admission because the health and well-being of the patient is the paramount concern, and the contract and intention of the parties never contemplated enforcement under these circumstances. He testified that the only time the Defendant would need to see a patient at a hospital would be if he were the on-call

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ophthalmologist. This was a mere scenario presented at trial by the defense. The scenario was speculative in nature. There is no evidence that such a scenario has, or will actually occur in the future. This Court declines to rule based on rare or speculative circumstances that do not go to the parties' true intentions.

Based on the language of the contract, the Court finds that it was the parties' intentions, at the time of contract, for the covenant not to compete to restrict the Defendant from opening a practice within a twenty-five (25) mile radius, with the exception of the carve-out as negotiated by the Defendant, and from soliciting patients directly or indirectly from the Plaintiff. This Court finds that the Plaintiff had clients in all the restricted areas. This Court further finds that the Plaintiff taught the Defendant how to run a private practice and introduced the Defendant to other OD's as a source of referrals. Dr. Seltzer testified that in July 2006, his practice had around twenty-five (25) referring OD's. After July 2006, the practice saw a gradual decline in referring OD's, and in August 2010, it had one (1) referring OD. Dr. Seltzer also testified that as time went on, the number of surgical procedures decreased. Dr. Seltzer noticed a shift in where cataract patients came from. In the past they came from referring OD's, but from 2006–2009 they came from the practice. Accordingly, this Court finds that the covenant not to compete was necessary to protect a legitimate business interest of the Plaintiff.

B. THE RESTRICTIVE COVENANT IS REASONABLY LIMITED IN ITS OPERATION WITH RESPECT TO TIME AND PLACE.

1. Geographical Area

"[I]n order to be reasonable, [the geographical restraint] must be necessary in its full extent for the protection of some legitimate business interest of the employer." Standard Register Co. v. Kerrigan, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961).

[I]n order for a covenant not to compete to be enforceable, the covenant must be reasonable and consistent with the public interests. Inevitably the determination of reasonableness depends on the competing needs of the parties. The employer is entitled to protect himself from instant pirating of his old customers as well as the good will of his business. At the same time the prior clientele is not to be forever insulated from competition. Therefore, some time and geographic limitation must be incorporated into the covenant. Likewise, the public interest, an elusive concept, must not be offended. A determinative factor in this regard is the economic consequences suffered by the employee. The covenant is incompatible with the public interest if it is 'unduly harsh and oppressive' tending 'to deprive the employee the opportunity of supporting himself and his family.'

Almers, 265 S.C. at 52-53, 217 S.E.2d at 137 (citing Standard Register, 238 S.C. at 67, 119 S.E.2d at 540; see also Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960) and a multitude of cases collected in two encyclopedia annotations, 41 A.L.R.2d 15: 43 A.L.R.2d 94). Our courts further found in Milliken that "a geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." 386 S.C. at 12, 685 S.E.2d at 834 (citing Dudley, 278 S.C. at 676, 301 S.E.2d at 143).

In the present case, the geographical restraint was a twenty-five (25) mile radius with the exception of the territory lying both west of the Ashley River and South of Bees Ferry Road. The Supreme Court of South Carolina has upheld a twenty-five (25) mile radius in a non-compete provision. In South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960), the court found a three (3) year, twenty-five (25) mile radius from the town of Anderson, South Carolina reasonable in time and distance, where the customers of the loan business came from within and outside the twenty-five (25) mile radius. The court of appeals affirmed a trial judge's decision in Rite-Aid of South Carolina, Inc. v. Cantrell, 287 S.C.

119, 119-120, 336 S.E.2d 726, 726-727 (Cl. App. 1985), to construe the term "within three miles" as "the distance measured by the most direct road route from the former location." It is important to note that with the advent of interstate highways and the construction of expressways in the Charleston Area, twenty-five (25) miles is not a daunting distance for a patient to travel, and often such a distance can be traveled in less than thirty (30) minutes if an office is appropriately located. See South Carolina Finance, 236 S.C. 109, 113 S.E.2d 329 (upholding twenty-five mile radius); Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (upholding five mile, five year restriction); Wolf, 309 S.C. 100, 420 S.E.2d 217 (holding that prohibitions against contracting with existing customers is a valid substitute for a geographic limitation); Milliken, 386 S.C. 1, 685 S.E.2d 828 (holding an inventions assignment provision containing an unlimited territory enforceable, because it was limited to the employer's competitors which is necessary to protect the employer's interests).⁶

Dr. Seltzer testified that the twenty-five (25) mile radius was a part of a skeleton contract provided by his consultants at Elliot Davis. Nonetheless, he further testified that he had clients in the areas of Charleston, West Ashley, North Charleston, Goose Creek, Summerville, Orangeburg, Johns Island, James Island, Ravenel, Hollywood, Meggett, and as far north as Myrtle Beach, as far south as Hilton Head, and as far west as Columbia. As in South Carolina Finance, the Plaintiff has clients within and outside of the twenty-five mile radius.

Moreover, the Defendant specifically negotiated with the assistance of counsel the geographical restriction with the "carve-out." The carve-out was the Defendant's idea, and the Plaintiff agreed to it. During negotiations the Defendant was represented by an attorney and was

⁶ The courts' analysis may have varied based on different factual circumstances. However, this is not a case where the terms of the covenant were arbitrarily applied such as in an adhesion type contract or a take it or leave it type of situation. This covenant was fully negotiated by the parties utilizing maps and legal counsel for the "carve out," reduced to writing, and signed. This case demonstrates a classic example of hindsight where the Defendant decided he no longer desired the deal he negotiated and simply decided unilaterally to disregard his contractual obligation. In the most basic terms, the Defendant merely decided he no longer liked his bargain.

very active in discussing the geographical restriction and parameters of the carve-out with that attorney and the Plaintiff. The Court finds that these facts go to the Defendant's intentions for the covenant not to compete to include the geographical restriction with the carve-out as stated in the Employment Agreement. Further, there was ample testimony that the area of the twenty-five (25) mile radius was reduced by forty (40) percent because of the ocean, lakes, and the Francis Marion National Forest, and the Court finds as such. This makes the area restricted even more reasonable, especially in that Defendant negotiated for the carve-out. This Court finds that the geographic restraint in the covenant not to compete is reasonable and enforceable.

2. Time Limitation

The Defendant testified at trial he thought the time limitation was reasonable. Moreover, the South Carolina Supreme Court has found a three (3) year restriction reasonable. See Rental Uniform Servs. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983); Sermans v. Caine & Estes Ins. Agency, Inc., 275 S.C. 506, 509, 273 S.E.2d 338, 339 (1980) (conceding that a time limitation of two to three years may not be obnoxious). As Dr. Seltzer testified, three (3) years gives the practice a reasonable amount of time to recover from the loss of a doctor and gives it enough leeway to deal with the competition that will come from someone intimately knowledgeable about the practice methods, referrals, and patients. Accordingly, the Court finds the time limitation of the covenant not to compete reasonable and enforceable.⁷

C. THE COVENANT NOT TO COMPETE IS NOT UNDULY HARSH AND OPPRESSIVE IN CURTAILING THE LEGITIMATE EFFORTS OF THE EMPLOYEE TO EARN A LIVELIHOOD.

The Court finds the scope of the restriction reasonable. The non-compete did not prevent the Defendant from practicing medicine or ophthalmology within the Charleston area. The best

⁷ The parties concede at paragraph 15 of the agreement that the restriction is for a reasonable period of time.

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evidence of this is that Defendant did in fact successfully practice ophthalmology in the areas of West Ashley and Orangeburg after leaving Plaintiff's employment. No evidence was presented that patients did not travel from areas of Charleston other than West Ashley to the Defendant's ophthalmology practice. The Defendant's practice in West Ashley and Orangeburg was allowed by the Employment Agreement. He opened the West Ashley office immediately after leaving the Plaintiff and still has that office along with the new office located within two or three miles of the Plaintiff's office. The Plaintiff testified that he also began seeing patients in Orangeburg in the fall 2006. He was not restricted from practicing medicine because he did in fact practice medicine. He was able to earn a living in his chosen field, and he did so successfully.

D. THE RESTRICTION WAS REASONABLE FROM THE STANDPOINT OF SOUND PUBLIC POLICY.

The restrictions contained in the covenant not to compete are reasonable. The public interests must not be offended by the restrictions contained in a covenant not to compete.

Almers, 265 S.C. at 52, 217 S.E.2d at 137.

[I]n order for a covenant not to compete to be enforceable, the covenant must be reasonable and consistent with the public interests. Inevitably the determination of reasonableness depends on the competing needs of the parties. The employer is entitled to protect himself from instant pirating of his old customers as well as the good will of his business. At the same time the prior clientele is not to be forever insulated from competition.

Id. One of the determining factors of public interests is the economic consequences suffered by the employee, particularly the employee's opportunity to earn a livelihood. Id. at 52-53, 217 S.E.2d at 137. As discussed *supra*, the restrictions contained in the non-compete did not restrict the Plaintiff from practicing medicine or from earning a living in his chosen field.

Further, the American Medical Association ("AMA") guidelines on restrictive covenants parrot the common law standards that call for reasonableness, so there is no overriding public

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policy concern in the medical field. See AMA Council on Ethical and Judicial Affairs, Op. E-9.02 (1998). The AMA opines that restrictive covenants are unethical if they fail to make reasonable accommodation of patients' choice of physician. Id. Though the restrictive covenant between the parties restricts the Defendant from soliciting patients from the Plaintiff, it does not preclude the Plaintiff's patients from coming to the Defendant on their own accord. Therefore, the covenant does not impede on a patient's ability to continue treatment with a particular doctor if he or she so chooses.

Moreover, an interest of the public is having adequate medical protection. See Fernidad Tinio, Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Partnership Agreement, 62 A.L.R.3d 970 (1975). Here, the Defendant has not shown that the restriction caused any shortage of doctors in the Charleston area that would result in inadequate medical protection for the public. There are no South Carolina cases dealing with the issue of inadequate medical protection as a result of a restrictive covenant, so the Court must look to other jurisdictions for guidance. As pointed out in Rash v. Toccoa Clinic Medical Associates:

If it be argued that the enforcement of this restrictive covenant would be contrary to public policy because it would limit the right of potential patients in the Demorest and Habersham County area to avail themselves of Dr. Rash's services, it can be argued with at least equal conviction that this would afford countless other people in other areas, both in and outside of the state, the opportunity to have a physician in their areas. There is no reason to conclude that the obstetrical and gynecological needs of persons within a 25-mile radius of Toccoa are any greater than in many other areas of this and other states, nor is there any reason to conclude that the need for the appellant's services, in the context of this case, is sufficient to outweigh the law's interest in upholding and protecting freedom to contract and to enforce contractual rights and obligations.

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253 Ga. 322, 326, 320 S.E.2d 170, 173–74 (Ga. 1984). Further, public policy is likely benefitted more from ophthalmologists' offices in diverse locations, rather than by two adjacent to one another.

The Defendant also proposed hypothetical emergency situations which the Plaintiff testified had never happened in his time of practice. This Court need not delve into every possibility or consequence to rule this restriction sound and not against public policy.

E. THE COVENANT IS SUPPORTED BY VALUABLE CONSIDERATION.

The issue of valuable consideration is not in dispute. Defendant was paid a generous salary and received significant bonuses. Particularly, under the Employment Agreement the Defendant received One Hundred Twenty Thousand Dollars (\$120,000.00) per year as a base salary, in addition to a quarterly bonus based on the Defendant's generated positive cumulative net income. Dr. Seltzer testified that when he later consulted with a healthcare attorney he realized that the Defendant's compensation was "overly generous" by industry standards, as the Defendant's salary was close to bypassing his own. The Court finds the covenant not to compete was supported by valuable consideration and is, thus, enforceable.⁸

II. AFFIRMATIVE DEFENSES

The Defendant raised three affirmative defenses: waiver, estoppel, and laches. The Court finds that the Defendant failed to meet his burden of proof as to all three affirmative defenses.

The Defendant claims that, even if there was a breach of contract, the Plaintiff waived the right to enforce the covenant not to compete by allowing the Defendant to continue performing surgery at Trident Eye Surgery Center with his express permission and encouragement. "[A] party to a contract may lose its right to enjoin another party's breach by consenting either

⁸ The parties concede at paragraph 15 of the contract that valuable consideration exists for the agreement.

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expressly or implicitly through words or acts inconsistent with an intention to enforce the contract's terms." Genesco, Inc. v. Palmetto Plaza Shopping Ctr., Inc., 274 S.C. 446, 448, 265 S.E.2d 34, 35 (1980). When a person waives a right it means that the person intentionally and voluntarily gives up that right with knowledge of all of the relevant facts. The Court finds, as discussed *supra*, that it was the intent of the parties that the covenant not to compete was to restrict the Defendant from soliciting patients from the Plaintiff and from opening an office within a twenty-five (25) mile radius of the Plaintiff's North Charleston practice with the exception of the carve-out. The Court also finds that the parties did not contemplate restricting surgical procedures performed at the Trident Eye Surgery Center at the time of contract. Accordingly, the Court does not find that the Plaintiff acted in a manner which made the Defendant believe that the Plaintiff gave up the right to prosecute the breach of contract. The Defendant failed to meet his burden of proof on the affirmative defense of waiver.

The Defendant also claims that the Plaintiff is estopped from claiming breach of contract. Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment. Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993). Under the doctrine of estoppel, the Plaintiff cannot recover for breach of contract that is caused by its own conduct. Carter & Co. v. Kaufman, 67 S.C. 456, 45 S.E. 1017, 1018 (1903). Because it was not the parties' intentions to restrict the performance of surgical procedures at Trident Eye Surgery Center, the Defendant's performance of surgery is not in violation of the covenant not to compete. In addition, the Defendant left the Plaintiff on July 3, 2006, and immediately upon leaving, he began looking to purchase property in or about West Ashley, Mount Pleasant, and North Charleston and ultimately purchased the property at Gateway Drive, Ladson, South Carolina on November 20, 2006. Accordingly, less than five months elapsed

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from the time the Defendant left and when he purchased the property at Gateway Drive. Therefore, there could be no change in position by the Defendant. As such, the Defendant failed to meet his burden of proof in showing that the Defendant's breach was caused by the Plaintiff's own conduct.

Defendant lastly alleges the affirmative defense of laches. Laches is the negligent failure to act for an unreasonable period of time. Gibbs, 311 S.C. at 269, 428 S.E.2d at 730. Delay alone in the assertion of a right, without injury to the Defendant, does not constitute laches. Id. As discussed previously, Dr. Seltzer's actions in allowing the Defendant to continue to perform surgical procedures at Trident Eye Surgery Center is of no consequence, as these procedures were not contemplated at the time of contract. The Court finds it was not the intent of either party to restrict surgical procedures within the restricted geographical zone through the covenant not to compete. Therefore, there was no "right" for the Plaintiff to assert after the Defendant continued to perform surgical procedures at Trident Eye Surgery Center. The Court accordingly holds that the Defendant has failed to meet its burden of proof as to the defense of laches.

III. LIQUIDATED DAMAGES

"The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999) (quoting Tate v. LeMaster, 231 S.C. 429, 99 S.E.2d 39 (1957)); Rental Uniform Serv. of Greenville v. K & M Tool & Die, Inc., 292 S.C. 571, 573, 357 S.E. 2d 722, 724 (Ct. App. 1987). The test for determining whether a stipulation constitutes a penalty is whether the stipulated amount is disproportionate to any probable damage resulting from the breach of contract. Tate, 231 S.C. at 442, 99 S.E.2d at 46. If the sum stipulated is reasonably intended by

the parties as the predetermined measure of compensation for actual damages for breach. the stipulation is for liquidated damages, but where the stipulation is intended to provide punishment for breach of the contract, it is a penalty. Id. at 441, 99 S.E.2d at 45-46.

Here, the covenant not to compete contained a liquidated damages provision which stated, "The Practice shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand (\$120,000.00) Dollars enforceable by the Practice in any court of competent jurisdiction." The liquidated damages amount equates to the Defendant's yearly salary under the Employment Agreement. The provision is part of the covenant not to compete the Defendant negotiated and agreed to. The Court finds that the amount listed in the provision is reasonable and proportionate to the probable damage resulting from the Defendant's breach. Further, the Defendant has neither contended nor offered proof that the One Hundred and Twenty Thousand (\$120,000.00) Dollars is a penalty rather than liquidated damages. Therefore, the Court finds the Plaintiff is entitled to liquidated damages in the amount of the One Hundred and Twenty Thousand (\$120,000.00) Dollars as specified in the contract.

IV. CONCLUSION

Given the foregoing Findings of Fact and Conclusions of Law, the Court concludes that the Plaintiff has met its burden of proof that the covenant not to compete is valid and enforceable. Furthermore, the contract provides for liquidated damages to compensate the Plaintiff from a breach of the covenant not to compete by the Defendant. Therefore, Plaintiff is entitled to judgment in its favor in the amount of One Hundred Twenty Thousand Dollars and 00/100 (\$120,000.00). Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment be, and it hereby is, entered in

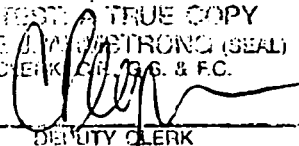
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favor of the Plaintiff Ophthalmology Associates of Charleston, P.A. in the amount of One Hundred Twenty Thousand Dollars and 00/100 (\$120,000.00) as stated in the liquidated damages provision of the contract.

AND IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

November 3, 2010
Charleston, South Carolina

ATTEST: TRUE COPY
JAMES J. McSTRONG (SEAL)
CLERK OF C.S. & F.C.
By 
DEPUTY CLERK

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