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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 (R. pp. 46-61). 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 (R. p. 59).

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 (R. pp. 62-66). Budev filed a Motion for Summary Judgment on May 5, 2009 (R. pp. 67-69). 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 (R. pp. 1-4).

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 (R. pp. 5-29). Seltzer moved for reconsideration on November 17, 2010, asking the Court to correct one

paragraph and asking for prejudgment interest (R. pp. 84-86). Budev opposed the Motion (R. pp. 87-90). Judge Jefferson issued an Order of January 25, 2011 (R. pp. 30-37), and an Amended Order of February 16, 2011 (R. pp. 38-45), granting the relief Seltzer asked for: amending the paragraph and awarding prejudgment interest.

Budev timely served his Notice of Appeal on March 10, 2011 (R. pp. 91-92), 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 (R. p. 258, lines 8-15). In 1981, he moved his practice to Medical Plaza Drive in North Charleston across from North Trident Hospital (R. p. 258, lines 16-25). Dr. Seltzer's practice was known as Ophthalmology Associates of Charleston, P.A. (R. p. 259, lines 3-12). Seltzer was the owner of that entity (R. p. 262, 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 (R. p. 261, 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 (R. p. 266, line 14 - p. 268, 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 (R. p. 209, line 16 - p. 211, line 12; R. p. 220, line 19 - p. 221, line 15; R. p. 265, line 25 - p. 266, line 13; R. p. 342, lines 11-23).

II. THE EMPLOYMENT CONTRACT

Dr. Seltzer and Budev began discussions of Budev coming to work for Seltzer in late 2002 (R. p. 270, line 13 - p. 271, 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 (R. pp. 389-401). Both parties freely and voluntarily entered into the Employment Agreement and both parties understood and accepted the terms of the contract (R. p. 141, 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 (R. p. 265, lines 4-23; R. p. 403). At the time of contracting in 2003, Seltzer had never employed an ophthalmologist other than himself (R. p. 261, line 18 - p. 262, line 1). Accordingly, Dr. Seltzer had never used an employment contract with a physician prior to the Employment Agreement with Budev (R. p. 262, 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 (R. p. 273, line 19 - p. 274, line 14; R. p. 300, line 24 - p. 301, 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. (R. p. 142, line 2 - p. 146, line 23; R. p. 274, line 9 - p. 275, 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 (R. p. 144, line 24 - p. 146, line 23; R. p. 277, line 14 - p. 282, 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 (R. p. 271, lines 3-25). He was represented by counsel at the time of contracting (R. p. 274, line 9 - p. 275, line 5). When Budev signed the employment agreement, he was well versed in business matters (R. p. 142, 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." (R. p. 393 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) (R. p. 399 at ¶15).

The trial court found Budev believed that the geographical area and three year time limitation were reasonable (R. p. 8). 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 (R. p. 205, line 3 - p. 207, line 10; Plaintiff’s Trial Exhibit 18). Budev specifically negotiated this particular carve-out area (R. p. 144, line 24, - p. 146, line 23; R. p. 277, line 14 - p. 282, 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; R. p. 158, line 18 - p. 159, line 9). A lay person can observe and deduce this from the maps (R. p. 283, line 24 - p. 284, line 25). The areas of the cutout are over populated (R. p. 246, line 1 - p. 148, line 12; R. p. 278, line 17 - p. 279, line 7; R. p. 281, 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 (R. p. 399 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 (R. p. 399 at ¶15).

The Defendant terminated his employment with Plaintiff effective July 3, 2006 (R. p. 151, lines 21-22) [Note: The transcript mistakenly labels the testimony on pages R. pp. 150-153 (Transcript 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 (R. p. 150, line 2 - p. 152, 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 (R. p. 150, lines 18-22) while remaining in the Charleston area. He successfully practiced there, and continues to successfully practice there (R. p. 150, line 18 - p. 151, line 3). Budev testified that practicing in the West Ashley area did not impede on his ability to see or treat patients (R. p. 151, 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 (R. p. 134, lines 8-15). They also looked at other areas outside the 25 mile radius (R. p. 134, lines 16-21). Along with forming a professional association for his practice, (R. p. 138, line 25 - p. 139, line 12; R. p. 388), on November 8, 2006, Budev formed Mombasa Development, LLC, to formalize his agreement with Dr. Vroman (R. p. 129, line 13 - p. 130, line 11; R. p. 370). 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 (R. pp. 381-387; R. p. 133, lines 4-12) and secured a construction loan for Two Million Five Hundred Thousand (\$2,500,000.00) Dollars on February 21, 2007 (R. p. 132, lines 8-25; R. pp. 371-380). Budev and Vroman were represented by counsel in this purchase (R. p. 133, lines 10-20). Construction on the Gateway Drive Office started in May, 2007 and the building was completed in April, 2008 (R. p. 137, 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 (R. p. 138, lines 13-17). Seltzer told him there would be a lawsuit if he built the office (R. p. 194, 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 (R. p. 134, lines 1-7; R. p. 294, lines 8-25; R. p. 404).

During his employment with Seltzer, Budev performed surgical procedures at the Trident Eye Surgery Center located across the street from Seltzer's office location (R. p. 182, line 14 - p. 183, 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 (R. p. 184, line 7 - p. 185, line 16; R. p. 186, lines 9-12).

Seltzer encouraged Budev to continue to operate at Trident and expressly allowed him to do so (R. p. 200, line 13 - p. 201, line 8). Budev operated there with Seltzer's express permission and blessing (R. p. 191, lines 13-16). Budev testified that the Trident Eye Surgery Center is not the only center at which he could operate (R. p. 200, 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 (R. p. 200, line 24 - p. 201, line 24; R. p. 191, line 13 - p. 192, 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 (R. p. 152, lines 12-20).

In the fall of 2006, the Budev began seeing patients in Orangeburg, South Carolina (R. p. 186, lines 19-24). In 2008, Seltzer, through his LLC, opened a new office in Orangeburg (R. p. 187, line 12 - p. 188, line 11; R. p. 317, 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 (R. p. 315, line 22 - p. 316, 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 (R. pp. 389-401, p. 399). Budev worked at Dr. Seltzer’s practice, learned everything about Dr. Seltzer’s practice (R. p. 290, lines 5-17; R. p. 270, line 24 - p. 272, line 4), learned how Dr. Seltzer recruited and dealt with OD’s, learned who those and other connections were (R. p. 266, line 14 - p. 268, line 24), and cultivated those connections (R. p. 272, line 5 - p. 273, 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.” (R. pp. 389-401, p. 399).

Dr. Seltzer had patients in all the restricted areas (R. p. 209, line 16 - p. 211, line 12; R. p. 220, line 19 - p. 221, line 15; R. p. 265, line 25 - p. 266, line 13; R. p. 342, 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 (R. p. 145, line 20 - p. 146, 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; R. p. 162, line 1 - p.167, 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 (R. p. 150, line 1 - p. 152, line 3). Additionally, the maps submitted by Seltzer show the proscribed areas (R. p. 402; Plaintiff's Trial Exhibits 18, 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 (R. p. 365, line 16 - p. 366, 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. (R. pp. 30-37, p. 32; R. pp. 38-45, p. 40; R. p. 158, line 18 - p. 159, 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 (R. p. 402), 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 (R. pp. 5-29, p. 22) 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 (R. p. 399 at ¶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 (R. p. 288, lines 4-9). He needed the non-compete to protect his practice because Budev had learned everything about his practice (R. p. 290, 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 (R. p. 286, line 4 - p. 288, 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.3rd 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 (R. pp. 389-401, p. 399). “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 (R. p. 25). 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 (R. p. 310, lines 15-23; R. p. 312, 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 (R. p. 26) 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 (R. p. 138, 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 (R. p. 194, lines 13-17; R. p. 197, lines 5-21). Despite this, Budev went full speed ahead (R. p. 194, lines 18-21). Budev did not believe his use of the surgical suite competition (R. p. 201, 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 (R. p. 152, 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 (R. p. 27), 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 (R. p. 308, line 20 - p. 309, 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 (R. p. 317, lines 13-16; Budev in his 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" (R. pp. 389-401). "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 (R. pp. 38-45, p. 42) 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 (R. p. 42). The covenant itself states that it is necessary to "protect the legitimate business interests of the practice" (R. p. 399) 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” (R. pp. 389-401, p. 399). 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 (R. p. 290, lines 5-17; R. p. 270, line 24 - p. 272, line 4), learned how Dr. Seltzer recruited and dealt with OD’s, learned who those and other connections were (R. p. 266, line 14 - p. 268, line 24), and cultivated those connections (R. p. 272, line 5 - p. 273, 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 (R. p. 272, lines 8-25). He was receiving less cataract patients via referrals (R. p. 273, lines 6-14). Seltzer thought he would need three years for his practice to recover from a physician such as Budev leaving his practice (R. p. 288, lines 4-9). He needed the non-compete to protect his practice because Budev had learned everything about his practice (R. p. 290, 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" (R. pp. 389-401, p. 399).

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" (R. pp. 5-29, p. 28). 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 (R. p. 275, line 18 - p. 276, 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.

November 1, 2011

Respectfully submitted,



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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

Ophthalmology Associates of Charleston, P.A., Respondent

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b) SCACR.

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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 November 1, 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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SC Court of Appeals