

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

William P. Keesley, Circuit Court Judge

C. A. NO. 2006CP32-0371

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. Petitioners,

v.

Columbia Heart Clinic, P.A. Respondent.

APPENDIX

Volume IV

A. Camden Lewis
Keith M. Babcock
Lewis & Babcock, LLP
1513 Hampton St.
Columbia, S.C. 29201
803-771-8000

ATTORNEYS FOR THE RESPONDENTS

Charles F. Thompson, Jr.
Michael D. Malone
Malone, Thompson, Summers & Ott LLC
339 Heyward St., Suite 200
Columbia, S.C. 29201
803-254-3300

ATTORNEYS FOR THE PETITIONERS

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LAW OFFICES

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

MALONE, THOMPSON
SUMMERS & OTT, LLC

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 06-CP-32-0371

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D.,

Respondents.

V.

Columbia Heart Clinic, P.A.,

Appellant.

FINAL BRIEF OF APPELLANT

A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS & BABCOCK, L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

ATTORNEYS FOR APPELLANT

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Statement of Issues on Appeal

1. Did the lower court err in finding the agreement was not equivalent to a partnership agreement and in applying a reasonableness test to the agreement?
2. Did the lower court err in finding that the covenant not to compete was unreasonable because it was too broad in scope?
3. Did the lower court err in finding that the court could not blue-pencil the covenant when the parties expressly contracted to allow the court to blue-pencil?
4. Did the lower court in ruling that Respondents are entitled to accounts receivable under the employment agreement?
5. Did the lower court err in ruling for Respondents under the South Carolina Wage Payment Act and awarding Respondents salaries or draws and a percentage of the accounts receivable?

Statement of the Case

This matter was initiated in 2006 when Respondents ("Departing Doctors") tendered their resignations from Appellant Columbia Heart Clinic (Appellant or "Columbia Heart") and filed a declaratory judgment as to the validity of covenants not to compete in Appellants' Shareholder Physician Employment Agreements. R.p. 40. Columbia Heart counterclaimed for breach of contract and violation of fiduciary duty and filed a Motion for Preliminary Injunction (R.p. 154), requesting that the court either enjoin Respondents from opening a competing practice or requiring Respondents to post a bond. R.p. 44. The Honorable Larry R. Patterson granted Appellant's motion and ordered each Respondent to post a bond of \$480,000. R.p. 37. The parties later agreed that the Respondents could obtain a Line of Credit in that amount in lieu of a bond, which Respondents did. R.p. 39.

Respondents filed a second action, which alleged causes of action for breach of contract (for compensation due and directorship fees); violation of Wage Payment Act, S.C. Code Ann. § 41-10-10 (for compensation due and directorship fees); quantum meruit; and an equitable action in the nature of replevin for failure to provide contact information. R.p. 51. Appellant filed counterclaims in the second action for unjust enrichment, breach of contract, and breach of fiduciary duty. R.p. 121. This second case was consolidated with the original action. R.p. 35. However, neither party requested a jury trial on the issues of the validity of the covenant and the Wage Payment claims, so those matters were tried non-jury.¹ R.pp. 40, 44, 51, 121.

¹Columbia Heart did seek a jury trial for the counterclaims on breach of contract, breach of fiduciary duty, and unjust enrichment, while Respondents sought a jury trial on their claims for breach of contract, quantum meruit.

On May 9-13, 2009, a non-jury trial was conducted by the Honorable William P. Keesley on Respondents' claims for declaratory judgment and the Wage Payment Act (S.C. Code § 41-10-10 et seq.). R.p. 609. On September 30, 2010, the lower court issued an order finding that the covenant not to compete was unenforceable; determining that the remedies for the breach of the covenant were unenforceable; and ruling in Respondents' favor on the Wage Payment claims. R.p. 1. Appellant timely appealed. R.p. 607.

Statement of the Facts

Appellant Columbia Heart Clinic is a professional medical practice association that provides comprehensive services for the prevention, diagnosis, and treatment of cardiovascular disease. R.p. 190:2-16. When this case was filed, Columbia Heart had offices in Lexington County² and Richland County.³ R.p. 1093:15-24. Respondents J. Kevin Baugh, M.D., and Barry J. Feldman, M.D. are physicians specializing in cardiology. R.p. 690:3-11; 892:21-24. Baugh began employment with Columbia Heart in 1996 and Feldman in 1993.⁴ R.pp. 692:4-18; 898:3-16. At the time of their departure, both Respondents had been shareholders in Columbia Heart for over 5 years. Id.

Columbia Heart opened a new office building in Lexington County in the year 2000,

²As a result of the Respondents' departure from the practice, the Defendant's Lexington office closed in 2006. R.pp. 712:11-713:2; 885:14-19.

³At the time, Columbia Heart had offices at Palmetto Richland and Providence Hospitals. Now, all of Columbia Heart's Richland County offices are located in a new office building at Palmetto Richland, and the Providence office has been closed. R.pp. 712:22-713:5.

⁴Dr. Feldman actually began his employment in 1993, which Columbia Cardiovascular Clinic and became a shareholder of that entity in 1996. R.pp. 692:13-693:1. Columbia Cardiovascular Clinic and Columbia Cardiology Consultants merged to become Columbia Heart Clinic. Id.

in part at the request of Respondents.⁵ R.p. 702:1-19. Columbia Heart spent hundreds of thousands of dollars to upfit the Lexington office. R.p. 852:9-12. Columbia Heart also employed sufficient staff to assist Baugh and Feldman at a significant cost. Id.

In 2004, Columbia Heart decided to build, and in fact did build, a new building in Richland County. R.pp. 842:8-843:8. To do so, Columbia Heart had to incur a significant debt. Id. A new LLC was created to own the building⁶ and all shareholders in Columbia Heart, including Respondents, were members and shareholders of new LLC.⁷ R.pp. 1099:18-1100:3. Columbia Heart leased space in the medical office building ("Richland Office") as soon as construction was complete. Construction occurred in 2004 and 2005, and Columbia Heart moved in to the new office building in late 2005. R.pp. 1119:19-1120:5. Columbia Heart originally leased space for \$110,000 per month, which later increased to \$115,000.⁸ R.pp. 1102:12-1102:7. Respondents, as shareholders of Columbia Heart and members of CHC MOB, were at all times aware of the plans for the new building and the associated costs. R.p. 1102:14-22. In fact, the new Richland County building cost over \$17 million to build. R.p. 1100:16-21. All of the twelve shareholder physicians at Columbia Heart Clinic (including the Respondents) signed personal guaranties for the construction loan. R.p.

⁵Columbia Heart had an earlier office location in Lexington, but it was not the fully staffed office that was created in 2000. R.pp. 888:16-25; 1096:10-1097:7.

⁶CHC MOB owns the majority percentage of the shares of Palmetto Heart MOB, LLC, which owns the new medical building. R.pp. 313:23-314:14.

⁷Respondents are no longer members of CHC MOB, and each Respondent was paid \$200,000 for his shares. R.pp. 1146:15-1147:13.

⁸The rent may increase even further in the future. R.pp. 1102:12-1102:7.

At the time the new building was planned, all shareholder physicians entered into new Employment Agreements that contained provisions regarding the termination of their employment with Columbia Heart.⁹ R.p. 1105:2-14. The Employment Agreement restricted shareholder physicians from employment with any other provider of cardiology services for one year within a 20-mile radius of any Columbia Heart office at which the physician routinely provided services. R.pp. 1280; 1301. In the alternative, the exiting physician could pay a contractually agreed upon price to compete:

In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Medical Group liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100 %) of Physician's Income (defined below). Medical Group may offset any amounts owed to Physician against amounts owed by Physician to Medical Group hereunder. For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of the Physician shareholders of Medical Group in the calendar year prior to the date of termination or expiration of this Agreement.

R.pp. 1290; 1311. The parties agreed that, using this contractual formula, the amount for each Respondent totaled \$591,710. R.pp. 1212:13-1213:21.

All shareholder physicians approved the language of the contracts. In fact, there was a provision in the Employment Agreement in which the shareholder physicians specifically acknowledged the reasonableness of that section:

Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3, and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the

⁹The previous employment agreements also contained covenants not to compete with regard to accounts receivable payments. R.pp. 1390; 1420.

protection of Medical Group.

R.pp. 1291; 1312.¹⁰

Another provision of the Employment Agreement granted a departing physician the right to a percentage of the accounts receivable, as determined by a certain formula, provided that the departing physician did not start a competing practice. R.pp. 1286; 1306. Again, the Respondents contractually agreed to reasonableness of that provision:

Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

R.pp. 1288; 1309.

The Employment Agreement also specifically provided that if a court found the provisions of the Employment Agreement to be inappropriate as to time period, scope of activity, or geographical location, a court could revise the Employment Agreement as to appropriate time period, scope of activity of geographical location. R.pp. 1291; 1312.

Prior to the construction of the new facility and the execution of the new agreements, Columbia Heart's then-existing employment contracts contained some restrictive language.

R.pp. 1390; 1420. For example, the prior Employment Agreement stated:

Notwithstanding any other provision of the Agreement in the event Physician continues or commences the active practice of medicine in the field of cardiology within Richland or Lexington Counties, South Carolina at any time during the twelve (12) month period immediately following termination (for any reason, whether with or without Cause) of this Agreement, then

¹⁰There is another provision acknowledging the reasonableness of provisions involving accounts receivable which is discussed, *infra*.

Physician shall forfeit any monies payable to Physician....

R.p. 1420.¹¹ However, in light of the major investment being undertaken in constructing the new building, Columbia Heart needed to strengthen and clarify the covenants. R.p. 889:1-11. Because of the size of the investment and importance of the covenants, Columbia Heart retained a lawyer, David Summer of Parker Poe Adams & Bernstein, LLP, to draft the new Employment Agreements. R.pp. 1007:17-18; 1013:5-17. Both Summer and his firm have expertise in the field of employment law and are well-respected in the community. R.pp. 1010:25-1011:5.

The shareholder physicians needed to ensure that all other shareholder physicians would continue work for, and not against, Columbia Heart, or that, in the alternative, the physician would pay Columbia Heart compensation to provide the necessary income stream for Columbia Heart to cover the burden of the new building and the loss to the practice. R.pp. 904:20-905:11. The shareholder physicians had meetings in which drafts of the Employment Agreements were discussed. R.pp. 743:22-744:16; 904:20-905:11. At one such meeting, the changes to the former employment agreement proposed by Summer were presented as a PowerPoint presentation by one of the shareholder physicians. *Id.* As additional consideration for the covenants, the Employment Agreements provided that any physician who left and did not compete with Columbia Heart would receive \$5,000 per month for one year, a portion of his accounts receivable, and any accrued, but unpaid, salary. R.pp. 1288; 1309.

¹¹Feldman's 1997 Employment Agreement contained an identical provision. R.p. 1390.

The Respondents signed the new Employment Agreements on July 15, 2004. R.pp. 1280; 1301. The new Richland County facility was opened in December 2005, just weeks prior to the Departing Doctors announcement in January 2006 that they were leaving Columbia Heart. R.pp. 1411; 1438. Around the same time, Respondents began taking steps to open a practice in Lexington County.¹² In addition, through the efforts of Dr. Feldman's wife, Dr. Jennifer Feldman, Respondents recruited and hired most of the staff from Columbia Heart's Lexington office. R.pp. 676:3-680:15. In fact, at least 12 employees of Baugh and Feldman's new practice had been employed by Columbia Heart just prior to Respondents' departure. Id.

The Departing Doctors tendered their resignations on January 22, 2006, providing Columbia Heart with 90 days notice. R.pp. 1411; 1438. Respondents continued to work for Columbia Heart after providing notice of their resignations. R.pp. 691:20-25; 954:14-352:3.

¹³ The Respondents' resignation with Columbia Heart was effective on April 21, 2006, and both Respondents ceased all work for Columbia Heart at that time. R.pp. 737:6-8; 902:17-19.

After tendering their resignations but while they continued to work at CHC, the Respondents filed a lawsuit for declaratory judgment and Appellant counterclaimed for breach of contract. R.p. 40. The lawsuit was still pending when the new medical practice

¹²Baugh and Feldman had already decided to open the competing practice, Lexington Heart Clinic, LLC, prior to their resignation. and they also began scouting locations, meeting with banks regarding financing, and making other plans. R.p. 1407.

¹³Dr. Baugh did take vacation from April 10-21, 2009, but was still technically employed by Columbia Heart.

formed by Baugh and Feldman, Lexington Heart Clinic, LLC, opened to patients on May 1, 2006. R.pp. 659:13-15; 691:17-19.

ARGUMENT

I. The lower court erred in applying a reasonableness analysis because the contractual provision is equivalent to an agreement among partners.

Columbia Heart, at the time this litigation began, had twelve shareholder physicians. Although Columbia Heart is professional association, it is akin to a professional partnership, in which the shareholders receive draws for fees not yet earned, as opposed to salaries. R.pp. 1105:15-1106:3. In other words, while the organizational entity was designed as professional association, in practice, Columbia Heart was a partnership and the Employment Agreement should be treated as an agreement between partners.

In *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 437 S.E.2d 557 (Ct. App. 1993), the court held valid a contractual provision that required a withdrawing partner to pay the partnership two times amount of the partnership's annual gross billings to former or existing client for any work the withdrawing partner did for former or existing clients. Using that contractual formula, the amount that the departing accountant was required to pay was \$879,068. The court found it was not a covenant not to compete subject to a reasonableness review but simply "a [contractual] business arrangement incident to the continuing practice of the parties" *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993).

The contractual provision at issue in this case is one that applies only to shareholder physicians. The Employment Agreement allows for competition, provided that Respondents

pay a contractually agreed upon price in order to open a new medical practice in Lexington County. Specifically, Section 5.4 provides:

In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Medical Group liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income (defined below). Medical Group may offset any amounts owed to Physician against amounts owed by Physician to Medical Group hereunder. For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of the Physician shareholders of Medical Group in the calendar year prior to the date of termination or expiration of this Agreement.

R.pp. 1290; 1311. In other words, Section 5.4 is like the contractual provision in *Hunt*. Similarly, it is not a covenant not to compete but simply "a [contractual] business arrangement incident to the continuing practice of the parties"

The lower court rejected Appellant's argument on the grounds that Columbia Heart was not a partnership and that the agreement contained a forfeiture which was subject to a reasonableness review. The lower court was incorrect on all counts.

The Employment Agreement in this matter is not a typical employment agreement in the hierarchical structure for an employer-employee relationship. In this case, Respondents were two of twelve physician shareholders of a professional association, and the agreement is virtually identical to an agreement between professional partners. The agreement here, like the one in *Hunt*, is not subject to reasonableness requirements because it is merely an agreement between partners.

II. The scope of the non-compete agreement is not overly broad because it simply prevents direct and indirect competition.

A covenant will ordinarily be upheld if: 1) it is necessary for protection of the

legitimate interest of the employer; 2) it is reasonably limited with respect to time and place; 3) it is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; 4) it is reasonable from the standpoint of sound public policy; and 5) it is supported by a valuable consideration. *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961); *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983). In this case, the lower court found that all of the above elements were met except the requirement that the covenant be tied to the legitimate efforts of the doctors to earn a living. R.p. 20. Because the court found that the third element had not be met, it ruled the entire covenant invalid. R.p. 1.

The lower court's order held that the covenant prohibited Respondents from assisting any entity or person engaged in the field of cardiology (even prohibiting renting property to such person) and thus the scope was excessive. The court relied on *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995) and *Preferred Research* for its position. Neither case applies here.

In *Faces Boutique*, the employer attempted to restrict its employee, who was trained to perform facials, from working for any business that provided facials, spa services, cosmetic application or sold cosmetics. Because the employer attempted to categorize selling of cosmetics and multiple other services as "competition", the court found the covenant exceeded protection of "any legitimate business interest[.]" Here, however, the covenant was drawn to protect the legitimate business interests of Columbia Heart:

Notwithstanding any other provision of this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reasons whether with or without Cause) of

this Agreement Physician continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of Section 4.5(I). The provisions of this Section 4.5(I) shall survive the expiration or termination of this Agreement for any reason.

R.pp. 1288; 1309.¹⁴ Section 5.1 of the Employment Agreement defines "Business as the practice of medicine in the field of cardiology." R.pp. 1288; 1309. Under Section 5.2, Respondents are restricted from competing by engaging in the "Business," or assisting anyone engaging in the "Business." R.pp. 1289; 1310. In other words, there is only one service being restricted -- the practice of medicine in the field of cardiology. Even under the *Faces Boutique* logic, it is obvious that Appellant only sought protection of its "legitimate business interest."

The other South Carolina case upon which the lower court relied, *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987), is also inapplicable. The lower court's order cites this case for the proposition that a covenant that restricts an employee from being employed "in any capacity" by a competing business is always unreasonable. First, *Preferred Research* is a case that was analyzed under Georgia law. Secondly, the covenant in that case was overly broad because of the definition of both the "any capacity" language and the breadth of the definition of "business." The clause there stated that the employee:

¹⁴In fact, the change in the 2004 Employment Agreement *reduces* the size of the territorial limitation from all of Richland and Lexington Counties to a twenty mile radius.

shall not thereafter engage directly or indirectly as a principal or employee, alone or in association with others in a similar business, in any capacity....

Id. at 547, 357 S.E.2d at 490. The description of “business” was broadly drafted to include a variety of services:

...a national service in the fields of courthouse records research and verification, title searches, title insurance commitments and policies, loan closings, real estate appraising, credit investigations, examination of records affecting title to real estate and personal property and related services.

Id. at 548.

Here, the Employment Agreement prohibits Respondents from competing for twelve months within the twenty-mile radius. “Competing” is defined as engaging in the Business, owning an interest in a business which engages in the Business, or assisting any one else to engage in the Business, within the twenty-miles territory.¹⁵ R.pp. 1289; 1310. “Business” is further defined as: “the practice of medicine in the field of cardiology.” R.pp. 1288; 1309.

In the Employment Agreement here, “business” has a very limited and focused definition: “the practice of medicine in the field of cardiology.” R.pp. 1288; 1309. It does not prohibit the practice of medicine in some other field. The term “practice of medicine” is statutorily defined, S.C. Code § 40-47-20(36); R.p. 1055:12-14. The definition includes activities such as: offering or undertaking to prescribe medicine; offering or undertaking to diagnose, correct or treat any illness, wound, condition, etc.; and offering or undertaking to perform any surgical operation upon a person. S.C. Code § 40-47-20(36).

Thus, the fact that the Departing Doctors are prohibited from assisting in the practice

¹⁵The lower court found that the 20 mile radius, which extended from the Richland and Lexington offices, was reasonable and this ruling is unappealed.

of medicine in the field of cardiology as a director, officer, employee, agent, consultant, lender, lessor, or other wise is not unreasonable. That provision simply prevents the Departing Doctors from being able to circumvent the agreement by competing in cardiology indirectly when they cannot compete directly. As David Summer, who drafted the agreement, testified at trial, the covenant was as narrowly drawn as possible to prevent Respondents from doing indirectly what they could not do directly:

What you're trying to do is you're trying to be very definitive about the activities that are prohibited. And what we're trying to do is make it real clear that they can't go out there and actively compete to the injury of Columbia Heart. And we feel like those three definitions, and these are standard in our contracts, adequately covered that and were sufficiently narrow in scope.

R.p. 1028:5-12. As he testified, The covenant must be written broadly enough to prevent a departing physician from using the "back door" to compete:

You can't do indirectly and use your experience and expertise to the detriment of your employer.

R.p. 1063:13-15.

Thus, Respondents were prohibited from engaging in the practice of medicine in the field of cardiology or assisting someone else in the field of cardiology in the practice of medicine.¹⁶ There is no dispute that "the practice of medicine in the field of cardiology" means seeing patients and performing procedures. Respondents indisputably have engaged in "the practice of medicine in the field of cardiology" only three hundred yards away from Columbia Heart's Lexington office, which was exactly what the covenant sought to prevent.

¹⁶Of course, Respondents were free to assist any medical practice or physician who was not engaged in the practice of medicine in the field of cardiology.

R.pp. 787:1-11; 1095:6-9.

The restrictive language used in the covenants is not unusual. Similar covenants in other jurisdictions have been upheld. In a case virtually on point with the facts of this case, the North Carolina Court of Appeals upheld the enforcement of a covenant not to compete in a cardiologist's contract. *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563 (N.C.App. 2006). The covenant upheld in that case also had a formula, almost identical to the contractual formula in this case, for an amount which a departing physician could pay to compete. In *Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.2d 81 (Kan. 2005), the following covenant was upheld:

9. *Restrictive Covenant.* During the term of this Agreement and for a period of two (2) years after the termination of this Agreement for whatever reason, Doctor will not, without the prior consent of Employer, directly or indirectly engage in the practice of medicine and/or surgery, nor own, manage, operate, control, be employed by, invest in, participate in, advise, consult with, or be connected with the ownership, management, operation or control of any business engaged in the practice of medicine and/or surgery within 75 miles of the city of Wichita, Kansas.

Id. at 85. In that case, the covenant was even more extensive than the one here in that it prohibited the practice of medicine, not just the practice of cardiovascular surgery, the physicians' speciality in that case.¹⁷ *Id.* at 87. However, the court noted that while the covenant imposed a burden on the physicians, it did not impose an undue burden and therefore was enforceable. *Id.* at 87. In *Mohanty v. St. John Heart Clinic*, 832 N.E.2d 940 (Ill. App. 2005), the court granted a preliminary injunction to enforce a covenant which provided, in part:

¹⁷The covenant there was also twice as long in duration as the one in this case and covered a far greater territory.

For a period of 5 years after the termination of this Agreement, the Employee shall not (within a radius of 5 miles from any of Corporation's offices in Illinois) directly or indirectly own, manage, operate, control, be employed by participating in or be connected in any manner with any office established for the practice of medicine....

Id. at 942. The court in *Prairie Eye Center Ltd. v. Butler*, 768 N.E.2d 414(Ill. App. 2002)

held the following covenant enforceable:

Upon the expiration or termination of this Agreement, employee covenants that he will not, for a period of two (2) years after expiration or termination, engage in, be associated with or have a financial interest in any medical practice or ophthalmology practice, either directly or indirectly, as employer, employee, principal agent, independent contractor, consultant, partner, stockholder, creditor in an other capacity, at any location(s) within Sangamon County, Illinois[,] or within ten (10) miles of Hillsboro, Illinois [,] and ten (10) miles of any branch office of Employer.

Id. at 417.

It is obvious that in order for a covenant to be effective, it has to prohibit the departing physician from both direct and indirect competition against his former practice. Thus, Respondents are prohibited from owning a business in the practice of medicine in the field of cardiology, engaging in the practice of medicine in the field of cardiology, or assisting someone else in the field of cardiology to engage in the practice of medicine. The uncontradicted facts are that Respondents: opened their own business within one month after leaving Columbia Heart (R.pp. 691:17-19; 659:13-15); engaged in the practice of medicine in the field of cardiology (R.pp. 787:1-11; 942:23-935:3); saw and treated patients in their new medical practice (R.p. 958:20-22); and assisted others (such as each other and Dr. Jennifer Feldman) in the practice of medicine in the field of cardiology (R.p. 659:21-660:10). It is also undisputed that the practice operated by Respondents was not outside the territorial

restriction. R.pp. 659:3-12; 1095:6-9. Respondents clearly engaged and assisted in “the practice of medicine in the field of cardiology” only three hundred yards away¹⁸ from Columbia Heart’s Lexington office, which was exactly what the covenant sought to prevent.

Furthermore, the non-compete clause is not an absolute restriction in that it allows the Respondents to work within the 20 mile restricted area without waiting for one year, provided that Respondents pay the contractually-agreed upon sum to Columbia Heart. South Carolina courts have upheld similar restrictions. In *Caine & Estes Ins. Agency, Inc. v. Watts*, 278 S.C. 207, 209, 293 S.E.2d 859,860 - 861 (1982), the court upheld a covenant that restricted an employee from selling insurance to an employer’s customers for three years unless the employee paid the employer part of the commission received. The geographical restriction was for the area where the employer’s clients were located. *Id.* The court noted that the employee was free to sell anywhere else, and thus the agreement was not unduly harsh or oppressive.

III. The court can modify the terms so as to render the covenant reasonable and enforceable because the parties contractually agreed to do so.

The lower court erroneously concluded that it could not rewrite the covenants. Generally, courts cannot alter the covenant entered into by the parties, but can merely find it enforceable or unenforceable. *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958) (“We cannot make a new agreement for the parties into which they did not voluntarily enter.”). However, the parties can agree to court modification if set forth expressly in the contract. *Cf., Rockford Mfg. Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C.2003)(Recognizing

¹⁸R.p. 1095:6-9.

that courts can, in certain situations, “blue pencil” any overbroad provisions of the covenant and enforce the narrowly tailored ones.). Such modification is known as “blue penciling,” which is “a process whereby a court will rewrite a covenant not to compete which is unreasonable in its restrictions as to time and territory, thereby transforming the covenant into a reasonable one which is then enforced.” *Broadway & Seymour, Inc. v. Wyatt*, 1991 WL 179084, 5 (4th Cir. 1991).

In *Rockford Mfg. Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003), the court found that because the parties intended, as evidenced by the express language of the contract, that any invalid or unenforceable provisions were severable, the court could modify the agreement. That court also noted that “*Eastern* and its progenitor, *Somerset*, suggest that South Carolina has not wholly rejected the ‘blue pencil’ test.”¹⁹ *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681, 687 -688 (D.S.C. 2003). The court explained that while an indivisible covenant could not be modified, a severable covenant could be modified. The court also found that just because “the particular agreements at issue in *Eastern* and *Somerset* did not lend themselves to severability” did not mean that there were not other covenants that were divisible so that a court could

honor the principles of *Somerset* and yet still, in effect, “blue pencil” any overbroad provisions of the covenant and enforce the narrowly tailored ones.

Rockford at 688. Ultimately, that court held that the employer showed a likelihood that the non-solicitation agreement was such a divisible covenant, and thus the employer had a

¹⁹The cases to which the District Court refers are *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22, 23-24 (1972) and *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958).

strong possibility of prevailing on the merits, which warranted the preliminary injunction.

The court further explained that a covenant is severable where it “is in effect a combination of several distinct covenants.” *Rockford* at 688, citing *Somerset*, 104 S.E.2d at 348. In *Rockford*, the covenant incorporated a definition of “Affiliated Companies” which could be altered without writing into the agreement something unintended by the parties, suggesting that the covenant operated more like several distinct covenants than a single indivisible one. *Id.* The definition of Affiliated Company expressly listed the companies that might have an interest in enforcing the covenant against the defendant; thus, the court could, using the “blue-pencil” method, strike companies that had *no* legitimate interest without disrupting the integrity, continuity, or intent of the remaining provisions. *Id.*

In addition to the structure of the covenant lending itself to severability, the *Rockford* court, relying on *Eastern*, also determined that the parties expressed the intent that the covenants be severable. The agreement there contained a severability clause which stated that the “invalidity or unenforceability of any provisions of the Agreement shall not affect the other provisions hereof, and this Agreement shall be enforced and construed as if such invalid or unenforceable provision were omitted.” *Rockford* at 688-689.

Here, the parties expressly agreed that a court could modify the covenant. Section 5.5 of the Employment Agreement states, in pertinent part:

If any provision of Sections 5.1 and 5.2 relating to the restrictive periods, scope of activity restricted and/or the territory described therein shall be declared by a court of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity

restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

R.pp. 1291; 1312. Furthermore, like the parties in *Rockford*, the physicians at Columbia Heart, including Drs. Baugh and Feldman, expressed their intention that the provisions be severable:

The provisions of this Agreement are deemed by the parties to be severable, and the invalidity of unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any other provision.

R.pp. 1291; 1312. In other words, the parties expressly intended for the provisions to be severable and expressly agreed that the court could blue pencil.²⁰ The parties contractually agreed that the court could determine the scope of activity if the covenant was deemed too broad. Thus, even if the court determined that it would otherwise be unable to blue-pencil, the parties have contractually agreed to allow the court to do so.

The covenant in this case has distinct definitions, which lends itself to blue-penciling, just as the covenant in *Rockford* did. The covenant separately defines the duration, the geographical location, and the scope of prohibited activity. In particular, the definition of compete is as follows:

"Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or otherwise) to engage in the Business in the Territory.

²⁰Even if the court would not have the authority to blue pencil an agreement on its own initiative, the fact that the parties specifically consented to such allows the court to do so here.

Section 5.2(I), Employment Agreement of Dr. Baugh.²¹ This definition does not require the court to rewrite the definition; instead, the court can strike out the words or phrases it determines to be overly broad. For example, it could strike out specific words in section (C), such as “or otherwise”, should the court determine that phrase to be too vague. Alternatively, the court could strike the entire clause in section (C). The covenant would remain intact as to the prohibition against organizing or owning any interest in a business which engages in cardiology or practicing medicine in field of cardiology, both of which are legitimate concerns of Columbia Heart. Under either option, Respondents have still violated the covenant.

The lower court places great reliance on *Poynter Inv. Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010), a case that was issued by the Supreme Court after this case was tried. However, the lower court erred in its analysis because *Poynter* does not apply here. In *Poynter*, the parties agreed to two alternatives if the trial court found the 75-mile geographic restriction overly broad. In that case, the parties agreed that the restriction could be reduced to: 1) Greenville County and all bordering counties, or 2) Greenville County only. Instead of amending to either of the contractually-agreed upon restrictions, the trial judge inserted his own definition by limiting the territory to “within Greenville County, South Carolina **and within an area encompassing fifteen miles in any direction from [the Premises].**” Id. at 585, 694 S.E.2d at 17 (emphasis added). The South Carolina Supreme Court found that the trial judge had erred in blue-penciling the covenant,

²¹The “Business” is defined as “the practice of medicine in the field of cardiology.” R.pp. 1288; 1309.

noting that the court had previously “held that it would violate public policy to allow a court to insert a geographical limitation where none existed” and cited *Stonhard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005).²² *Id.* at 587-588, 694 S.E.2d at 17. In *Poynter*, the lower court inserted the geographical limitation of “fifteen miles in any direction from [the Premises]” which did not exist in the contract. The Supreme Court held that “the trial judge erred in rewriting the territorial restriction in the parties' contract.” *Id.* at 588, 694 S.E.2d at 18.

In this case, all parties specifically agreed to allow the court to re-write part of the covenant, stating that if the time, geographical limitation, or scope was deemed unenforceable, that “the time period, scope of activity restricted and or area of restriction held reasonable by the court shall thereafter be” applicable to the agreement. R.pp. 1291; 1312. Thus, *Poynter* is distinguishable because the contract did not allow the court to rewrite the size of territory; in our case, the court can, by the express terms of the agreement, alter the scope of activity.

Furthermore, contrary to the lower court's assertion, the covenant can easily be blue-penciled without drastically changing the intent of the agreement. As David Summer testified, the covenant was intended is to prevent a departing physician from directly or indirectly competing. Direct competition would included, as here, the departing physician performing cardiology services at another practice within the territory. However, a departing physician could indirectly compete by becoming a shareholder in a competing practice, even

²²The covenant in *Stonehard* contained no geographical limitation and the Supreme Court held that a trial court could not create one.

if the physician did not actually perform services there. Under the Employment Agreement, that phrase prohibiting Respondents from “assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or other wise)” is to prevent such indirect competition. If that phrase is, as the lower court found, too broad, the words “consultant, lender, lessor, or otherwise” could be struck, while Respondents would still be prohibited from indirect competition, and the intent of the agreement would remain intact.

IV. The accounts receivable covenant is not tied to the other covenant, and thus survives even if the other covenant does not.

The lower court wrongly concluded that the portion of the Employment Agreement governing accounts receivable was so closely tied to the Article 5 covenant, which the lower court refused to uphold, that the accounts receivable covenant must also fail.

Respondents had previously entered into employment agreements with Columbia Heart. Dr. Barry Feldman’s Employment Agreement was signed in 1997 and Dr. Baugh’s in 1999. R.pp. 1382; 1412. Under the terms of both the old agreement and the 2004 Employment Agreement, all accounts receivable belonged to Columbia Heart, not the individual physician:

Medical Group shall own and control all collections and billings arising pursuant to the rendering of medical service by Physician or any other employee. All fees and compensation received or realized by Medical Group, as a result of the rendering of services by Physician and other employees shall belong, be paid and be delivered to Medical Group.

R.pp. 1306; 1416. The accounts receivable are not paid to each physician for their performance under the contractual compensation plan. A physician only becomes eligible to receive a portion of the accounts receivable when he leaves the practice, for retirement or

other reasons. R.pp. 1284; 1305. Under the Employment Agreement, Respondents are contractually granted a percentage of the accounts receivable, but only if they do not compete. R.pp. 1287-1288; 1308-1309. The old agreement provided:

Notwithstanding any other provision of this Agreement in the event Physician continues or commences the active practice of medicine in the field of cardiology within in Richland or Lexington Counties, South Carolina at any time during the twelve (12) month period immediately following the termination (for any reasons whether with or without Cause) of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of Section 4.5(i). The provisions of this Section 4.5(i) shall survive the expiration or termination of this Agreement for any reason.

R.pp. 1390; 1420. When the new Employment Agreement was created in 2004, the covenant regarding the accounts receivable remained, with only slight changes:

Notwithstanding any other provision of this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reasons whether with or without Cause) of this Agreement Physician continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of Section 4.5(i). The provisions of this Section 4.5(i) shall survive the expiration or termination of this Agreement for any reason.

R.pp. 1288; 1309.

This covenant existed before the covenant in Article 5 of the 2004 Agreement, and was not tied to Article 5. In other words, both the old agreements and the 2004 Employment Agreement set forth a contractual computation that provided a departing physician with a share of Columbia Heart's accounts receivable, but only if they did not compete. In order to

collect a percentage of the accounts receivable, the departing physician had to first abide by the condition precedent, which was that the physician could not compete within a specified territory. Unlike Article 5, the prohibition in this section was limited to "the active practice of medicine in the field of cardiology." R.pp. 1288; 1309.

The lower court properly found that the definition of compete in Article 4 was derived from the previous employment agreement and different from the definition in Article 5 (Order, p. 9) so that Accounts Receivable covenant could survive even in Article 5 did not. However, the lower court then erred by concluding that Article 4 was tied Article 5 through sections 4.5 and 5.4(a):

First, Article 4.5 states that the forfeiture of the accounts receivable based monetary amount, together with the \$591,710 amount, is restitution to CHC for damages it will suffer as a result of competition. Second, Article 5.4(a) similarly states that the forfeiture of the accounts receivable based monetary amount, along with together with the \$591,710 amount, is required for the physician to practice in breach of the new non-competition provisions at § 5.1.

R.p. 10. The lower court concluded that the provisions are so intertwined as to render both unenforceable. However, the lower court wrongly focused on the contractual explanation of why Columbia Heart is entitled to the accounts receivable. The explanation is not relevant because the fact remains that the definitions of competition are in Section 4.5(I) and Section 5.1 are different; thus, even if the covenant in Section 5.1 is determined to be too broad, the covenant in Section 4.5(I) survives. It is undisputed that Respondents "continue[d] or commence[d] the active practice of medicine in the field of cardiology within a twenty (20) mile radius" of Appellant's Lexington office. R.pp. 787:1-11; 1095:6-9. Thus, Respondents have violated that contractual provision if nothing else, and they are not entitled to any

percentage of the accounts receivable.

Moreover, the lower court improperly rejected the reasonableness provisions acknowledged by Respondents. The 2004 Employment Agreement provides:

Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(I) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

R.pp. 1288; 1309. Because the provision acknowledges that the loss of the Accounts Receivable is "partial restitution" for competition of the Respondents, the provision is valid, even if the other provision or remedies are struck.

V. The lower court erred in applying the Wage Payment Act.

The Wage Payment Act, S.C. § 41-10-10, et seq., does not apply to this matter. Columbia Heart is a professional association, which operates much like a partnership. As in a partnership, Respondents were not being paid wages, but were receiving advances or draws on monies yet to be earned. R.pp. 1105:15-1106:7; 1150:17-21. An "advance" is not a "wage" but a loan which carries with it the obligation to repay. *Boyd v. Gynecologic Associates of Jefferson Parish, Inc.*, 15 So.3d 268, 272, 08-1263, 6 (La.App. 5 Cir. 2009).

At the end of the year, or the end of the doctor's employment, if the doctor had not brought in sufficient earnings to exceed the draws, the doctor had to repay Columbia Heart. R.pp. 1105:15-1106:7; 1140:17-21. This process is known as a "true-up." *Id.* At the time that Respondents left Columbia Heart Clinic, a true-up was performed, which revealed that Dr. Baugh owed \$24,888 and Dr. Feldman owed \$55,273. R.p. 1220:2-11. Had Respondents

received another check, it would have only increased the amount due to Columbia Heart under the true-ups.

At trial, Respondents acknowledged that the use of true-ups was routine in Columbia Heart's practice. R.pp. 916:22-917:11. Other doctors that have had a negative true-up have been required to pay monies back to Columbia Heart and Respondents were aware of such situations. R.pp. 917: 4-11. For example, Dr. Humphrey retired in June 2006. R.p. 1154:9-16. Dr. Humphrey did not open a competing practice and therefore collected the \$5,000 benefit as well as his portion of the accounts receivable. R.pp. 1154:24-1155:9. However, because Dr. Humphrey was negative (in that he had received more draws than he had earned), the amount of accounts receivable paid to Dr. Humphrey was offset by the amount he owed Columbia Heart. R.pp. 1154:24-1155:9.

Respondents have received all monies to which they are entitled, and in fact, *owe* money to Columbia Heart. As detailed above, Respondents were employed by Columbia Heart until April 21, 2006. During their term of employment during 2006, Respondents were paid regular draws, with the last draw check paid to Respondents on April 15, 2006. R.p. 1140:22-24.

Respondents' last day of employment with Columbia Heart was April 21, 2006, but the draws were not to be paid until after their last day. R.pp. 1140:25-1141:7; 715:14-716:3.

If Columbia Heart had issued additional draw checks to Respondents, it would only have increased the amount that Respondents were to pay back to Columbia Heart under the "true-

ups.” Thus, Respondents were not entitled to any further checks.²³

Furthermore, even if the checks that Respondents received could be considered “wages” under the Act, they contractually gave up the right to any additional pay. Section 4.5(f) states that if the departing physician terminates the Employment Agreement, Columbia Heart shall pay to the physician “all salary earned or accrued but unpaid as of the date of Physician’s death[.]”²⁴

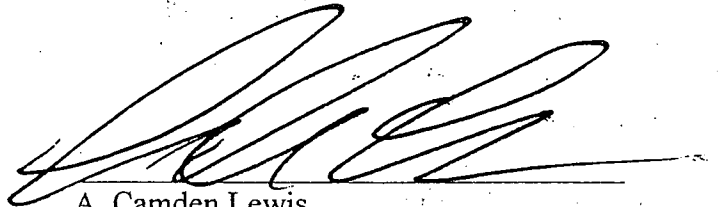
In addition, the accounts receivable are not subject to the Wage Payment Act because, as set forth above, the accounts receivable are not paid to each physician for their performance under the contractual compensation plan. The accounts receivable do not belong to the individual physician, but to Columbia Heart. Rpp. 1283; 1304. Thus, the Respondents’ claim is subject to contract interpretation, not one within the wage claim statute.

²³Similarly, Dr. Feldman was not entitled to a check for director’s fees for the same reason. Appellant admitted that director’s fees in the amount of \$4,500 had inadvertently not been paid to Dr. Feldman. R. pp. 1142:18-1143:15. When the oversight was discovered, Appellant did not remit a check because Dr. Feldman was in a negative position under the true-up. *Id.*

²⁴The use of the word “death” in this paragraph was clearly a typographical error. A previous section, Section 4.5(b), contains almost identical provisions for the event of termination of the Agreement by the death of a physician, rather than resignation or withdrawal of a shareholder physician. Obviously, the word “death” was accidentally used in Section 4.5(f) instead of a more appropriate term. However, the meaning is clear. A departing physician who competes is not entitled to any salary accrued but unpaid as of the date of this termination, which, in this case, is April 21, 2006.

CONCLUSION

The contractual provision at issue is equivalent to an agreement between partners and not subject to a reasonableness review. However, even if a reasonableness review is applied, the covenant should be upheld. Furthermore, the parties explicitly contracted to allow the court to rewrite any provision of the covenant that was deemed unreasonable. Finally, the Wage Payment Act does not apply to the Accounts Receivable or draws advanced to Respondents.



A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS & BABCOCK, L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
March ____, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley. Circuit Court Judge

Case No. 06-CP-32-0371

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D., ... Respondents.

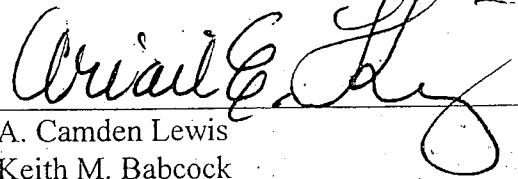
V.

Columbia Heart Clinic, P.A., ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Appellant complies with Rule
211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.

LEWIS & BABCOCK, L.L.P.



A. Camden Lewis

Keith M. Babcock

Ariail E. King

1513 Hampton Street

Post Office Box 11208

Columbia, South Carolina 29211

(803) 771-8000

Attorneys for Appellant

Columbia, South Carolina
March 28, 2011

1503

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

C. A. NO. 2006CP32-0371

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. Respondents,

v.

Columbia Heart Clinic, P.A. Appellant.

RESPONDENTS' FINAL BRIEF

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SC COURT OF APPEALS

March 17, 2011

Charles F. Thompson, Jr.
Michael D. Malone
Malone, Thompson, Summers & Ott LLC
339 Heyward St., Suite 200
Columbia, S.C. 29201
803-254-3300

ATTORNEYS FOR THE RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. May this court affirm the circuit court on the alternative ground that the 2004 Agreements were not supported by adequate consideration?
2. The circuit court correctly held the Agreements were required to be reasonable and were overbroad because they prohibited Drs. Baugh and Feldman from working, in any capacity, for any business engaged in the practice of medicine in the field of cardiology.
3. Did the circuit court correctly hold that the non-competition provisions of an employment agreement must be reasonable?
4. Did the circuit court correctly hold that the non-competition agreements in this case were not reasonable because they purport to prohibit Drs. Baugh and Feldman from working with a business that engages in cardiology in any capacity?
5. Did the circuit court correctly hold that it could not rewrite the Agreement for the parties because to do so would require it to make substantive changes?
6. Did the circuit court correctly hold that Drs. Baugh and Feldman were entitled to compensation provided for in the Agreements that would otherwise have been forfeited if the non-competition provisions were enforced?
7. May this court affirm the circuit court on the alternative grounds that the scope of the geographical restriction was overly broad?

STATEMENT OF THE CASE

The Plaintiffs (Drs. Kevin Baugh and Barry Feldman) are two cardiologists who own and operate the Lexington Heart Clinic (LHC) located on the Lexington Medical Center (LMC) campus. Before April 21, 2006, they were employed by the Defendant (Columbia Heart Clinic (CHC)) at CHC's Lexington, South Carolina office. After that time, both Plaintiffs left CHC's employ and opened LHC. The Plaintiffs each had essentially identical Employment Agreements (Agreements) with CHC that contained non-competition provisions that applied following the termination of their employment.

This action was brought by the Plaintiffs as a declaratory judgment action seeking a ruling that the non-competition provisions were invalid. CHC counterclaimed for breach of contract, breach of fiduciary duty, and breach of duty of loyalty and sought a preliminary injunction to prevent Plaintiffs from opening LHC. CHC's motion for a preliminary injunction was denied.

Plaintiffs subsequently added claims for breach of contract, violation of the South Carolina Wage Payment Act, and similar claims based on CHC's alleged failure to pay compensation due. The circuit court, sitting non-jury, held a trial beginning May 12, 2009 and heard testimony and took evidence on the non-jury questions of the validity of the non-competition provisions of the Agreements and the Plaintiffs' claims to unpaid compensation under the South Carolina Wage Payment Act. The remaining claims, by consent of the parties, are to be heard after the resolution of these issues.

Judge William P. Keesley ultimately ruled that the non-competition provisions of the Agreements were unenforceable because they were overbroad in that they sought to prohibit the Plaintiffs from working, in any capacity, for a business engaged in the practice of

medicine in the field of cardiology. The court held that a restriction that went beyond prohibiting the actual practice of medicine in cardiology was not enforceable under South Carolina precedent. The court then awarded the Plaintiffs compensation due them under the Agreements. That compensation was being withheld by CHC only because of the unenforceable non-competition provisions.

STATEMENT OF THE FACTS

Dr. Feldman joined the Columbia Cardiovascular Clinic (a predecessor to CHC) in 1993. Dr. Baugh joined that same entity in 1996. That entity later merged with another cardiology practice to form CHC. At the time of the merger, Dr. Feldman was an employee and shareholder of CHC (a corporation). Dr. Baugh became a shareholder of CHC in 1999.

Both Drs. Baugh and Feldman had employment agreements that preceded the 2004 Agreements. (*R. p. 1280, 1412*) (*D. Ex. 2, D. Ex. 7*). These prior agreements contained a non-competition provision at article 4(h) that provided, in relevant part:

... in the event Physician continues or commences the active practice of medicine in the field of cardiology within Richland or Lexington Counties, South Carolina at any time during the twelve (12) month period immediately following the termination ... of this Agreement, the Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5.

The "monies payable" in Section 4.5 was an amount of money determined by a formula. The amount was calculated by using accounts receivable balance that existed on the date of the termination of the Agreement times the physician's percentage ownership of CHC. (The A/R-based monetary amount). There were no other penalties or forfeitures provided in these prior agreements. The purported consideration for these agreements was a compensation system that was attached, as exhibit A, to the agreements.

The Agreements at issue in the case were entered into in July 2004. Although not relevant to whether or not the Agreements were enforceable, it was not contested that one of the main reasons CHC sought new employment Agreements in 2004 was because the CHC shareholders (through a separate entity) were constructing a new office building at the Richland Hospital campus of Palmetto Health.¹ The building was owned by Palmetto Heart MOB LLC ("the MOB") that was separate and independent of CHC. The MOB was formed in 2003 and its operating agreement was signed in October 2003. (*R. p. 1439*)(*D. Ex. 11*). The MOB operating agreement was drafted independently of the Agreements at issue in this case and contained no reference to CHC or to the shareholder's employment with CHC. The same shareholders of CHC owned a majority share of the building through the MOB although there were other shareholders in the building. CHC was going to be the anchor tenant of the new building.

Partially out of concern to protect the investment in the new building, the CHC shareholders sought to bind all the physicians more tightly to CHC. (*R. p. 842-843*) (*Tr. pp. 234-235*). The mechanism CHC settled on to do this was to create a new and stronger non-competition covenant to the employment agreements. Discussions about such a new provision occurred in 2004. As late as July 2004, CHC was still weighing how to draft the new employment agreements. (*R. p. 1020-1022*) (*Tr. pp. 412-414*). The Agreements are dated July 15, 2004.

No consideration was paid to any physician to sign the Agreement although the preamble in the Agreement refers to consideration being the "promises of the parties" and "other good and valuable consideration, the receipt and legal sufficiency of which are hereby

¹ "Palmetto Health" is an umbrella organization under which several hospitals in the Midlands of South Carolina operate.

acknowledged . . .” There was no change to the compensation system in connection with the 2004 Agreements. The Agreements purported to provide new consideration for the new non-competition provisions as follows:

Physician shall be paid Five Thousand and No/100 Dollars (\$5,000.00) per month for each of the twelve (12) months following termination, so long as the Physician is not in violation of Article V of this Agreement. In the event Physician violates Article V, no amount shall be paid pursuant to this section .

(R. p. 1288)(P. Ex. 1 Article 4.5(l) page 9).

The new non-competition provision states:

Physician, in the event of termination or expiration of this Agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete (defined in section 5.1 below) with Medical Group.

(R. p. 1289) (P. Ex. 1 Article 5.1(b) page 10).

“Compete” is defined as follows:

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of the Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

(R. p. 1289) (P. Ex. 1 Article 5.2 page 10).

“The Business” is defined as “. . . the practice of medicine in the field of cardiology.”

(Id. at § 5.1(a)). The “Territory” is defined as “the area within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.” *(Id. at § 5.2(iii)).*

Another provision of the Agreement is pertinent to this decision. Article 4 of the Agreement gives the Physician a right to a large payment determined by a formula. That formula is based on the physician's CHC shareholder ownership percentage times the accounts receivable balance on their termination date.² Termination can occur in several ways. The type of termination that occurred in this case was termination "without cause" and the Agreement required Drs. Baugh and Feldman to give ninety days notice (which they did). The A/R-based monetary amount is defined in the same manner as it was in the previous employment agreement.

According to the Agreement, if a departing physician breaches the non-competition provision, there are three significant consequences. First, Article 5.4(a) provides that a physician who practices in violation of the non-competition provisions must pay CHC an amount equal to the average W-2 income of all the physicians in the practice for the preceding year. Payment of this penalty "will entitle Physician to practice in breach of the provisions contained in Section 5.1 without further liability to Medical group for such breach." (*R. p. 1290*) (*P. Ex. 1, Article 5.4(a)*). The parties agreed this amount is \$591,710. Second, as indicated above, the physician does not receive the consideration provided for in Article 4.5(l). Finally, the physician forfeits his claim to the A/R-based monetary amount provided for in Article 4. With regard to the forfeiture of the A/R-based monetary amount, the definition of improper competition is different. It retains essentially the same non-competition language from Article 4(h) of the predecessor agreement that is quoted above. However, the new Agreement ties the A/R-based monetary amount forfeiture at Article 4 to

² Contrary to CHC's assertions, this payment is not based on the physicians' billings or the accounts receivable he generated. It is a bonus that uses the accounts receivable balance on the date of departure times the physician's percent of the stock he owns in CHC.

the new non-competition provisions of Article 5 in at least two ways. First, Article 4.5 states that the forfeiture of the A/R-based monetary amount, together with the \$591,710, is restitution to CHC for damages it will suffer as a result of competition. Second, Article 5.4(a) similarly states that the forfeiture of the A/R-based monetary amount, along with the \$591,710, is required for the physician to practice in breach of the new non-competition provisions at 5.1.

The forfeiture of A/R-based monetary amount was valued by Plaintiffs' expert at approximately \$172,070 for Dr. Baugh and \$171,460 for Dr. Feldman.³ (*R. p. 1322*) (*P. Ex. 4*). CHC claimed that Drs. Baugh and Feldman owed it \$24,888 (Dr. Baugh) and \$55,273 (Dr. Feldman). Drs. Baugh and Feldman counterclaimed under the South Carolina Wage Payment Act for two weeks pay that was never paid by CHC which amounts to \$8,095.17 (Dr. Baugh) and \$8,063.00 (Dr. Feldman) and their A/R-based monetary amount payment under the Agreements. Dr. Feldman also claims unpaid Director fees in the amount of approximately \$4,500. (*R. p. 1322*)(*P. Ex. 4*). None of these amounts appears to have been disputed by the parties.

Articles 4 and 5 both contain "acknowledgement of reasonableness" clauses. (*R. p. 1309 and 1312*)(*P. Ex. 1 Article 4.6 and 5.5 pages 9 and 12*). The Article 4 provision purports to acknowledge the reasonableness of the forfeiture of the A/R-based monetary amount and states:

³ During discovery, CHC was unable to provide an accounts receivable balance for the last day Drs. Baugh and Feldman worked. This amount is therefore estimated from the Plaintiffs' personal receipts after they left. Plaintiffs' expert also compared this number to the most recent available Accounts Receivable balances and determined that, if the most recent numbers were used, the amount would even be higher. Furthermore, Defendant's expert witness provided a report showing the A/R-based monetary amount that Drs. Baugh and Feldman might have gotten to be \$191,130. (*D. Ex. 22*).

4.6 Acknowledgement of Reasonableness. Physician acknowledges that the forfeiture [of the A/R-based monetary amount] is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by physician with the Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

Article 5.5 purports to require acknowledgment that the non-competition and penalty provisions contained in Article 5 are reasonable and it states:

5.1 Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3 and 5.4 (together with the remedy set forth in Article 4) are fair and reasonably required for the protection of the Medical Group.

CHC infers in its brief that Drs. Baugh and Feldman acted cavalierly toward CHC by leaving when they did and in close proximity to the time the new building was constructed. This allegation is irrelevant to the legal questions before the court. However, CHC has conveniently omitted the uncontested evidence that Dr. Feldman decided to leave CHC after some of the CHC physicians falsely accused his wife (who was also a physician employee of CHC) of lacking competence and because CHC denied her admission to the partnership. CHC's own witnesses admitted that the accusations were shocking and they agreed with Dr. Feldman's decision to leave. (*R. pp. 693-695, 844, 854, 867-872*) (*Tr. pp. 85-87, 236, 256, 259-264*). Dr. Baugh decided to leave with Dr. Feldman because of their close personal and working relationship and because it would have been very difficult to continue practicing in Lexington by himself. (*R. pp. 900-902*) (*Tr. pp. 292-294*).

ARGUMENT

A. The Circuit Court Should Have Ruled in Plaintiff's Favor on the Alternative Ground That the 2004 Agreements were Not Supported By Adequate Consideration

This court may affirm the circuit court's decision on any alternative ground that was argued to the circuit court and supported by evidence. The Respondents were not required to cross-appeal in order to present an alternative ground for affirmance.

The rule that arguments supporting the judgment as entered can be made without a cross-appeal likewise is stated and applied in many settings. Cross-appeal is unnecessary even with respect to matters that have been put aside by the district court, or matters that have been explicitly rejected by the district court.

Wright and Miller, *Federal Practice and Procedure* § 3904 (2d ed. 2001 and Supp. 2010)

(citing numerous cases on point).

The respective Employment Agreements were signed by Dr. Baugh and by Dr. Feldman in 2004 well after the commencement of their employment with CHC. Unlike restrictive covenants entered into at the inception of employment, restrictive covenants entered into after the onset of employment require new and independent consideration. *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207 (S.C. 2001).⁴

The Agreements purport, in section 4.5(l), to provide consideration by offering \$60,000 to be paid after termination of the Agreement—but only if the physician obeys the terms of non-competition clause. Such a promise is illusory, and therefore insufficient, because any physician who chooses to compete and incur the substantial penalties in the

⁴ The South Carolina Supreme Court in *Poole* explained its position as follows: "We are persuaded by jurisdictions, such as North Carolina, which find that ordinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, there is no consideration when the contract containing the covenant is exacted after several years employment and the employee's duties and position are left unchanged. *Kadis v. Britt*, 29 S.E.2d 543 (N.C. 1944). Therefore, we adopt the rule that when a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable." 548 S.E.2d 207, 209.

Agreement does not receive the \$60,000 and, therefore, has incurred obligations without receiving anything in return.

The circuit court held that the promise of future compensation was adequate consideration because it was in exchange for a promise to obey the non-competition provisions. This ruling was incorrect. Because of the way section 4.5(l) is worded, Dr. Baugh and Dr. Feldman did not receive and will never receive any additional compensation for signing the 2004 Employment Agreement that included the non-competition provision. Drs. Baugh and Feldman received only a conditional promise of future compensation subject to a complete forfeiture if the restrictive covenants were violated. The South Carolina Supreme Court's decision in *Poole* requires the payment of additional, valuable consideration. CHC's decision not to provide additional, valuable consideration to Drs. Baugh and Feldman is fatal to CHC's attempt to enforce the restrictive covenants.

The North Carolina Court of Appeals' decision in *Moses Cone Memorial Health Service Corp. v. Triplett*, 605 S.E.2d 492 (N.C. Ct. App. 2004) is instructive. In *Triplett*, a non-compete case involving a physician and her former employer, the North Carolina Court of Appeals held that the amount of money (\$53,340.16) paid to the physician as consideration for her agreement to the non-competition provision was not a proper element of damages in a non-compete case, and could not be recovered by the former employer as damages. The court of appeals in *Triplett* recognized that the \$53,340.16 was the consideration paid by the employer to Dr. Triplett in exchange for her agreement to the covenant not to compete, and therefore could not be retained by the employer because of a violation of the non-compete. The same logic applies here. There must be consideration that is paid for the obligations incurred by Drs. Baugh and Feldman.

It is true, as the circuit court noted, that mutual promises can afford sufficient legal consideration for the support of each other. *See, e.g., Carolina Chemical Equipment Co., Inc. v. Muckenfuss* 471 S.E.2d 721, 728 (S.C. App.,1996); *Evatt v. Campbell*, 106 S.E.2d 447 (S.C. 1959).⁵ However, here there was no mutual promise. According to CHC, Drs. Baugh and Feldman were required to pay \$591,710 each if they competed in violation of the terms. In return for incurring this obligation, they received nothing—the \$60,000 is not paid if the non-competition provisions are breached. And a breach occurs even if the penalty is paid. The agreement itself is an executory agreement (for which no consideration was paid) which is a concept separate from executory consideration. Courts do not enforce executory agreements without actual valuable consideration. *See, e.g., Black v. Gettys*, 119 S.E.2d 660, 669 (S.C.1961) (“Equity will never enforce an executory agreement unless there was an actual valuable consideration”) (quoting *Kaiser v. Cobbey*, 79 N.E.2d 604, 607 (Ill. 1948)). In some instances, an executory agreement can be enforced if fully performed. An example would be if one party agrees to accept a future payment for an existing obligation. Until the payment is received and accepted, however, the executory agreement is voidable by either party. *See, e.g., McManus v. Little*, 163 S.E.2d 613, 615 (S.C. 1968) (“when the executory contract is fully performed, as agreed, there is an accord and satisfaction and the previous existing claim is discharged. The original liability is not discharged by an executory accord, and, as long as the accord is executory, it is revocable at will by either party.”). However, the CHC 2004

⁵ “executory consideration is conceptually adequate to support enforceability of the contract.” *See, e.g., Marshall Durbin Food Corp. v. Baker*, 909 So.2d 1267, 1276 (Miss.App.,2005); *Jim Murphy & Assoc., Inc. v. LeBleu*, 511 So.2d 886, 891 (Miss.1987).

Agreement is not even of that type because CHC does not promise to do anything if a physician departs, competes, and pays the \$591,000 penalty.

Because no consideration was ever provided to support the new non-competition provisions, the circuit court should have found them unenforceable for lack of consideration.

B. The Circuit Court Correctly Held the Agreements Are Subject to Reasonableness Review

Non-competition agreements, to be enforceable, must pass a stringent review. In South Carolina, non-competition clauses are greatly disfavored by the Courts. *Moser v. Gosnell*, 513 S.E.2d 123 (1999). In addition, such covenants are strictly construed against the employer. 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.

Id.

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 Boutique, Ltd. v. Gibbs*, 455 S.E.2d 707 (S.C. Ct. App. 1995); *Somerset v. Reyner*, 104 S.E. 344 (S.C. 1958).

CHC argues that the non-competition agreements are not even subject to reasonableness review because the CHC physicians are more like partners and partnership agreements containing non-competition provisions are not subject to reasonableness review.

First, CHC conceded at trial, and in its post-trial briefing, that the Agreements were subject to reasonableness review.

Mr. Babcock: the other section, which is really the new covenant not to compete, is in section 5 of the agreement.... I don't think there's any question that in South Carolina, you do have to be reasonable in terms of time. Well, it's a one year provision, it's a one-year provision for the covenant and that's clearly an appropriate time and I don't think there can be any dispute in terms of that. But the other two sections for what needs to be reasonable under South Carolina law is what is being prohibited, which is protected.

(R. p. 633-634) (Tr. Transcript pp. 25-26) (emphasis added).

Mr. Babcock: again, when they look at covenants not to compete, the law is clear in South Carolina, there is no prohibition against covenants not to compete. They need to be reasonably drawn and narrowly protect [sic] -- that's what's being done here because you had to make sure that these doctors didn't go out and become employees or owners or for display in the field of cardiology within the restricted area.

(R. p. 634-635) (Tr. Transcript pp. 26-27) (emphasis added).

In order to be upheld, a covenant must be reasonably limited with respect time and place and it cannot be unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.

(R. p. 567) (CHC Post Trial Brief p. 6).

the scope of prohibited activities is not unduly harsh or oppressive

(R. p. 569) (CHC Post Trial Brief p. 8).

In addition; CHC's witness, David Summer, who drafted the Agreements, testified as follows:

Q: And I think I understand your testimony correctly that in South Carolina these types of agreements must be reasonable?

A: That's true.

Q: You don't dispute that?

A: I do not dispute that.

(R. p. 1043-1044) (Tr. Transcript pp. 435-436).⁶

⁶ Of course, this is a legal conclusion which was not within the province of Mr. Summer to decide in his testimony. Nevertheless, Respondents assert this testimony makes clear CHC waived this issue.

CHC, therefore, clearly conceded that the Agreement must meet be reasonable.

At this point, as the above demonstrates, the parties' agreement that the covenant must be reasonable is a stipulation which the parties and the court are bound to. This makes sense because the parties, and particularly Drs. Baugh and Feldman, relied upon this stipulation in presenting their case. Had the requirement of reasonableness not been conceded, Drs. Baugh and Feldman would have submitted more extensive testimony relevant to this point. *See, e.g., McCrea v. City of Georgetown*, 681 S.E.2d 918, 921 (S.C. Ct. App. 2009) ("A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding upon those who make them . . . The court must accept stipulations as binding upon the parties). *Id.*; *See also, State v. Pichardo*, 623 S.E.2d 840, 846 (S.C. Ct. App. 2005) (same). Therefore, because the issue was waived at trial, this court should not consider CHC's challenge to the circuit court's ruling on reasonableness.

CHC bases its argument that reasonableness is not required on the case of *J.W. Hunt v. Davis* in which the court held that the partnership agreement in that case was not subject to reasonableness review. 437 S.E.2d 557, 559 (S.C. Ct. App. 1994). In that case, a departing accountant was required by an agreement to pay J.W. Hunt an amount equal to two times the gross annual billings for each client of J.W. Hunt that Davis took. In holding this type of agreement valid, the court specifically noted that the agreement was a partnership agreement and, had it been an employment agreement, it would be treated differently and subject to reasonableness review. In this case, of course, the Agreements are employment agreements — not partnership agreements. CHC is a corporation—not a partnership. As the circuit court correctly noted, the court cannot simply ignore the form of business chosen by a party. *See, e.g., Todd v. Zaldo*, 403 S.E.2d 666, 668-669 (S.C. Ct. App. 1991) ("Zaldo argues he may

recover damages personally because Georganne Apparel Company, Inc. was a close corporation with only three stockholders. He seeks to have Georganne Apparel viewed more as a partnership than a corporation. This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.”).

Therefore the Agreements are subject to reasonableness review.

In addition, the *Hunt* court was also careful to base its decision on a line of cases holding that the agreement in that case was due to the fairness of requiring payment for clients that a departing partner takes. The Agreement in this case is nothing like this and simply imposes a huge penalty whether or not the departing physicians take any patients with them. The *Hunt* court based its decision on holdings in cases from other jurisdictions including North Carolina, Nevada, and Kansas. *Dixom, Odom & Co. v. Sledge*, 296 S.E.2d 512 (N.C. App. 1982); *Engel v. Ernst*, 724 P.2d 215 (Nev. 1986) and *Francis v. Schlotfeldt*, 704 P.2d 381 (Kan. 1985). In each of these cases, the penalty was tied to customers or clients that the departing employee took with them. In other words, the payment was reasonably related to the employer’s damages. In *Mosner v. Gosnell*, the South Carolina Court of Appeals examined the penalty provision of a covenant not to compete. 513 S.E.2d 123 (S.C. App. 1999). The penalty provision was examined separately from the reasonableness of the non-compete restrictions. In *Mosner*, the non-compete was connected to a sale of a business. The penalty if the sellers broke the non-compete provisions was set at the full amount of the purchase price. The court held that “where the stipulation is not based upon contemplated actual damages but is intended to provide punishment for breach of the contract, it is a

[unenforceable] penalty.” *Id.* at 126. The court held that setting the penalty at the amount of the purchase price indicated that it was not intended to compensate for damages but, instead, was designed solely as a punishment for breach. This, the court held, was an unenforceable penalty. The CHC Agreement is indistinguishable. The penalties it stipulates have no relationship whatsoever to a reasonable estimate of damages. David Summer, the attorney who drafted the Agreements, admitted they did not attempt to estimate damages when they devised the penalty amount. (*R. p. 1055-1062*) (*Tr. Pp. 459-466, particularly 459-460*). CHC’s witness Dr. Shuzle testified that the purpose was simply to have a high enough penalty that physicians would not leave. (*R. p. 842-843*) (*Tr. 234-235*). The sole purpose was to try to prevent physicians from leaving so that there was less risk with the new building. In this case, damages would be lost profits from patients who chose to follow the Plaintiffs to their new practice. This could have been estimated, however, CHC sought instead to simply impose a huge penalty. While CHC attempted, through its expert, to show an estimation of lost business, the expert admitted that the reports he was relying on appeared to be incorrect. (*R. pp. 1228-1229, 1237, 1242-1243*) (*Tr. 620-621, 629, 634-635*). Therefore, CHC presented no evidence that the penalty in the Agreement was a reasonable estimate of its actual damages.

Although the *Gosnell* court was not applying the penalty analysis in the context of a *Hunt*-type agreement, other courts have done so. Those courts have also uniformly held that the penalty must be a reasonable estimate of the damages which would probably be caused by the breach. *See, e.g., Eastern Carolina Internal Medicine v. Faidas*, 564 S.E.2d 53, 56 (N.C. 2002); *Holloway v. Faw, Casson*, 572 A.2d 510 (Md. 1990) (“the liquidated damages must reasonably be compensation for the damages anticipated by the breach”); *Cherry, Bekaert &*

Holland v. LaSalle, 413 So.2d 436 (Fla.App.1982) (two times employer's prior year's fees obtained from client was too great to be related to actual damages); *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208 (Ind. App.1982) (three times gross annual billings to client not related to actual damages) and *Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1310 (N.H. 1979) (fifty percent of fees for three years after termination not related to actual damages); see also *Lewis v. Premium Inv. Corp.*, 568 S.E.2d 361 (S.C. 2002) (forfeiture clause that allowed a lender to seize land and retain any prior payments made by a defaulting borrower is an unenforceable penalty because it is unrelated to damages) (citing *Tate v. Le Master*, 231 S.C. 429, 99 S.E.2d 39 (1957); *Kirkland Distributing Co. of Columbia, S.C. v. United States*, 276 F.2d 138 (4th Cir.1960) (Equity will not enforce a penalty for breach of contract); *South Carolina Dep't of Health and Envtl. Control v. Kennedy*, 344 S.E.2d 859 (S.C. App.1986); *Lane v. New York Life Ins. Co.*, 145 S.E. 196, 209 (S.C. 1928); and *Bangert v. John L. Roper Lumber Co.*, 86 S.E. 516, 517 (N.C. 1915).

The penalty in this case is the physician's prior year income. Of course, the physician also forfeits the A/R-based monetary amount, and the purported (illusory) consideration of \$60,000.00. These penalties bear no relationship whatsoever to possible lost damages. Unlike any of the cases where a *Hunt* exception was recognized, CHC has made no attempt whatsoever to equate its penalties to damages. In fact, even the cases cited above where the court held the agreements did not bear a sufficient relationship to damages, the employer at least used a measure based on client or firm revenue. CHC's measures have nothing to do with either and are therefore a penalty that requires reasonableness review.

C. The Circuit Court Correctly Held the Non-Competition Provisions Were Not Reasonable Under South Carolina Law

The circuit court correctly ruled that the covenant not to compete contained in the Agreements cannot pass reasonableness review. Section 5.2(a)(i) of the non-competition provision broadly defines “compete” as “assisting any person (as a director, officer, employee, agent, consultant, lender, lessor, or otherwise) to engage in the Business in the Territory.” The provision would preclude Drs. Baugh and Feldman from working in any capacity in cardiology or a business that provides cardiology services. For example, neither could serve as a consultant, as director of a hospital’s cardiology department, as a marketer of cardiology devices, as a manager of a business or practice in the cardiology field, nor even provide services (such as renting property) to a medical practice engaged in the field of cardiology. CHC attempts to downplay the restriction by inferring that the Agreement only prohibits Drs. Baugh and Feldman from directly or indirectly practicing medicine in the field of cardiology. However, the restriction is far broader than that. The examples of prohibited activity in section 5.2 make clear that the prohibition on “assisting” is quite broad and either Plaintiff is barred from being a “director,” or “consultant,” or even a “lendor” or “lessor.” This non-exclusive list of examples makes it apparent that the Agreement seeks to bar Plaintiffs from assisting in any capacity—even if that assistance is not the practice of medicine in the field of cardiology. CHC’s witness Mr. Summer (who drafted the covenant) had to admit that the provision would prohibit Drs. Baugh and Feldman from working in a teaching hospital. (*R. p. 1057-1058*) (*Trial Tr. pp. 449-450*). He also testified that if they “affiliate[ed] with a cardiology practice in the marketplace, that is prohibitive [sic] conduct under the language” (*Id. at 1056, 1061*). He further admitted it would violate the prohibitions to loan money or be a landlord to a cardiology practice. (*Id. at 1056-1057*).

None of these activities would be competitive with CHC nor are they the type of services Drs. Baugh and Feldman rendered on behalf of CHC.

The circuit court correctly focused on the South Carolina Court of Appeals decision in *Faces Boutique, Ltd. v. Gibbs*, 455 S.E.2d 707 (S.C. App. 1995). In *Faces*, the employer — a facial spa — attempted to enforce a non-competition covenant that purportedly forbade the former employee from owning, managing, operating, controlling, being “employed” by, participating in, or being connected “in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces.]” 455 S.E. 2d at 708. The court refused to enjoin the employee from working for a competitor, in part because the restriction prohibited the employee from working for any business that sold cosmetics or facials even if she did not participate in such activities. This, the court held, was beyond what was necessary to protect the employer and was therefore unenforceable. CHC attempts to distinguish *Faces* by arguing it stands only for the proposition that the employer there improperly tried to expand the scope of what was competition, whereas the CHC Agreements limit themselves to the field of cardiology. This is pure sophistry. The *Faces* decision does prohibit expanding the restriction beyond the types of services the employee provided. But this is exactly what the Agreements in this case do as well. They seek to prohibit Drs. Baugh and Feldman from performing services they did not perform for CHC. The *Faces* court specifically held it was improper to prohibit an employee from working “in any capacity” for a competitor. In *Faces*, the court specifically included competitors who performed the same services that Gibbs performed for Faces. So it is

the “any capacity” restriction that is unenforceable—not just attempting to expand the scope of services prohibited. *Id.* at 709.

This point is also made clear in *Preferred Research, Inc. v. Reeve*, 357 S.E.2d 489, 490 (S.C. Ct. App. 1987). In *Reeve*, the clause in question prevented Reeve from working “alone or in association with others, in a similar business, *in any capacity*.” Reeve had previously done title search work for Preferred and, thereafter, sought to do real estate work of a different nature for other firms. The trial judge found this particular language unreasonably overbroad, and the Court of Appeals agreed.

the clause in question prevents Reeve from working “alone or in association with others, in a similar business, *in any capacity*.” The trial judge found this particular language unreasonably overbroad, and we agree.

Preferred Research, Inc. v. Reeve, 357 S.E.2d 489, 490 (S.C. Ct. App. 1987) (emphasis added).

The overwhelming majority of other state courts to have considered such “any capacity” restrictions have reached the same conclusion. For example, in *Ponders, Inc. v. Norman*, 272 S.E.2d 345 (Ga. 1980), the Georgia Supreme Court held a noncompetition clause prohibiting an employee from working “in any capacity” in a business or service “in competition with the business of the employer,” was overbroad and unreasonable. Georgia has reached this conclusion in a number of other cases. Other courts have ruled the same. See, *Facility Servs. & Sys., Inc. v. Vaiden*, 2006 Westlaw 1572236, 6 (Ohio App. 8 Dist. 2006) (“non-compete that [bars] employment in areas which were merely incidental to FSS's main line of work during the time of Vaiden's employment, and areas where FSS seeks to work but has not yet acquired contracts [is overbroad].”); *Hostetter v. Answerthink, Inc.*, 599 S.E.2d 271, 274 (Ga. App. 2004) (“In this Agreement the noncompete provision has no

geographic limitation and prohibits any type of employment in competition.”); *Allied Informatics, Inc. v. Yeruva*, 554 S.E.2d 550, 553 (Ga. App. 2001) (“The terms “employment” and “contractual agreement” are not limited in the agreement and could encompass work that has nothing to do with the type of work that Yeruva did while he was employed with Allied); *Ward v. Process Control Corp.*, 277 S.E.2d 671 (Ga. 1981) (“restrictions which prohibit an employee's working for a competitor in his trade or business in “any capacity” have been consistently struck down by this court.”); *Johnson v. Country Life Ins. Co.*, 300 N.E.2d 11, 15 (Ill. App. 1973) (“We hold that portion of Section 23 which prohibits plaintiff from representing any other life insurance company in any capacity, or from engaging in the sale of insurance policies except on forfeiture of renewal premiums is a provision in restraint of trade.”); *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 175 (Ind. App., 2008) (“noncompetition agreements and covenants not to compete prohibiting an employee from working in any capacity for a competitor or from working within portions of the business with which the employee was never associated are unreasonable because they extend beyond the scope of the employer's legitimate interests.”); *Edwards v. Harris*, 964 So.2d 196 (Fla. App. 1 Dist. 2007) (“Temporary injunction enforcing covenant not to compete against employee unnecessarily restricted competition by enjoining the employee from working with another competitor in any capacity.”); *Omniplex World Services Corp. v. U.S. Investigations Services, Inc.*, 618 S.E.2d 340, 343 (Va. 2005) (“Because the prohibition in this non-competition provision is not limited to employment that would be in competition with Omniplex, the covenant is overbroad and unenforceable.”); *Freiburger v. J-U-B Engineers, Inc.*, 111 P.3d 100, 106 (Idaho 2005) (“covenant not to compete which prohibits an employee from working in any capacity or which fails to specify with particularity the activities the employee is

prohibited from performing is too overbroad and indefinite to be considered reasonable.”); *McNeilus Companies, Inc. v. Sams*, 971 S.W.2d 507, 511 (Tex. App.-Dallas 1997) (“the trial court could have reasonably found that prohibiting Sams from working *in any capacity* for a McNeilus competitor was a restraint too broad in scope.”); *Geocarls v. Surgical Consultants, Ltd.* 302 N.W.2d 76, 78 (Wis. App. 1981) (“We reject the trial court's conclusion that the restriction was reasonable because Geocarls was not likely to practice medicine in any capacity other than as a surgeon.”); *PEMCO Corp. v. Rose*, 257 S.E.2d 885, 891 (W.Va. 1979) (Enforcing this contract provision literally would preclude the employee from working in any capacity on any type engineering project for any business or enterprise the nature of which is competitive with plaintiff.).

Only North Carolina and Ohio appear to have either enforced or indicated courts there might enforce such language. The appeal courts in North Carolina have actually issued conflicting opinions. *Compare Precision Walls, Inc. v. Service*, 568 S.E.2d 267, 273 (N.C. App. 2002) (ruling that the plaintiff's legitimate business interest allows the covenant not to compete to prohibit employment of any kind by defendant with a direct competitor) *with Wallace Butts Ins. Agency, Inc. v. Runge*, 314 S.E.2d 293, 296 (N.C. App. 1984) (bar of “employment *in any capacity* by a company [or] participat[ion] *in any manner connected with* the ownership, management, operation or control of a credit or health insurance company [is unenforceable].”). In Ohio, the court did not actually enforce the “any capacity” language. The court only noted that such language is “valid in general.” *Gobel v. Laing*, 231 N.E.2d 341 (Ohio App. 1967). However, when applied to the facts in that case, the court actually ruled the clause was unenforceable. The court held that although Laing went to work for a competitor, his new position was not such that he might use trade secret or confidential

information he might have acquired from Gobel or that he had diverted Gobel's customers.

Therefore, the bar was unenforceable in those circumstances.

Clearly, therefore, the "any capacity" type language utilized in the CHC Agreements is overly broad, not narrowly tailored, and unnecessary to protect CHC's legitimate interests, and unenforceable under South Carolina law.

CHC places much reliance on the North Carolina case of *Calhoun v. WHA Medical*, 632 S.E.2d 563 (N.C. 2006). In that case, a group of non-interventional cardiologists left WHA and set up a competing practice. However, they had all signed non-competition agreements with WHA several years earlier in conjunction with the sale of their practice to another entity called Phycor. The physicians received a substantial sum of money from Phycor and then continued practicing in the employ of Phycor. They subsequently repurchased the practice from Phycor. The agreements provided that, for a period of eighteen months following termination of employment, they would not compete against WHA in five counties that surround WHA's location in Southeastern North Carolina. However, the Agreement also provided that:

In the event the Physician desires to practice in violation of this restrictive covenant, Physician shall have the option of paying to the Company the following liquidated damages in advance of practicing in violation of the covenant. Physician shall pay to the Company as liquidated damages an amount equal to the greater of (i) Physician's "average annual income" as shown on the W-2 or K-1 forms prepared by Wilmington Health Associates, P.A. ("WHA") or the Company for the two most recent years preceding termination of Physician's employment, or (ii) Physician's share of the total gross proceeds payable to WHA pursuant to the Asset Purchase Agreement between WHA and PhyCor of Wilmington, Inc. ("PhyCor")

Id. at 567.

The WHA court recognized that, under North Carolina law, such restrictions are not subject to reasonableness review. *Id.* at 572 (citing *Eastern Carolina Internal Med. v. Faidas*,

564 S.E.2d 53, 56 (N.C. 1988). In *Faidas*, the court examined a similar agreement wherein a departing physician could avoid a non-competition provision by paying 25% of his share of the previous year's operating cost of the practice. The court held that such a clause was not a non-competition agreement subject to reasonableness review so long as the payment amount was a reasonable estimate of damages. Although acknowledging that, under *Faidas*, a reasonableness review was not required, the WHA court nevertheless examined the WHA agreements under a reasonableness standard. The court found they were reasonable because the physicians were able to pay the penalty and there was no danger of harm to the public because the physicians would not close their practice if they were forced to pay.

The *WHA Medical* case has obvious appeal to CHC because of the factual similarities and the similarity of the payment provisions. However, South Carolina clearly would not follow the reasoning or results used in *WHA Medical* or *Faidas*. As stated above, the South Carolina Court of Appeals examined a restriction analogous to the *WHA Medical* restriction in *J.W. Hunt*. The court held that an employment agreement (unlike a partnership agreement of certain types) was required to pass reasonableness review. In addition (also discussed above) the *J.W. Hunt* case "penalty" was based on profits off of client the departing accountant took. The cases discussed above make clear that a penalty unrelated to damages (as we have in this case) would be treated differently. *Caine v. Estes Ins. Agency*, also cited by CHC, was similarly based on profits derived from clients taken and, therefore, is inapposite for the same reason. *Caine v. Estes Ins. Agency*, 293 S.E.2d 859 (S.C. 1982).

The bottom line is that the Agreements go beyond restricting the Plaintiffs from doing what they did for CHC and seek to expand restrictions into areas wholly unrelated to the Plaintiffs' CHC employment. The Agreements are, therefore, not "narrowly drawn" to

protect only the “legitimate interests” of the employer as South Carolina courts require and, therefore, the circuit court correctly held them unenforceable. See, e.g., *Faces Boutique, Ltd. v. Gibbs*, 455 S.E.2d 707, 708-709 (S.C. Ct. App. 1995); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 301 S.E.2d 142 (S.C. 1983); *Stringer v. Herron*, 424 S.E.2d 547 (S.C. Ct. App. 1992); *Almers v. South Carolina Nat’l Bank*, 217 S.E.2d 135 (S.C. 1975); *Collins Music Co. v. Parent*, 340 S.E.2d 794 (S.C. Ct. App. 1986); *Eastern Business Forms, Inc. v. Kistler*, 189 S.E.2d 22, 24 (S.C. 1972); *Somerset v. Reyner*, 104 S.E.2d 344, 346 (S.C. 1958).

D. The Circuit Court Should Have Ruled in Respondents’ Favor on the Alternative Ground That the Scope of the Geographical Restriction Was Overbroad

The Respondents also argued that the effective scope of the geographical restrictions was overbroad because it would force them to relocate at least 55 miles in order to practice their specialty. The circuit court incorrectly held that the restriction was not unreasonable because the Respondents still had places in the state where they could practice and they could have dropped some services they provided in order to avoid the greater restrictions.

The Covenant provides for a territorial restriction of a twenty-mile radius (over 1,250 square miles) around any Medical Group office where the physician “routinely provided” services during the year prior to your departure. In South Carolina, a geographical restriction must be narrowly drawn and limited to the area from which customers are drawn. See, e.g., *Stringer v. Herron*, 424 S.E.2d 547, 548 (S.C. App. 1992) (“Considering that an overwhelming majority of Stringer’s clients lived much closer than 15 miles from at least one of the practice locations, we hold the territorial restriction to be overbroad; therefore, it is unreasonable and unenforceable.”); *Somerset v. Reyner*, 104 S.E.2d 344 (1958); *Delmar*

Studios of the Carolinas v. Kinsey, 104 S.E.2d 338 (1958); *Oxman v. Sherman*, 122 S.E.2d 559 (1961); *Sermons v. Caine & Estes Insurance Agency, Inc.*, 273 S.E.2d 338 (1980).

In practical reality, however, the geographical restriction is much broader than twenty miles from the Lexington and Richland offices. In order to practice their medical specialty, "interventional" cardiologists like Drs. Baugh and Feldman require frequent access to a medical facility authorized to perform elective invasive procedures like stenting and angioplasty. (*R. pp 834-836, 1188-1189*) (*pp. 238-240, 592-593*). In addition, they must live within thirty minutes of the medical facility at which they take call. CHC's own witnesses admitted the ability to perform interventional procedures was an important medical distinction and valuable to their individual practices. Dr. Shulze agreed it required a big effort to become an interventional cardiologist (as opposed to a cardiologist who did not do interventional procedures) and he became offended when it was inferred in questioning that he was not certified. (*R. p. 839*) (*Tr. p. 243*). Dr. Baugh explained that, although a small component time-wise, the ability to do invasive procedures was critical to an interventional cardiologist's practice. (*R. p. 881-886*) (*Tr. pp. 285-290*).

Palmetto Richland and Providence Hospitals are the only medical facilities in the Midlands authorized to perform elective invasive procedures. Even CHC's physicians agree that, to avoid violating the Agreement, the next nearest locations Drs. Baugh and Feldman would have to move their practices include Aiken, Anderson, Greenville, Florence, Spartanburg and Charleston. (*R. p. 835*) (*Tr. 239*). The effective restriction therefore is at least 55 miles to the Aiken Regional Medical Center. This is far beyond what was reasonably necessary to protect CHC.

At least one court has recognized the practical effect of such provisions regarding physicians and has struck down a provision whose practical effect was much larger than what was stated in the contract. *Cardiovascular Surgical Specialists v. Mammana*, is remarkably similar to the facts of this case. 61 P.3d 210 (Ok. 2003). In that case, surgeons were subject to a geographical non-compete within a twenty mile radius of CSS offices that prohibited them from engaging in the practice of cardiovascular surgery. However, like Drs. Baugh and Feldman, in order to practice his specialty, Dr. Mammana needed access to a hospital at which such surgeries could be performed. The nearest of these were approximately 100 miles away. This, the court noted, was far beyond the area where CSS drew patients and was therefore unreasonable. CSS argued that Dr. Mammana could simply drop cardiovascular surgeries and continue to perform other types of surgeries he was qualified to perform. This is the same argument CHC makes when it argues Drs. Baugh and Feldman could simply stop doing interventional procedures (even though they are interventional cardiologist). The *Mammana* court rejected this possibility as an unreasonable alternative for such specialists.

E. The Circuit Court Correctly Held that it Could Not Rewrite the Agreements to Make Them Reasonable

CHC argues that, even if the non-competition provisions do not pass reasonableness review, the court should have rewritten the restrictions of the Agreements to make them reasonable. This would be employing the so-called “blue-pencil” rule. CHC argues that because the Agreement authorizes such changes, the court had the power to reform the Agreement by changing the language.

However, to save the non-competition provisions, the court would have to reform the definition of “Compete.” South Carolina courts have repeatedly stated that a court is not

allowed to rewrite or reform an agreement. *Id.*; *Somerset v. Reyner*, 104 S.E. 344 (S.C. 1958) (“We cannot make a new agreement for the parties into which they did not voluntarily enter.”); *MailSource, LLC v. M.A. Bailey & Associates*, 588 S.E.2d 635, 639 (S.C. Ct. App. 2003) (reformation of contracts “is a service the courts of South Carolina do not provide.”); *Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 134 (S.C. 2003) (courts do not rewrite contracts); *Lewis v. Premium Inv. Corp.*, 568 S.E.2d 361, 363 (S.C. 2002) (same).

CHC has pointed out that a United States District Court in South Carolina has used the blue-pencil rule in a limited fashion. *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 68, 688 (D. S.C. 2003). However, even that court noted that there is little room in South Carolina for blue-penciling and it is only arguably allowed when the court can strike a provision without affecting anything else in the agreement. In *Rockford*, the agreement listed specific customers that the employee could not solicit. The court struck some of the customers off the list. In doing so, the court relied on dicta in *Eastern Business Forms v. Kistler*, 189 S.E.2d 22 (S.C. 1972) and *Somerset v. Reyner*, 104 S.E.2d 344 (S.C. 1958). Both of these cases discussed the issue of partial enforcement of non-compete and the possibility of reforming such provisions. Both courts noted that this would only be (perhaps) possible where a covenant was actually a “combination of different covenants” with “distinct undertakings bounded by different limits of space or time or different in subject matter.” The court noted that even if it were to blue-pencil, “this does not mean a single covenant may be artificially split up in order to pick out some part of it that can be upheld.” *Eastern Business Forms*, 189 S.E.2d at 23-24.

Nothing like striking out a few customer names or striking a “distinct” covenant, while leaving another distinct covenant in force, is possible in this case. The entire CHC covenant

is tied to the definition of compete. There is no way to strike the Compete definition without rewriting it and significantly changing the meaning that was intended. Such changes would go far beyond what even the court in *Rockford* did and what the *Eastern Business Forms* and *Somerset* courts stated might be possible. It clearly crosses into impermissible reformation and a rewriting service that South Carolina courts “do not provide.” *MailSource, LLC v. M.A. Bailey & Associates*, 588 S.E.2d 635, 639 (S.C. Ct. App. 2003). This would be a far cry from what the *Rockford* court did in simply striking out a customer name or two. Here, the court would be required to fundamentally alter the intent of the Agreement. South Carolina case law, including *Rockford*, makes clear this would be going too far.

Nevertheless, CHC argues that, because the Agreements authorize, in Article 5.5, a court to rewrite the restrictions that this court has greater latitude to rewrite the restrictions as it sees fit. However, South Carolina courts have expressly, and repeatedly, held that rewriting contracts “is a service the courts of South Carolina do not provide.” *MailSource, LLC v. M.A. Bailey & Associates*, 588 S.E.2d 635, 639 (S.C. Ct. App. 2003), *see also, Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 134 (S.C. 2003) (courts do not rewrite contracts); *Lewis v. Premium Inv. Corp.*, 568 S.E.2d 361, 363 (S.C. 2002) (same). Even if Article 5.5 provided authority to blue-pencil the Agreement, the court would be bound by the limitation that it could only sever provisions that could be struck without substantively altering the intent of the Agreement. The changes that CHC suggests the court make would require the court to provide a contract which was very different from what the parties intended. This, courts are not permitted to do.

F. The Circuit Court Correctly Held that, if the Non-Competition Provisions Are Not Enforceable, Then the Plaintiffs Are Entitled to the Compensation Provided for in the Agreements

If the non-competition provisions are deemed unenforceable then Drs. Baugh and Feldman are entitled to the A/R-based monetary amount under the South Carolina Wage Payment Act. This is because invalidity of a non-competition agreement does not affect the validity of the remainder of the contract. Drs. Baugh and Feldman terminated their employment in accordance with the "termination without cause" provisions of the Agreement at Sections 4.4(a) and 4.5(f) by providing ninety days notice. As a result, they are entitled to the specified compensation. The A/R-based monetary amount was valued by Plaintiffs' expert are valued at \$172,070 for Dr. Baugh and \$171,460 for Dr. Feldman. (*R. p. 1310*)(*P. Ex. 4*). This amount is less than the estimate provided by CHC's expert and is therefore a conservative estimate. (*R. p. 1469*) (*D. Ex. 22*). CHC claims that Drs. Baugh and Feldman owed it approximately \$24,888 (Dr. Baugh) and \$55,273 (Dr. Feldman) and this is not contested. Drs. Baugh and Feldman also claim two weeks pay that was never paid by CHC which amounts to \$8,095.17 (Dr. Baugh) and \$8,063.00 (Dr. Feldman). Finally, Dr. Feldman has unpaid Director fees in the amount of approximately \$4,500. (*R. p. 1322*) (*P. Ex. 4*). CHC refused to pay these amounts only because it did not take the A/R-based monetary amount payment into account and because it offset the \$24,888 and \$55,273 against any wages dues. CHC argues that Drs. Baugh and Feldman were, in reality, not employees but partners and therefore were not being paid wages under the Wage Payment Act. Clearly, however, they were employees. CHC was organized as a corporation. The Agreements describe the physicians as employees and make repeated references to terms that would only be applicable

in an employment context.⁷ CHC argues that the A/R-based monetary amount payments are not wages under the Act. However, South Carolina Code § 41-10-10(2) broadly defines “wages” as all “amounts...which are due to an employee under any...employment contract,” and the definition includes similar compensation schemes such as severance payments. CHC argues that this is a contractual matter not subject to the Wage Payment Act. However, the fact that wages are defined by contract does not preclude application of the Act. In fact, the Act specifically contemplates that a contract may define what wages are due.

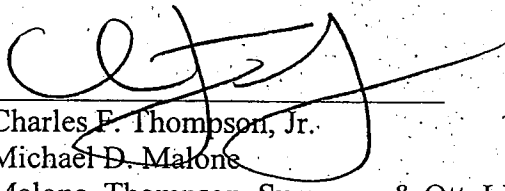
Finally, CHC argues that the A/R-based monetary amount forfeiture language in section has its own non-compete restrictions that are less restrictive than the provisions of section 5.1 and 5.2 and are therefore enforceable. The A/R-based monetary amount forfeiture provision is in Article 4 of the Agreement and mirrors the covenant in section 4(h) of the 1999 employment contracts. The article 4 language is less restrictive only when read out of context. The circuit court correct found that the new Agreement ties the A/R-based monetary amount in Article 4 to the new non-competition provisions of Article 5 in at least two ways. First, Article 4.5 states that the forfeiture of the A/R-based monetary amount, together with the \$591,710 is restitution to CHC for damages it will suffer as a result of competition. Second, Article 5.4(a) similarly states that the forfeiture of the A/R-based monetary amount, along with the \$591,710, is required for the physician to practice in breach of the new non-competition provisions at 5.1. Mr. Summers, who drafted the Agreements for

⁷ CHC’s Employment Agreement with Plaintiffs, makes reference to “Employee Benefits,” “salary,” and “W-2 compensation of physician-shareholders.” In addition, the Employment Agreement provides that CHC agrees to provide “office space, equipment, instruments, supplies, medicines, and support personnel for the practice of Physician.” Furthermore, the Employment Agreement establishes extensive control over Plaintiffs with regard to the business operations of the practice. Finally, the Employment Agreement provides CHC with the ability to terminate the Employment Agreement with Plaintiffs with or without cause. This clearly shows a range of control indicative of an employment relationship. South Carolina Workers’ Compensation Comm’n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).

CHC, admitted in his testimony that a violation of the Article 5 non-competition provisions was intended to, and did cause, forfeiture of the A/R-based monetary amount in Article 4. (*R. pp. 1052-1053*) (*Tr. 444-445*). Because of this, the circuit court correctly held that the forfeiture of A/R-based monetary amount was premised on the unenforceable provision in Article 5 and was therefore unenforceable.

CONCLUSION

For the foregoing reasons, the Respondents request that the court affirm the circuit court that the non-competition provisions of the Agreements are unenforceable and that the compensation in the Agreements is not forfeited.



Charles F. Thompson, Jr.
Michael D. Malone
Malone, Thompson, Summers & Ott, LLC
339 Heyward Street
Columbia, SC 29201
Telephone: (803) 254-3300
Facsimile: (803) 254-0309

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

LAW OFFICES

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

MAR 29 2011

MALONE, THOMPSON
SUMMERS & OTT, LLC

William P. Keesley, Circuit Court Judge

Case No. 06-CP-32-0371

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D., ... Respondents.

V.

Columbia Heart Clinic, P.A., ... Appellant.

REPLY BRIEF OF APPELLANT

A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS & BABCOCK, L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

ATTORNEYS FOR APPELLANT

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ARGUMENT

I. Respondents are not entitled to receive compensation for wages and accounts receivable under the Wage Payment Act. (Reply to Respondents' Argument F)

The Wage Payment Act, S.C. Code §41-10-10, et seq., does not apply to this matter.

The Act defines wages as: all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Id. Under the Employment Agreement, Columbia Heart "shall own and control all collections and billings pursuant to the rendering of medical services by Physician or other employee." Pl. Ex. 1, § 3.1. Respondents do not own any part of the accounts receivable and only entitled to the receive a portion of the accounts receivable under the Employment Agreement if certain contingencies in the Employment Agreement are met. Thus, the accounts receivable are not wages under the Act.

Respondents also claim that they terminated their employment under the termination without cause section of the Agreement, which entitles them to receive a portion of the accounts receivable. However, the contract only permits a departing physician to receive the percentage if he does not compete:

Notwithstanding any other provision in this Agreement in the event or at any time during the twelve (12) month period immediately following the expiration or termination (for any reason, whether with or without Cause) of this Agreement Physician continue or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then

Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation nor commencement of the practice of medicine in violation of this Section 4.5.(i).

Pl. Ex. 1, § 4.5 (i). This provision is separate and apart from the non-compete provision in Section 5 of the Agreement, and it is not affected by the lower court's ruling on that section. Respondents argue that the this provision must be construed with the non-compete in Section 5. However, Section 4.5 is of narrower scope and stated that, in order to receive a portion of the accounts receivable, a departing physician must not "continue or commences the active practice of medicine in the field of cardiology" within a twenty mile radius. There is no dispute that Respondents did exactly that, as Dr. Feldman admitted it at trial. R.p. 787:1-11; 1095:6-9. Furthermore, the accounts receivable are not owned by any individual doctor, but are the property of the medical practice. Pl. Ex. 1. As Respondents noted in their Brief, the accounts receivable are not tied to the actual production of each Respondent, which further supports the conclusions that the accounts receivable are not wages earned under the Act. Thus, the Respondents were never entitled to any portion of the accounts receivable under the contract or the Wage Payment Act.

The other two forms of additional compensation claimed -- an additional draw or advance check for each Respondent and director's fees for Dr. Feldman -- likewise are not subject to the Wage Payment Act. The Wage Payment Act covers the amount "at which labor rendered is recompensed" or, in other words, the amounts actually earned. S.C. Code § 41-10-10. Respondents were not being paid for amounts earned, but were given advances on monies yet to be earned. See, *Boyd v. Gynecologic Associates of Jefferson Parish, Inc.*, 15 So.3d 268, 272, 08-1263, 6 (La.App. 5 Cir. 2009) (an "advance" is not a "wage" but a

loan which carries with it the obligation to repay). Respondents admitted that at the time of the departure, they were both negative under the true up formula and owed money back to Columbia Heart. Since the Respondents had already been overpaid, they are not entitled to an additional draw or advance. Furthermore, the director's fees are not a part of the compensation plan between Columbia Heart and any physician, but were payments made by various hospitals for services performed by Columbia Heart physicians. R.p. 1142:5-17.¹ Thus, the director's fees are likewise not subject to the Act.

II. Columbia Heart did not concede that reasonableness analysis applied. (Reply to Respondents' Argument B)

Respondents deliberately misconstrue Columbia Heart's arguments regarding the applicability of a reasonableness review. Respondents pick certain comments in the transcript and claim that Columbia Heart has "conceded" that the Employment Agreement was subject to such a review. Columbia Heart had two arguments at trial. First, Columbia Heart argued that the Employment Agreement was actually an agreement among partners, and thus, the contractual provision at issue was not subject to the reasonableness analysis. Alternatively, if the court determined that it was not a partnership agreement and was a true covenant not to compete requiring a reasonableness review, the covenant survived the analysis and should be upheld. In its opening argument Columbia Heart stated:

...because although they're structured like a professional -- they are a professional association and that has a corporate side to it, in fact this is like a professional partnership. ...So when we look at it, when we get down to

¹In addition, while Columbia Heart acknowledged that \$4,500 in director's fees had inadvertently not been paid to Dr. Feldman, Appellant did not remit a check to Dr. Feldman upon discovery of the error because Dr. Feldman was in a negative position under the true-up. R.p. 1142:18-1143:15.

looking at things like the Hunt case and the accountants in Hunt, that same type of analysis we should-- we submit applies.

R.p. 20. The case to which the opening argument referred was *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 437 S.E.2d 557 (Ct. App. 1993), in which the Court of Appeals evaluated a contractual provision that required a withdrawing partner to pay the partnership two times amount of the partnership's annual gross billings to former or existing client for any work the withdrawing partner did for former or existing clients. The court found it was not a covenant not to compete subject to a reasonableness review but simply "a [contractual] business arrangement incident to the continuing practice of the parties" *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993).

The comments by Columbia Heart's counsel cited in Respondent's Brief, contrary to Respondent's claim, are not concessions and are consistent with the two pronged argument.

For example, Respondent cites this comment:

Mr. Babcock: In the other section, which is really the new covenant not to compete, is in section 5 of the agreement....I don't think there's any question that in South Carolina you have to be reasonable in terms of time. Well it's a one year provision, it's a one-year provision for the covenant and that's clearly an appropriate time and I don't think there can be any dispute about that. But the other two sections for what needs to be reasonable under South Carolina law is what is being prohibited, being protected.

R.p. 633-634. This portion of the argument clearly refers to "the covenant" which is a part of Columbia Heart's second argument. In other words, if the court determined that the contractual provision was a true covenant, and not, as Columbia Heart asserted in its first argument, an agreement between partners, then the covenant had to be reasonable as to time, geography and scope. However, that portion of Columbia Heart's argument did not concede

that a reasonableness analysis was required, but simply noted that if one applied, the one-year time limit was appropriate and reasonable.

Respondents are also disingenuous in claiming that had the reasonableness not been conceded, they would have submitted more extensive testimony on this point. As already noted, Columbia Heart's opening argument expressly articulated its two positions-- that reasonableness was not required under *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 437 S.E.2d 557 (Ct. App. 1993), but even if one did, the covenant was not reasonable.² Respondents could have put in testimony or evidence on that point, but chose not to do so.

Furthermore, the contractual provision here is only in the Employment Agreements of physician shareholders, which does make it an agreement between partners, just like the agreement in *Hunt*. Contrary to Respondent's claim, this provision was designed, in part, to compensate Columbia Heart for the loss of patients and referrals, just as *Hunt*³ (and the cases it relied on) were designed to compensate the employers for the loss of clients a departing partner takes. At trial, Dr. Schulze testified:

...certainly, if anybody left the practice, we were going to have substantial shortfalls in revenue because patients tend to follow their doctors.

R.p. 843:11-14. Dr. Schulze also testified that a Lexington County doctor would receive a lot of Lexington referrals, while a Richland County doctor would receive a lot of Richland

²In addition, Columbia Heart had raised this point earlier in the case, in the Motion for Summary Judgment. R.p. 310; 318-320. (Memorandum in Support of Summary Judgment). Respondents cannot claim that they were surprised that this argument was also a focal point at trial.

³In *Hunt*, the agreement required the departing accountant to pay an amount equal to two times the annual gross billing for each client the accountant took.

referrals. R.p. 893:15-25. In other words, when Respondents departed Columbia Heart's Lexington County office, they took both Lexington referrals and current Lexington patients away from Columbia Heart.⁴ David Summer, who drafted covenant, explained the formula for payment⁵ was selected because "it is a conservative, logical proxy to offset the damages that occur" as result of the revenue loss Columbia Heart would (and did) sustain if Respondents departed and set up a competing practice. R.p. 1031:14-1032:8.

In summary, the Employment Agreement at issue here is between professional shareholders (physicians), and it is virtually identical to an agreement between partners. Like a partnership, a professional association such as Columbia Heart has shareholders who are all physicians, which is distinguishable from the normal formation in a company with typical employees.⁶ In fact, the other physicians employed by Columbia Heart do not have this same

⁴This obviously happened here, as Columbia Heart had to close the Lexington office in the fall of 2006, as a result of the Respondents' departure. R.p. 712:13-713:2; 885:14-19.

⁵Here, the contractual provision allows a departing doctor to practice upon payment of an amount equal to the average W-2 compensation of the Physician shareholders of Medical Group in the calendar year prior to the date of termination or expiration of the Agreement. R.p. 1290.

⁶Respondents cites *Todd v. Zaldo*, 304 S.C. 275, 279, 403 S.E.2d 666, 669 (S.C. Ct. App. 1991) for the proposition that the court cannot look beyond the corporate form of a business. However, *Todd* -- which was a case regarding misconduct in managing a company, not a covenant not to compete -- did not suggest that a court could never look beyond the corporate form, but instead, focused on the lack of evidentiary support in that case: "This record does not support application of these principles.... This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc." *Id.* In other words, the court suggested that, had the facts been different, the court could have looked beyond the corporate form.

provision, only the "partner" physicians. R.p. 1280, 1301, 681:18-20. The lower court should have considered the substance of the agreement and structure of the business, and concluded that the provision at issue is not a covenant not compete but simply "a [contractual] business arrangement incident to the continuing practice of the parties" *Hunt*, 313 S.C. at 355-356, 437 S.E.2d at 560.

III. Even if a reasonableness review applies, the restriction should be upheld. (Reply to Respondents' Argument C)

The Employment Agreement in this case prohibiting a departing physician from competing in the twenty mile radius one year and defines "compete" as follows:

"Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or other wise) to engage in the Business in the Territory.

R.p. 1289. The covenant is not overbroad simply because it prohibits Respondent from "assisting" another person in the "practice of medicine in the field of cardiology." In order for the covenant to be effective, it has to prevent Respondents from doing indirectly what they are prohibited from doing directly:

And the reason you put it [clause (C)] in there is so that they can't do indirectly what they can't do directly.

R.p. 1057:1-3.

Respondents, relying on *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), argue that the covenant cannot be upheld because it goes beyond what is necessary to protect Columbia Heart. That case is not applicable because the employer in

Faces Boutique attempted to restrict its employee, who was trained to perform facials, from working for any business that providing facials, spa services, cosmetic application or selling cosmetics. Because the employer in *Faces Boutique* attempted to categorize selling of cosmetics and multiple other services as "competition", the court found the covenant exceeded protection of "any legitimate business interest[.]" Here, however, there is only one service being restricted -- the practice of medicine in the field of cardiology. In other words, Columbia Heart attempted to prohibit Respondents from providing cardiology services to a competitor, whether it be by actively practicing cardiology or by creating, investing in, and advising a cardiology practice even if Respondents did not actively practice medicine. Even under the *Faces Boutique* logic, it is obvious that Defendant only seeks protection of its "legitimate business interest."

Respondents argue that the covenant clause (C)-- which prevents Respondents from "assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or other wise) in the Business" -- prevents them from working "in any capacity" even if they are not assisting directly in the practice of cardiology. Respondents then claim that other states have refused to uphold covenants that prevent a departing employee from working "in any capacity." Respondents' Brief, pp. 24-25. However, those cases do not apply.

First, the Employment Agreement in this matter did not use the phrase "in any capacity."⁷ The cases cited by Respondents used broad terms in restricting the activities of a departing employee, whereas in this case, the Agreement only prohibits Respondents from

⁷See, e.g., *Ponders, Inc. v. Norman*, 272 S.E.2d 345 (1980); *Facility Servs. & Sys., Inc. v. Vaiden*, 2006 WL 1572236 (Ohio App. 2006).

assisting “(as a director, officer, employee, agent, consultant, lender, lessor, or other wise) in the Business,” and “the Business” is limited to “the practice of medicine in the field of cardiology.” R.p. 1288. As David Summer testified at trial, the term “practice of medicine” is statutorily defined, and includes offering or undertaking to do any of the following: prescribe drugs or medicine, prevent or to diagnose, correct or treat illness or wound, or perform any surgical operation upon a person. R.p. 1055:12-14; S.C. Code § 40-47-20(36). Moreover, with one exception,⁸ the cases cited by Respondents did not include agreements between doctors. Therefore, Respondents’ cases provide no support for their position.

Respondents argued that the covenant would prevent them from activities such as providing janitorial services for a medical practice or acting as a landlord for a practice.⁹ However, David Summer, who noted that engaging in janitorial services would never been considered as assisting in the practice of cardiology,¹⁰ testified that the covenant was drawn

⁸Respondent misconstrues the one case they cite that does involve a doctor, *Geocaris v. Surgical Consultants, Ltd.*, 302 N.W.2d 76 (Wis. Ct. App. 1981). First, the opinion in that case did not even quote the covenant at issue, so it is impossible to compare it to the provision here. In addition, the case actually supports Columbia Heart’s argument that the covenant was appropriately tailored to protect Columbia Heart’s business interests. In *Geocaris*, the covenant prohibited the doctor from practicing as a physician for nine months following his termination of employment. However, the court found that restricting him from practicing as any type of physician was not reasonably necessary for the protection of Surgical Consultants, whose practice was limited to surgery. Here, Columbia Heart sought only to prevent Respondents from practicing, either directly or indirectly, in the field of cardiology, not the entire practice of medicine.

⁹At trial, Baugh and Feldman took the extraordinary position that any type of support, such as accounting or janitorial, would be “assisting the practice of medicine in the field of cardiology,” although David

¹⁰R.p. 1061:25-1062:11

as narrowly as possible to prevent a departing physician from doing indirectly what he cannot do directly. R.p. 1028; 1057. As Mr. Summer testified:

What you're trying to do is you're trying to be very definitive about the activities that are prohibited. And what we're trying to do is make it real clear that they can't go out there and actively compete to the injury of Columbia Heart. And we feel like those three definitions, and these are standard in our contracts, adequately covered that and were sufficiently narrow in scope.

R.p. 1028:5-12.

The covenant only prohibits the active practice of medicine in the field of cardiology, or assisting the active practice of medicine in the field of cardiology, not selling pharmaceuticals or cleaning a medical office. It does not prohibit the practice of medicine in another field, or assisting others in practicing medicine in another field. However, the covenant had to be written broadly enough to prevent a departing physician from using the "back door" to compete.¹¹ As noted by David Summer, the agreement has to prevent an employee from doing indirectly what he cannot do directly:

You can't do indirectly and use your experience and expertise to the detriment of your employer.

R.p. 1063:13-15.

Additionally, many courts have upheld covenants with language similar to that used here in cases involving the medical field. In *Lovelace Clinic v. Murphy*, 417 P.2d 450, 451

¹¹ Respondents argue that the covenant is overbroad because it would not allow them to manage another person's cardiology practice or act a landlord for a cardiology practice. However, such a prohibition is obviously within in Columbia Heart's legitimate business interests in preventing Respondents from facilitating competition against Columbia Heart. This section would not prevent Respondents from managing another type of medical practice or acting a landlord for any other type of medical practice.

(N.M. 1966), the Supreme Court of New Mexico upheld a grant of injunctive relief to medical clinic, that sought to enforce the following provision:

...the Staff Member, upon any termination of his employment, during a period of three (3) years thereafter will not, in Bernalillo County, New Mexico, **engage or be engaged either directly or indirectly in behalf of himself or in behalf of others in the practice of medicine, or surgery, general or special, and that during such period and within said limits, he will not, in anywise, be connected with any Clinic, Hospital, Sanitarium, Sanatorium, physician's or surgeon's office without the written consent of the Clinic being first had and obtained**, and no termination or modification of this contract or any part thereof, by whatsoever means the same might be or might be construed to be affected, shall in anywise change the provisions of this paragraph, or release the Staff Member from the terms hereof unless this paragraph be specifically referred to in writing in such way as clearly to indicate the purpose of the Clinic to release the Staff Member from the terms hereof[.]

Id. (emphasis added). The covenant in that case is even broader than the provision here, was for a duration of three years, and would not allow a departing employee to be employed in any type of hospital or medical practice.

Similarly, in *Mohanty v. St. John Heart Clinic*, 832 N.E.2d 940 (Ill. App. 2005), the court granted a preliminary injunction to enforce a covenant which provided, in part:

For a period of 5 years after the termination of this Agreement, the Employee shall not, (within a radius of 5 miles from any of Corporation's offices in Illinois) **directly or indirectly own, manage, operate, control, be employed by participating in or be connected in any manner with any office established for the practice of medicine....**

Id. at 942 (emphasis added). It should be noted that the covenant in *Mohanty* is even more extensive than the one here, as the duration is for 5 years and it prohibits the employee from participating in any practice of medicine, not just a specific field.

In another Illinois case involving the enforcement of a covenant between a medical practice and an ophthalmologist, the court upheld a covenant which stated :

Upon the expiration or termination of this Agreement, employee covenants that he will not, for a period of two (2) years after expiration or termination, **engage in, be associated with or have a financial interest in any medical practice or ophthalmology practice, either directly or indirectly, as employer, employee, principal agent, independent contractor, consultant, partner, stockholder, creditor in any other capacity,** at any location(s) within Sangamon County, Illinois[,] or within ten (10) miles of Hillsboro, Illinois [,] and ten (10) miles of any branch office of Employer..

Prairie Eye Ctr., Ltd. v. Butler, 713 N.E.2d 610, 612 (Ill. App. Ct. 1999) (emphasis added).

Like the cases *Columbia Heart* cited previously, the covenant in *Prairie Eye* is longer than the one at issue here and prohibits the departing physician from participating in any type of medical practice, not just a specific field. Clearly, courts have routinely upheld covenants which seek to protect the interests of a medical practice by prohibiting a departing physician from both direct and indirect competition.¹²

¹²Respondents suggest that the formula for the payment to compete is a penalty not related to damages and would not be upheld. Respondents argue that *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563 (N.C.App. 2006), which upheld a similar formula, was based on North Carolina law and the formula would be reviewed under a different standard by South Carolina courts. However, even under a South Carolina case law, the formula would not constitute a penalty. The record shows that the formula was chosen as “logical proxy for what damages could fairly be.” R.p. 1030:5-12. *Columbia Heart* knew that they would “lose all the net revenue that that individual would have generated....” R.p. 1032:3-5. In South Carolina, if the payment is not arbitrary and arises out of the nature of the contract and is designed a fair measure of the harm, it will be enforced. *Kirkland Distrib. Co. of Columbia, S. C. v. United States*, 276 F.2d 138 (4th Cir. 1960).

IV. The law does allow the court to blue-pencil the agreement. (Reply to Respondents' Argument E)

Blue penciling has been permitted in South Carolina in some circumstances. In *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681 (D.S.C. 2003), the court rejected the argument that blue-penciling was not allowed in South Carolina stating, "A survey of South Carolina law suggests otherwise. . . . *Eastern* and its progenitor, *Somerset*, suggest that South Carolina has not wholly rejected the 'blue pencil' test." *Rockford* at 687. Furthermore, contrary to Respondent's assertion, the court would not have to rewrite or reform the definition of "competent." Both *Rockford* acknowledged that when a court could simply strike through a provision to "save" a clause, the court could do so.

Here, the lower court's only objection to the definition of "competent" was the clause that prohibiting Respondents from assisting others in the field of cardiology. R.p. 3. Thus, the lower court could have struck through clause (C) of Section 5.2(i), which prohibits a departing doctor from "assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory." R.p. 1288. Respondents argue that the portions struck in *Rockford* were customer names and would not extend to include striking clause (C) in this case. However, *Rockford* did not limit its ruling to customer lists, but merely noted that blue-penciling was permissible because the court could do so "without disrupting the integrity, continuity, or intent of the remaining provisions." *Rockford* at 688. Similarly, in this case, the lower court could have simply struck clause (C) without disrupting the remaining provisions.

In addition, even if the court's striking of clause (C) would constitute rewriting, *the parties contractually agreed to allow the court to do so*. Section 5.5 of the Employment Agreement specifically provided that if the time, scope or geographical area exceeded what was deemed reasonable, the parties contractually agreed to allow the court to deem a reasonable time, scope or geographical area. While Respondents cite three cases¹³ for the proposition that our courts do not rewrite contracts, those cases do not control because, unlike here, the parties in those cases did not contractually agree to allow the modification. None of the cases cited by Respondents indicate that parties to a contract are not allowed to include a contractual provision allowing the court to rewrite the covenant.¹⁴

V. This Court should not affirm the lower court on the alternative grounds asserted by Respondent. (Reply to Respondents' Arguments and D)

Respondents argue that this Court can affirm on two alternative grounds. First, Respondents claim that the Employment Agreement was not supported by adequate consideration. Respondents also claim that lower court should have ruled that the

¹³*Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002); *MailSource, LLC v. M.A. Bailey & Associates*, 356 S.C. 363, 588 S.E.2d 635 (S.C. Ct. App. 2003); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003).

¹⁴Notably, Respondents did not cite the recent case of *Poynter Inv. Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010), on which it relied in the lower court. In *Poynter*, this Court found that the lower court had improperly rewritten the contract. The parties in *Poynter* had agreed that the geographic limitation could be reduced to either Greenville County or Greenville County and all border counties. The trial judge, however, **inserted his own definition** by changing the limitation to "within Greenville County and within an area encompassing fifteen miles in any direction from [the Premises]." It was the addition of new language created by the judge that was improper. In this case, of course, the court does not have to rewrite the contract to insert new language, but merely needs to strike one clause.

geographical limitation was overbroad. However, the lower court correctly ruled on both of these issues, thus, neither provides an additional ground for affirmance.

A. The Employment Agreement was supported by sufficient consideration.

When the Employment Agreements were executed in 2004, the Respondents were already employed as shareholder physicians. As consideration for the new Agreement, Appellant Columbia Heart Clinic, P.A. ("Columbia Heart") promised to pay a departing shareholder physician \$5,000 per month for 12 months provided that the departing physician did not compete. R.p. 1288. In its order, the lower court rejected Respondents' argument that the consideration was illusory because they never received any money in exchange for the promise not to compete. R.p. 3.

It is well settled in South Carolina that, for a contract to be binding, it must be supported by consideration. *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). "A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984).

Here, the consideration is executory -- Columbia Heart promised to pay a certain amount of money in the future if Respondents agreed not to compete in the future. A promise can constitute consideration. In contract law in general, "... a promise which is bargained for is consideration if, but only if, the promised performance would be consideration." RESTATEMENT (SECOND) OF CONTRACTS § 75 (1981). "In modern times the enforcement of bargains is not limited to those partly completed, *but is extended to the*

wholly executory exchange in which a promise is exchanged for a promise."

RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. a (1981) (emphasis added).

South Carolina case law clearly establishes South Carolina's adherence to this widely accepted contract principle. In *Carolina Chemical Equipment Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (1997), the Court of Appeals held "[c]learly, under contract law, mutual promises afford sufficient legal consideration for the support of each other." *Id.* at 303, 728 (citing *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959)). As the lower court noted, the Employment Agreement here contained mutual promises: Columbia Heart promised to pay Respondents \$5,000 per month for one year in exchange for Respondents' promises not to compete. The order also correctly found:

The consideration is not illusory as Plaintiffs claim. The fact that Plaintiffs never received any payments does not affect the validity of the consideration - the promises themselves.... Mutual promises must both be performed, or not at all.

Order, p. 14. See also, 17A Am.Jur.2d Contracts § 606 (A material breach by one party relieves the other of the obligation to perform."); *Modern Controls v. Andreadakis*, 578 F.2d 1264 (8th Cir. 1978). In a case with similar facts, *Aon Consulting, Inc. v. Midlands Fin. Benefits, Inc.*, 748 N.W.2d 626 (2008), the court found there was adequate consideration where there was a promise for additional payments in the future, but the employee never received the payments. In *Aon*, after the employee had worked for the employer for some time, he signed a covenant not to compete. Later, the covenant was challenged, including the argument that the employee had not received a bonus or compensation for signing the covenant, and that continued employment alone was not sufficient consideration. The court

held that it did not have to decide if continued employment constituted sufficient consideration because the agreement also provided that the employer would provide severance pay at the termination of employment. The court held that:

[t]his undertaking constituted a benefit of [employee] and a detriment to [employer] which would not have otherwise existed in their employment relationship. The fact that [employee] claims not to have received a severance payment following termination does not alter the fact that [employer's] agreement to make such payment constituted valid consideration for the nonsolicitation agreement.

Id. at 639. Likewise, in this case, the undertaking by Columbia Heart was the promise to pay \$5,000 per month for twelve months. The use of executory consideration had a beneficial practical effect as well. As David Summer, the attorney who drafted the Agreement, testified:

It's more practical to use executory consideration in cases like this. And this is a really good example: Had these physicians taken money on the front end, that would be an additional loss to the practice.

R.p. 1023:2-6. The record and the law clearly support the lower court's finding that there was sufficient consideration.

B. The lower court properly held that the geographical limitation was reasonable.

Respondent's second additional ground involves the geographical limitation. This is clearly a reasonable restriction. Article 5 contains the restrictive covenant and states the physician, during the twelve (12) months period immediately following the date of termination or expiration of the Agreement, shall not compete. Section 5.1(b). The term "compete" is defined in Section 5.2 and prohibits certain activities in the "territory" which is also defined:

"Territory" means the area within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.

R.p. 1289. South Carolina courts have recognized that a radius of 25 miles is reasonable.

South Carolina Finance Corp. of Anderson v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960). 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. *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). As that court noted,

...it has been said that the most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.

Id., 119 S.E.2d at 539.

The testimony at the trial indicated that the majority of Columbia Heart's patients, its "customers," came from Richland and Lexington County. R.p. 843:15-25; 1148:3-8. Thus, the 20 mile radius was designed to protect Columbia Heart's patient base as Columbia Heart would lose both current patients and future referrals upon a doctor's departure. R.p. 843:11-25.

Respondents argue that the radius was actually at least 55 miles because, as interventional cardiologists, Respondents require frequent access to a hospital authorized to perform invasive procedures (such as stenting and angioplasty) and that the next nearest locations (outside of Richland and Lexington) where Respondents could perform those procedures were Aiken, Anderson, Greenville, Florence, Spartanburg, and Charleston. The

evidence at trial, however, indicated that interventional procedures, such as stents and angioplasty, are only a small part of the practice and that there are many other non-interventional parts to the practice. As Dr. Schulze, one of the Columbia Heart doctors testified:

None of us spends more than five percent of our time doing interventional cardiology. We do consultative cardiology. We treat people in the hospital. we do diagnostic catheterization, echocardiography, nuclear cardiology, we regulate the cardiograms, we spend hours on-call basically answering the phone or attending to patients in the emergency room. The interventional part of the practice, and it's nice to call ourselves interventional cardiologists, that's only a small amount of our income, probably three to four percent at the most.

R.p. 847:15-848:1. Dr. Schulze also testified that it would be impossible for a doctor to lose his privileges if he did not do interventional procedures for a time:

So, no, no one's going to lose their privileges to-- or nobody's going to lose their ability to do interventional cardiology because they don't do it for a year.

R.p. 849:5-9. Dr. Ben Jones, another Columbia Heart doctor, also testified that "the bulk of the practice of interventional cardiologist in most cases is not interventional cardiology" and that if a physician could not do interventional procedures for one year, he could still heart catheterizations, and all other diagnostic modalities, such as stress testing, echo, and EKGs.

R.p. 1150:4-6; 1150:23. This one year absence from interventional procedures would not affect a doctor's board certification. R.p. 1152:20-1153:6. In other words, Respondent had multiple options; they could have opened a practice in Camden, Sumter, Orangeburg, which would allow them to practice all procedures but stenting and angioplasty; they could have opened a practice in Greenwood, Aiken or Rock Hill, in which the hospitals are authorized

for interventional procedures; or they could have paid the amount specified in the contract that would allow them to opening a competing practice in Lexington County.¹⁵

Respondent wrongly rely on *Cardiovascular v. Mammana*, 61 P.3d 210 (Okla. 2002). In that case, Dr. Mammana was a cardiovascular and thoracic surgeon who was subject to a covenant not to compete for two years within twenty-miles of his previous employer. Mammana argued that the radius was actually 100 miles because the closest hospitals were 100 miles away. There was also evidence that Mammana would not be able to practice his speciality, cardiovascular and thoracic surgery at all, unless he moved 100 miles away. The court, putting heavy emphasis on the fact that the covenant was for two years, found that the covenant was not reasonable. Here, however, Respondent do not have to relocate 100 miles or more away in order to continuing practicing medicine in the field of cardiology. The radius here, as the lower court properly recognized, is 20 miles from the office where the Respondents regularly practiced. R.p. 12. Respondents could have located their medical practice outside of the 20 miles there in areas such as Camden, Sumter, or Orangeburg, and performed all cardiology functions except for stents and angioplasty, which only amount to small percentage of their practice. In contrast, the surgeon in *Mammana* would not be able to perform any of his functions as a surgeon without moving 100 miles away for two years. Furthermore, there was no provision in *Mammana*, as there is here, that

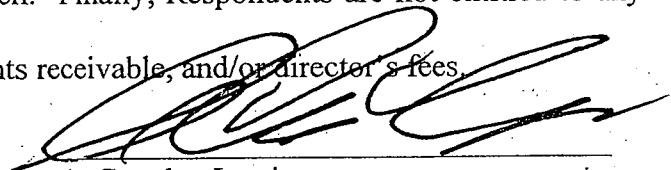
¹⁵Apparently, there is no territorial restriction that would satisfy Respondent. Respondent's new office is only approximately 300 yards from Columbia Heart's Lexington office. Thus, even if the territory was limited to one mile, Respondent would be in violation.

would allow the doctor to pay to compete. The covenant and circumstances in that case cannot be compared to this one.

In summary, the lower court correctly ruled on consideration and the geographical limitation, and thus, Respondents have cited no alternative grounds for affirmance.

CONCLUSION

The alternative sustaining grounds cited by Respondents provide no support for affirming the lower court. Furthermore, as set forth herein and in Appellant's Initial Brief, the contractual provision, should a reasonableness review deemed applicable, is reasonable in scope. Alternatively, the could have struck or revised the covenant's scope because the parties contractually agreed to allow such. Finally, Respondents are not entitled to any additional payments of advances, accounts receivable, and/or director's fees.



A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS & BABCOCK, L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
March 28, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 06-CP-32-0371

J. Kevin Baugh, M.D., and Barry J.
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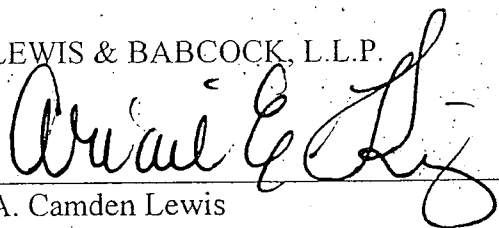
V.

Columbia Heart Clinic, P.A., ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Reply Brief of Appellant complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.

LEWIS & BABCOCK, L.L.P.



A. Camden Lewis
Keith M. Babcock
Ariail E. King
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Attorneys for Appellant

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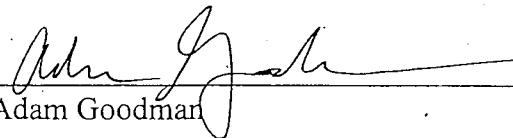
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CERTIFICATE OF SERVICE

I, Adam Goodman, employee of the law firm of Lewis & Babcock, L.L.P., hereby
certify that I have served the Reply Brief of Appellant and Final Brief of Appellant by
hand delivering copies of same to opposing counsel as follows:

Michael D. Malone, Esquire
Charles F. Thompson, Jr., Esquire
Malone Thompson & Summers, LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201


Adam Goodman

This 29th day of March, 2011.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D.,
Respondents,

v.

Columbia Heart Clinic, P.A., Appellant.

Appellate Case No. 2010-176767

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 5074

Heard September 12, 2012 – Filed January 16, 2013

REVERSED

A. Camden Lewis, Keith M. Babcock, and Ariail King,
of Lewis Babcock & Griffin LLP, of Columbia, for
Appellant.

Charles F. Thompson Jr., of Malone Thompson Summers
& Ott LLC, of Columbia, for Respondents.

THOMAS, J: Columbia Heart Clinic, P.A., appeals the trial court's final order from a non-jury trial. The trial court held (1) the restrictions on competition in agreements between Columbia Heart and the respondents are unenforceable and (2) the South Carolina Wage Payment Act entitled the respondents to unpaid compensation. We reverse.

FACTS & PROCEDURAL HISTORY

I. The Practice

Columbia Heart is a corporate medical practice that provides comprehensive cardiology services. Its physicians are all cardiologists, although each performs different subspecialties within that field.

J. Kevin Baugh, M.D., and Barry J. Feldman, M.D. (collectively, Respondents) are cardiologists who had been shareholders and employees of Columbia Heart since before 2000. They specialize in interventional cardiology. Interventional cardiology is a subspecialty of general cardiology focusing on certain invasive procedures such as the implantation of medical balloons and stents to unblock arteries. Usually interventional cardiology must be performed in a hospital with capability to perform open-heart surgery in case complications arise from interventional procedures.

II. The Agreements

When Respondents became shareholders, they each entered employment agreements that forfeited money payable to them upon termination if they competed with Columbia Heart in Lexington and Richland Counties within a year. These agreements contained no other provisions that discouraged competition, and their consideration was a compensation system attached as an exhibit.

In 2004, Columbia Heart's shareholders embarked on the construction of a new medical office building in Lexington County through a limited liability company (the LLC). The LLC was almost entirely owned by the shareholder-physicians of Columbia Heart. Columbia Heart was to be the anchor tenant, but it did not own any interest in the LLC. Each member of the LLC signed personal obligations on the project debt in proportion to their equity in the LLC. Because of (1) the investment and liabilities undertaken by Columbia Heart's shareholders as members of the LLC and (2) a recent departure of a large number of Columbia Heart physicians, Columbia Heart sought to bind its shareholder-physicians more tightly to the medical practice. Thus, in July 2004 Columbia Heart's shareholder-physicians entered into the agreements at issue (the Agreements).¹

¹ Columbia Heart's non-shareholder physicians had different employment agreements than its shareholders.

The Agreements contain two separate non-competition provisions, one in Article 4 and one in Article 5. Section 4.5(i) of Article 4 provides the following:

Notwithstanding any other provision in this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reason, whether with or without Cause) of this Agreement Physician continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5 following Physician's continuation or commencement of the practice of medicine in violation of this Section 4.5(i).

Section 5.1 of Article 5 says the following:

Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart.

Section 5.2 defines specific terms "[f]or purposes of Article 5":

"Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

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

No separate monetary consideration was paid to any shareholder-physician to sign the Agreements, nor did the Agreements change the compensation system established by Respondents' prior agreements.

III. Respondents' Departure and Ensuing Litigation

Columbia Heart opened a new office in the LLC's building in December 2005. In April 2006, Respondents left Columbia Heart in accordance with the Agreements. Ten shareholders remained.

Within a month after departing, Respondents opened a new practice, Lexington Heart Clinic, where they treated patients in cardiology and hired a number of Columbia Heart's administrative and medical support staff. Lexington Heart was on the same campus as Columbia Heart's Lexington office, separated by an approximate distance of 300 yards. Columbia Heart's physicians were rotated in pairs to work in its new Lexington office until the office closed in September 2006 because of fiscal unsustainability.

Respondents filed suit against Columbia Heart, raising a number of claims. They raised a declaratory judgment action against Columbia Heart, seeking two things: (1) a ruling that the Agreements contain unenforceable non-competition provisions and (2) injunctions to prohibit Columbia Heart from enforcing those provisions. Respondents also claimed violation of the Wage Payment Act, seeking treble damages for unpaid compensation, plus costs and attorney's fees. Columbia Heart answered and sought damages for contract and fiduciary duty counterclaims but did not seek injunctive relief.

The trial court conducted a bench trial addressing Respondents' declaratory judgment and wage payment claims.² It held the Agreements' non-competition provisions unenforceable and awarded Respondents unpaid compensation under the Wage Payment Act. This appeal followed.

² Trial will proceed on the remaining actions after these claims are resolved.

ISSUES

1. Did the trial court err in holding the Agreements contain unenforceable non-competition provisions?
2. Did the trial court err in holding Respondents are entitled to unpaid compensation under the Wage Payment Act?

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006). "The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review." *Id.* at 17-18, 640 S.E.2d at 495.

ANALYSIS

I. Declaratory Judgment Action

On appeal, Columbia Heart contends the Agreements' non-competition provisions are enforceable for a number of reasons. Respondents raise alternative sustaining grounds. We address these arguments in turn.

The trial court found the Agreements were supported by consideration and subject to review for whether their non-competition provisions were reasonable. The court addressed the provisions in Article 5 and Article 4 separately. It found Article 5's territory restriction was reasonable because the twenty-mile radius was necessary to protect Columbia Heart's legitimate business interests and was not unduly burdensome on Respondents' ability to earn a living. The court also found Article 5's restriction against "the practice of medicine in the field of cardiology" was not overbroad. However, the court held Article 5's prohibition of "assisting any Person . . . to engage in the [practice of medicine in the field of cardiology]" was unreasonable under *Preferred Research, Inc. v. Reeve*³ and *Faces Boutique, Ltd. v. Gibbs*.⁴ The court reasoned this restriction "goes beyond restricting [Respondents]

³ 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987).

⁴ 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995).

from doing what they did for" Columbia Heart and would bar them from assisting any cardiology practice "in any capacity." The court thus held the restriction was not necessary to protect a legitimate interest of Columbia Heart, and it found the restriction could not be blue-penciled from the rest of Article 5. And as a result, the court struck the entire covenant as unenforceable. In tandem, the court struck the non-competition provision in Article 4 because the court found the provision was a "part of, intended to be part of, and cannot be logically separated from the consequences of violating the non-compete provisions of Article 5."

To determine the standard of review for a claim brought under the Declaratory Judgment Act, we look to the main purpose of the complaint, as reflected by the character of the claims, evidence, and relief sought. *Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010). Respondents' declaratory judgment claim seeks a determination that the Agreements' non-competition provisions are unreasonable and an injunction. An injunction is an equitable remedy, and the interpretation of an unambiguous contract is a question of law, as is the question of whether a non-competition clause is reasonable. *Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 467, 688 S.E.2d 597, 601 (Ct. App. 2010); *Preferred Research*, 292 S.C. at 547-48, 357 S.E.2d at 490. Thus, we interpret the Agreements and address necessary factual questions involving the declaratory judgment action de novo. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

"While recognizing the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living." *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 338 (1980). Therefore, restrictions on competition "are generally disfavored and will be strictly construed against the employer." *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). Hence, they "must be narrowly drawn to protect the legitimate interests of the employer." *Faces Boutique*, 318 S.C. at 42, 455 S.E.2d at 708. Such an arrangement is enforceable only if it is (1) supported by valuable consideration; (2) necessary to protect the employer in some legitimate interest; (3) not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood; and (4) otherwise reasonable from the standpoint of sound public policy. *Rental Uniform Serv.*, 278 S.C. at 675-76, 301 S.E.2d at 143. The arrangement must be reasonably limited "with respect to time and place," but an otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction. *Rental Uniform Serv.*, 278 S.C. at 675-76, 301 S.E.2d at 143; *Wolf v.*

Colonial Life & Acc. Ins. Co., 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992).

A. The Agreements Are Subject to Reasonableness Review

Columbia Heart argues the trial court erred in finding the Agreements' non-competition provisions are unenforceable. Columbia Heart contends that under *J.W. Hunt & Co. v. Davis*,⁵ the non-competition provisions are not subject to reasonableness review because Respondents were two of twelve shareholders in a professional association that operates "in practice" as a partnership.⁶ The trial court rejected this argument, and so do we.

In *J.W. Hunt & Co. v. Davis*, an accounting partnership sued a former partner for providing services to the partnership's clients after resigning from the partnership. 313 S.C. at 353, 437 S.E.2d at 558. The firm sought to enforce a provision in the partnership agreement. *Id.* While an earlier partnership agreement "prohibited a withdrawing partner from rendering any accounting services to the partnership's clients for a five year period," the provision in issue stated the following:

In the event a partner . . . leaves the employ of the Firm and such Partner either "directly or indirectly" within a period of three (years) of such departure from the Firm does work for former or existing clients of the Firm, such [P]artner shall pay the following as liquidated damages The meaning of "directly or indirectly" is that such Partner will not render public accounting services in any of its phases

Id. at 353 n.1, 437 S.E.2d at 558 n.1. The trial court held the provision was not subject to review for whether it was a reasonable restraint on trade. *Id.* This court agreed. *Id.* It reasoned the provision was not a "covenant not to compete" because it "neither prohibit[ed] [the withdrawing partner] from practicing public accounting for any specific period of time nor from servicing any client in any specific

⁵ 313 S.C. 352, 437 S.E.2d 557 (Ct. App. 1993) (cert. denied).

⁶ As an alternative sustaining ground, Respondents argue Columbia Heart conceded the Agreements were subject to reasonableness review. We disagree. The issue was never conceded and is otherwise preserved.

geographic region." *Id.* at 355, 437 S.E.2d at 559. The provision instead "allow[ed] a withdrawing partner to service former clients provided the partner pays the partnership liquidated damages calculated by using a formula prescribed by [the provision]." *Id.* at 353, 437 S.E.2d at 558. The court also distinguished its circumstances from the facts of a case where our supreme court held a provision was subject to reasonableness review, *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975).

In *Almers*, a vice president was covered under a profit sharing program with his employer bank. *Id.* at 50, 217 S.E.2d at 135. He had acquired an 85% vested interest in the program as he departed to work for another bank in substantially the same duties. *Id.* After he left, his former bank terminated his benefits under the program pursuant to the following provision in the plan:

Notwithstanding anything in this Plan to the contrary, no benefit shall be paid hereunder subsequent to the date any Participant, former Participant or Retired Employee enters any employment in the State of South Carolina, if in the opinion of the Board such employment is in competition with or to the detriment of The South Carolina National Bank of Charleston.

Id. at 50-51, 217 S.E.2d at 136. On appeal, our supreme court acknowledged this provision was not "the classic example of a direct restraint" on competition, the "covenant not to compete." *Id.* at 51, 217 S.E.2d at 136. The court instead characterized the provision as a "forfeiture clause" and noted that "the consequence [of the clause] is not the inability to engage in competitive employment, but the forfeiture of pecuniary benefits should [the bank] . . . determine that an employee with accrued benefits had" competed against the bank. *Id.* at 52, 217 S.E.2d at 136. Despite the distinction, the court held that "a forfeiture clause in a profit or pension plan which provides that upon employment with a competitor a participant is divested of rights under the plan is invalid unless" it satisfies the same reasonableness review applied to covenants not to compete. *Id.* at 56, 217 S.E.2d at 138-39.

In rejecting the *Almers* analogy, the *J.W. Hunt* court explained the following:

Unlike *Almers*, there is no employment relationship involved in this case. Instead, the relationship here is a partnership agreement between partners with equal

bargaining power. When Article VII was adopted in 1986, Davis formally assented to Article VII by signing the agreement. Although the partnership agreement was subsequently amended five times, Article VII remained intact. As opposed to the sole protection of an employer's interest accomplished through the forfeiture of accrued benefits in *Almers*, Article VII, a provision for which Davis bargained, afforded Davis protection against withdrawing partners from the time of the Article's adoption until Davis' withdrawal in 1990.

Id. at 355-56, 437 S.E.2d at 559-60 (citations omitted) (alterations in original).

J.W. Hunt does not apply to the provisions of this case. First, the Agreements are contracts of employment.

Further, the non-competition provisions in the Agreements are substantively different than the provision in *J.W. Hunt*. Unlike the provision in *J.W. Hunt*, Article 5's non-competition provision is a covenant not to compete. Section 5.1 directly prohibits certain types of competitive conduct within a certain territory for a certain period of time. None of our courts have declined to apply a reasonableness analysis to covenants not to compete, and thus, Section 5.1 is subject to reasonableness review. Like the provision in *J.W. Hunt*, Article 4's non-competition provision is not a covenant not to compete. Unlike in *J.W. Hunt*, however, Article 4's provision is a forfeiture clause. While the clause in *J.W. Hunt* required the partner to pay a certain amount upon competition, Article 4 upon competition divests Respondents' rights to "any monies payable to Physician pursuant to this Section 4.5" under the Agreements. Forfeiture clauses are generally subject to reasonableness review, and none of our courts have declined to apply a reasonableness analysis to forfeitures: *See also Wolf*, 309 S.C. at 106, 420 S.E.2d at 220 (providing forfeiture clauses "are subject to the same requirements and strict analysis as covenants not to compete") (per curiam).

B. Article 5's Activity Restriction Is Reasonable

Columbia Heart also argues the trial court erred in finding Article 5's restriction against assisting a person to engage in the practice of medicine in the field of cardiology is not necessary to protect a legitimate interest of Columbia Heart.⁷

⁷ No party contends Article 4's activity restriction is unreasonable.

Columbia Heart specifically contends the covenant's prohibition against assisting the practice of medicine in the field of cardiology is necessary to prevent Respondents from indirectly engaging in activities they clearly could not participate in directly. We agree.

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

Respondents maintain this case is controlled by *Preferred Research, Inc. v. Reeve* and *Faces Boutique, Ltd. v. Gibbs*. However, those cases are inapposite.

In *Preferred Research*, an attorney executed a licensing agreement to perform real estate title work and related services for a company. 292 S.C. at 546, 357 S.E.2d at 489. The agreement described the company's business as "a national service in the fields of courthouse records research and verification, title searches, title insurance commitments and policies, loan closings, real estate appraising, credit investigations, examination of records affecting title to real estate and personal property and related services." *Id.* at 548, 357 S.E.2d at 490. The agreement further provided the following:

In the event of termination of this Agreement for any reason whatsoever, Licensee shall not thereafter engage either directly or indirectly as principal or employee, alone or in association with others, in a similar business, *in any capacity*, to that licensed and established hereunder within an airline radius of twenty-five (25) miles of any of Licensee's places of business established under this Agreement and within the Territory described in Exhibit "B" attached hereto and by reference incorporated herein, for a period of twelve (12) months.

Id. at 547, 357 S.E.2d at 490. Applying Georgia law, this court held the activity restriction was broader than necessary to protect the company because it would prevent the attorney from working in any capacity for any employer who engaged in any of the activities encompassed by the company's business. *Id.* at 548, 357 S.E.2d at 490.

In *Faces Boutique*, a facial spa that provided skin care and face lifts employed the defendant, an esthetician who performed facials. 318 S.C. at 41, 455 S.E.2d at 708. The defendant's employment contract contained the following covenant:

For a period of three (3) years after the termination of this agreement, the Employee will not, WITHIN THE TOWN OF HILTON HEAD ISLAND, SC, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Employer].

Id. The court held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's legitimate business interests. *Id.* at 43, 455 S.E.2d at 708. It reasoned the owner of the spa admitted the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [the] business would not be threatened." *Id.*

The "any capacity" restrictions employed in *Preferred Research* and *Faces Boutique* are broader than the restriction here. Article 5 only prohibits "assisting any Person . . . to engage in [the practice of medicine in the field of cardiology]." Assuming Respondents do not violate the other restrictions, they could work for a business that practices medicine in the field of cardiology so long as they do not assist a person to engage in the practice of cardiology. Although Respondents do not contest that they breached the restrictions here, whether a shareholder-physician has actually assisted someone to engage in the practice of medicine in the field of cardiology could be a question of fact in other cases.

We accordingly find the trial court erred in determining the scope of activity restricted by Article 5's covenant not to compete was unreasonable. We thus must consider Respondents' additional grounds for sustaining the trial court's finding that the Agreements' non-competition provisions are unenforceable.

C. The Agreements Are Supported by New Consideration

Respondents contend as an additional sustaining ground that the Agreements are unenforceable because they are not supported by new consideration. We disagree.

"[W]hen a covenant [not to compete] is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable." *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001). "[T]here is no consideration when the contract containing the covenant is exacted after several years' employment and the employee's duties and position are left unchanged." *Id.*

Respondents executed the Agreements after they became employed by Columbia Heart, and the Agreements did not change the general compensation system agreed to by the parties under their prior employment contracts. However, Section 4.5(1) of Article 4 of the Agreements provides the following:

Physician shall be paid Five Thousand and No/100 Dollars (\$5,000.00) per month for each of the twelve (12) months following termination, so long as the Physician is not in violation of Article 5 of this Agreement.

This language established that Columbia Heart promised to pay each Respondent a total of \$60,000 over twelve months after termination so long as they did not violate the non-competition provision in Article 5. In Article 5, Respondents promise not to compete with Columbia Heart, and the parameters of that promise are more restrictive than the covenants in the prior agreements. Consequently, the Agreements are supported by new consideration. *See Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises . . . constitute a good consideration.").

Respondents maintain Columbia Heart's promise to pay \$60,000 in severance after termination was illusory because they will not receive the money if they compete in violation of Article 5. However, a promise is not illusory merely because its enforceability depends upon the performance of a reciprocal promise. Consequently, the Agreements are supported by new consideration.

D. Article 5's Territory Restriction Is Reasonable

As a further additional sustaining ground, Respondents argue the Agreements' non-competition provisions are unenforceable because Article 5's territory restriction is unreasonable.⁸ Respondents maintain the nearest medical facilities outside the territory restriction that are authorized to perform elective invasive procedures critical to their subspecialty, interventional cardiology, are 55 miles away. In other words, they argue the territory restriction would in practical effect force them to make a significant relocation in order to perform their practice. They contend the territory restriction is therefore not tied to a legitimate interest of Columbia Heart and constitutes an unduly oppressive restraint on their ability to earn a living. We disagree.

Here, the territory restriction is necessary to protect a legitimate interest of Columbia Heart. The plain terms of the restriction prohibit Respondents from competing within a 20-mile radius of Columbia Heart offices at which Respondents "routinely provided services" during the last year of their employment. At the height of its size, Columbia Heart had permanent offices in Providence Hospital, Palmetto Richland Memorial Hospital, and Lexington Medical Center, as well as clinics throughout the state. Respondents worked primarily at Columbia Heart's Lexington and Richland County offices. Although Columbia Heart receives referrals from all over South Carolina, most of its physicians' patients come from the county where the physicians' main office is located. The restriction is limited to areas where Respondents primarily dealt with Columbia Heart patients, and no evidence in the record shows a large number of these patients were located within a distance significantly smaller than the 20-mile radius. *See Stringer v. Herron*, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (Ct. App. 1992) (holding a covenant in an employment contract unreasonable where it prohibited a veterinarian from competing against his prior veterinary medicine practice "within fifteen miles of any veterinary practice operated by the employer . . . at the time of termination of employment" because the 15 mile radius around each location overlapped with the others and reached into adjoining counties and another state despite the fact that the "overwhelming majority" of the practice's clients "lived much closer than 15 miles from at least one of the practice locations").

⁸ No party contends Article 4's territory restriction is unreasonable.

Further, the fact that the practical effect of the territory restriction will make it difficult for Respondents to practice their subspecialty in interventional cardiology does not indicate under our facts that the restriction is unnecessary to protect Columbia Heart's legitimate interests. See *Rental Uniform Serv.*, 278 S.C. at 676, 301 S.E.2d at 143 ("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."). Such an argument more appropriately addresses whether the covenant is unduly oppressive.

In this case, the territory restriction's practical effect on Respondents' practice is not unduly harsh or oppressive in curtailing their legitimate efforts to earn a livelihood. Respondents highlight *Cardiovascular Surgical Specialists, Corp. v. Mammana*⁹ for their argument that the territory restriction is unreasonable because of the practical effect on Respondents' practices. There, a medical practice specializing in cardiovascular and thoracic surgery imposed a covenant not to compete that prohibited one of its surgeons from, among other things, owning, operating, or participating in cardiovascular or thoracic surgery for two years after termination. 61 P.3d at 213-14. Testimony indicated the prohibition would effectively bar the physician from practicing in cardiovascular and thoracic surgery within 100 miles of his former practice's location due to the remoteness of other hospitals. *Id.* at 214. The court struck the restriction because the employer testified, "It would be unlikely that if the non-compete was abided by, that someone would stay in the community for two years, not practice, and then have a viable practice at the end of two years." *Id.* The court further rejected the argument that the physician could switch to another medical specialty. *Id.*

Unlike in *Mammana*, Columbia Heart is a full-service cardiology practice, and Respondents specialized in general cardiology, with a subspecialty in interventional cardiology. While the restriction in *Mammana* prevented the physician from practicing in his field far beyond the technical terms of the provision, here Respondents can continue to practice in their field—offering cardiology services not involving interventional cardiology—outside the 20-mile radius.¹⁰ Moreover, Respondents have not established their inability to perform

⁹ 61 P.3d 210 (Okla. 2002).

¹⁰ Both sides' testimony indicates that interventional procedures constitute only 5 to 10% of Respondents' time. Further, one witness testified interventional cardiology constitutes "probably three or four percent" of Respondents' income "at most."

interventional procedures would prevent them from having a viable practice after the one-year period. The evidence indicates board certification in interventional cardiology lasts for ten years, and Respondents' ability to obtain credentialing in that field after the one-year period would depend upon subsequent negotiations between Respondents and the hospitals at which they attempt to obtain credentialing. Consequently, Respondents have not shown the restriction would be unduly burdensome on their ability to earn a living, and the trial court did not err in finding the territory restriction in Article 5's covenant was reasonable.¹¹

E. Article 5 and Article 4 Are Subject to Review for Whether They Contain Penalties

As another sustaining ground, Respondents assert the Agreements' non-competition provisions are not enforceable because they contain penalties for violation of their restrictions. We disagree.

"Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of" breach. *Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011). They likewise may stipulate that a breaching party will lose a right to which the party is entitled under the agreement. *Tate v. Le Master*, 231 S.C. 429, 441-42, 99 S.E.2d 39, 45-46 (1957) (providing that parties may stipulate to the "forfeiture" of rights under a contract). However, if the stipulation is a penalty, it will not be enforced. *Foreign Academic*, 394 S.C. at 204, 715 S.E.2d at 334; *Tate*, 231 S.C. at 442, 99 S.E.2d at 46.

Whether a provision is a penalty is a question of construction and is generally determined by the intention of the parties. *Tate*, 231 S.C. at 429, 99 S.E.2d at 39. "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.*

Another witness testified 90% of cardiology patients are managed medically, and less than 10% require interventional procedures each year.

¹¹ We do not address the trial court's findings that Article 4 and Article 5's non-competition provisions were intended to operate together in all cases and were thus unenforceable because Article 5 contained an unreasonable activity restriction. We find Article 5 enforceable. Therefore, the argument that Article 4 must fail because Article 5 fails does not apply to this case.

Winter Consrt. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). We must "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." *Id.* at 460, 713 S.E.2d at 322 (quoting *Foster v. Roach*, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922)). Where the stipulation "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." *Tate*, 231 S.C. at 440, 99 S.E.2d at 45-46. "However, where the stipulation is not based upon contemplated actual damages but is intended to provide punishment for breach of the contract, it is a penalty." *Moser v. Gosnell*, 334 S.C. 425, 432, 513 S.E.2d 123, 126 (Ct. App. 1999). The stipulation will be deemed a penalty if it "is so large that it is plainly disproportionate to any probable damage resulting from breach of contract." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002).

It is clear the Agreements' remedies were created in part to deter departures from the practice. However, that fact does not by itself indicate the remedies are penalties. A stipulation for breach will often serve as a disincentive to breach. Here, the probable damages caused by a shareholder-physician's competition would have been difficult to estimate at the time the Agreements were created. Although patients follow their doctors, the continuance of that relationship relies upon the uncertain actions and feelings of the patients. Further, Columbia Heart generates income through the delivery of services, and the practice's accounts receivable does not reflect what the company actually collects through those services. In this particular practice, the accounts receivable actually collected ranged between 37% and 48%. Lastly, the parties entered the Agreements knowing Columbia Heart itself planned to—and did—incur \$5 million in debt to furnish its space in the LCC's Lexington building with equipment and furniture. The practice's ability to utilize these assets thus would depend upon the physicians' abilities to continue or increase services provided. As a result, the effect of a doctor's departure on a practice's business, while expected to be negative, would have been highly uncertain.

1. *Article 5's Stipulated Damages Provision Is Not a Penalty*

Article 5 provides remedies "available to Columbia Heart in the event of a breach of" the covenant. Those remedies included Section 5.4(a), a stipulated damages provision:

In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Columbia Heart liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of physician-shareholders of Columbia Heart in the calendar year prior to the date of termination or expiration of this Agreement.

These damages are in partial restitution for the loss or damage which Columbia Heart will suffer as a result of such breach and in partial recovery of its investment in the practice of Physician, which together constitute full payment of such losses or damages. Notwithstanding anything to the contrary stated herein, payment of such liquidated damages (together with the forfeiture described in Article 4 above) will entitle Physician to practice in breach of the provisions contained in Section 5.1 without further liability to Columbia Heart for such breach.

Article 5 subsequently states:

Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, . . . , and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Columbia Heart.

Article 5's stipulated damages provision is not a penalty. It reasonably attempted to provide a conservative estimate of damages sustained by Columbia Heart when a shareholder-physician departed and competed. The parties agreed at trial that the amount established by the average shareholder-physician's taxable income from the year before equaled roughly \$591,710 and that Respondents are financially able to pay that amount. Further, Respondents' taxable income for each year was generally "six figures" less than the net revenue earned by each shareholder-

physician for the practice. Because patients tend to follow their doctors, the use of a physician's W-2 income for the prior year is a logical estimate of the income to be lost by the practice when the physician leaves. The provision further contains an acknowledgment the stipulated amount reflects a portion of the damages Columbia Heart would suffer from breach. Consequently, the stipulated damages provision is enforceable. *Cf. ERIE Ins. Co.*, 393 S.C. at 461, 464, 713 S.E.2d at 321, 322 (holding the language of a contract that imposed a 15% fee to cover the burden of overseeing completion of a project after the project's breach was reasonably intended as a predetermined measure of loss from breach because it varied the recoverable damages based upon the outstanding work).

2. *Article 4's Forfeiture Is Not a Penalty*

Article 4's forfeiture provides that if Respondents competed with Columbia Heart in violation of Article 4, they "shall forfeit any monies payable to [them] pursuant to this Section 4.5." Section 4.5(l) provides that upon termination, Respondents were entitled to \$60,000. Section 4.5(f) provides that upon termination without cause, Respondents were entitled to:

- (i) All salary earned or accrued but unpaid as of the date of [termination]¹²; and
- (ii) Physician's Prorata Share of the Current Year's Actual Collection Percentage of the accounts receivable of Columbia Heart, computed on the date of termination of this Agreement.

Article 4 defined "Physician's Prorata Share" and "Current Year's Actual Collection Percentage." Those definitions indicate the shareholder-physician is entitled to a percentage of the accounts receivable earned by Columbia Heart between the beginning of the fiscal year and time of termination (the defined share of accounts receivable). The percentage of earned accounts receivable is based upon the shareholder-physician's ownership in Columbia Heart at termination and the percentage of accounts receivable actually collected by Columbia Heart in the last fiscal year.

¹² This section states "Physician's death," but every party agrees the language is a typo.

Section 4.6 of Article 4 provides:

Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Columbia Heart will suffer as a result of competition by Physician with Columbia Heart. Physician further acknowledges that such forfeiture . . . , is fair and reasonably required for the protection of Columbia Heart.

Like Article 5's stipulated damages provision, Article 4's forfeiture is not a penalty. Here, the Agreements indicate that if a shareholder-physician was to compete in violation of Article 4, Article 4 would simultaneously divest the shareholder-physician's rights to earned but unpaid salary, the defined share of accounts receivable, and the \$60,000 severance pay. The defined share of accounts receivable is a formula that estimates the accounts receivable attributable to the physician until the physician left during the current year. Reviewed in that light, its forfeiture may conservatively estimate probable damage caused by a departed shareholder-physician's competition with Columbia Heart for a period equal to the amount of time the physician worked for the practice in the year he left. *See ERIE Ins. Co.*, 393 S.C. at 461, 464, 713 S.E.2d at 321, 322 (holding the language of a contract that imposed a 15% fee to cover the burden of overseeing completion of a project after the project's breach was reasonably intended as a predetermined measure of loss from breach because it varied the recoverable damages based upon the outstanding work). In contrast, the amounts reflecting earned but unpaid salary and \$60,000 severance pay are not on their face related to Columbia Heart's probable loss suffered by a shareholder-physician's departure and competition. But the damages to be expected by competition are highly difficult to predict, and the Agreements involved large sums of money, sophisticated shareholder-physicians, and arm's length negotiation. Article 4 itself says the forfeiture was "reasonable" and "intended as partial restitution" for Columbia Heart's damages caused by competition. The money actually forfeited by each Respondent pursuant to Article 4 totaled near \$240,000,¹³ and the difference between the stipulated damages in Article 5 and the revenue loss Columbia Heart could expect in one year if a shareholder-physician took patients away from the practice equaled about "six

¹³ Each Respondent's defined share of accounts receivable equaled around \$172,000, and each Respondent sought the \$60,000 severance pay and about \$8,000 in earned but unpaid salary.

figures," or \$100,000.¹⁴ Although Article 4's forfeiture would as a result divest each Respondent of items worth \$140,000 more than the estimate of the net revenue each shareholder-physician might earn for the practice in serving its patients, Columbia Heart's loss of patients was not the only foreseeable loss resulting from departure and competition by shareholder-physicians. Probable damages to Columbia Heart could include other losses resulting from the closing of an office, and no evidence allows us to conclude the \$140,000 difference is an unreasonable estimate of those uncertain losses. *See* Restatement (Second) of Contracts § 356 cmt. b ("To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties."), *cited by* *ERIE Ins. Co.*, 393 S.C. at 462, 713 S.E.2d at 322. Considering the Agreements as a whole and the circumstances surrounding their entry—especially the millions of dollars Columbia Heart incurred in opening the new practice—the forfeiture in Article 4 could reasonably be intended to compensate Columbia Heart for part of the probable damages resulting from the shareholder-physician's departure and competition in contravention of Article 4. *See id.* § 356 cmt. b ("The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss. The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable." (citations omitted)). Consequently, the forfeiture in Article 4 is enforceable.

II. Wage Payment Action

Columbia Heart contends the trial court erred in awarding Respondents the unpaid compensation they sought under the Wage Payment Act. We agree.

At trial, Respondents sought payment from Columbia Heart under the Wage Payment Act for compensation left unpaid after they departed from the practice. Both doctors sought amounts owed for their defined share of accounts receivable and earned but unpaid salary. Dr. Feldman sought payment for unpaid director's

¹⁴ We consider Article 5's stipulated damages provision along with Article 4's forfeiture because Respondents breached the non-competition provisions of both.

fees, but Dr. Baugh did not. Respondents did not seek payment for the \$60,000 severance pay.

The parties agreed that Respondents had competed in contravention of the Agreements, but the trial court held the non-competition provisions were unenforceable. Thus, the court found Respondents had not lost their rights to the above compensation by competing with Columbia Heart, and it awarded Respondents compensation for their wage payment claims. The court declined to grant treble damages or attorney's fees.

Actions seeking damages for a violation of the Wage Payment Act are actions at law. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010). In an action at law tried without a jury, the trial court's findings are conclusive on appeal when supported by competent evidence. *Id.* Accordingly, our standard of review is limited to correcting errors of law and determining whether the trial court's findings are supported by competent evidence. *Id.*

Under the Wage Payment Act, Respondents are entitled to recover in a civil action "all wages due" but unpaid by Columbia Heart when Respondents left the practice. S.C. Code Ann. § 41-10-50 (Supp. 2012); S.C. Code Ann. § 41-10-80(C) (Supp. 2012). The Act provides the trial court the discretion to award treble damages, attorney's fees, and costs as well. *Mathis*, 389 S.C. at 315, 698 S.E.2d at 781.

Under the Act, "wages" are defined as the following:

[A]ll amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10(2) (Supp. 2012). In other words, the Act "defines 'wages' as 'all amounts . . . which are due to an employee under any . . . employment contract.'" *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 195 n.4, 463 S.E.2d 641, 645 n.4 (Ct. App. 1995) (quoting § 41-10-10(2)).

Here, because the forfeiture in Article 4 is enforceable and Respondents have forfeited their rights to compensation under that article, no evidence indicates the defined shares of accounts receivable, unpaid draws, and director's fees are "due" to them under the Agreements. Accordingly, the items are not "wages" and the trial court erred in holding Respondents were entitled to them pursuant to their wage payment claims.

CONCLUSION

We reverse the trial court's finding that the non-competition provisions in Article 5 and Article 4 are unenforceable. We also reverse the trial court's finding that Respondents were entitled to damages for unpaid director's fees, draws, and the defined share of accounts receivable under the Wage Payment Act.

REVERSED.

HUFF and LOCKEMY, JJ., concur.

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In the Court of Appeals**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas**

William P. Keesley, Circuit Court Judge

C. A. NO. 2006CP32-0371

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. Respondents,

v.

Columbia Heart Clinic, P.A. Appellant.

**RESPONDENTS' PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC**

January 30, 2013

Charles F. Thompson, Jr.
Michael D. Malone
Malone, Thompson, Summers & Ott LLC
339 Heyward St., Suite 200
Columbia, S.C. 29201
803-254-3300

ATTORNEYS FOR THE RESPONDENTS

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ATTORNEYS FOR THE RESPONDENTS

Introduction

The question in this matter is whether Drs. Baugh and Feldman were bound by a non-competition clause (non-compete) contained in an employment agreement. The non-compete prohibited them from practicing cardiology, working for, or assisting in any manner, an entity engaged in the practice of medicine in the field of cardiology.

The restriction applied within a 20 mile radius of Columbia Heart's Lexington Medical Center, Providence Hospital and Palmetto health/Richland Hospital offices for a period of one year.

After a week-long bench trial, Judge Keesley held the covenant was unenforceable. The Court of Appeals panel, however, held that the restriction was not an improper "any capacity" restriction because, despite the broad language, it allowed Drs. Baugh and Feldman to be employed by an entity engaged in cardiology so long as they did not directly assist a person who practices cardiology. To reach this conclusion, however, the panel did not acknowledge all the plain language in the non-compete that made it clear the restriction was an improper "any capacity" restriction. Nowhere in the panel's decision does it quote or discuss critical definitions and descriptive phrases that made it clear that Columbia Heart was attempting to bar the Respondents from being employed by, or involved with, a cardiology business in any capacity. The panel ignored the plain language of the non-compete. Even if there was any ambiguity in the language, the panel incorrectly failed to "strictly construe" that language against the employer.

The panel also incorrectly rejected Appellant's alternative grounds for finding the non-compete invalid and reversed Judge Keesley's ruling in Appellant's favor on their Wage Payment claim.

The Panel Erred in distinguished the "any capacity" restriction in this case from those previously found unenforceable by this court.

The Columbia Heart non-compete "any capacity" restriction (in relevant part) reads as follows:

"Compete" means **directly or indirectly**, on his own behalf or on behalf of any other Person, other than at the direction of the Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) **assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise)** to engage in the Business in the Territory.

(R. p. 1289) (P. Ex. 1 Article 5.2 page 10) (emphasis added).

"The **Business**" is defined as "... the practice of medicine in the field of cardiology." (*Id.* at § 5.1(a)) (emphasis added).

"**Person** means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization, or government unit." (R. 1289) (*Id.* at § 5.2(ii)) (emphasis added).

This court previously found the following "any capacity" restriction to be overly-broad and unenforceable:

Licensee shall not thereafter engage either **directly or indirectly** as **principal or employee, alone or in association with others**, in a similar business, **in any capacity**, to that licensed and established hereunder within an airline radius of twenty-five (25) miles of any of Licensee's places of business established under this Agreement and within the Territory described in Exhibit "B" attached hereto and by reference incorporated herein, for a period of twelve (12) months.

Preferred Research, Inc. v. Reeve, 292 S.C. 545, 547, 357 S.E.2d 489, 490 (Ct. App. 1987) (emphasis added). The two restrictions are indistinguishable in their effect. If anything, the Columbia Heart restriction is broader. Both improperly prohibit the employee from working for a competitor (or in this case any entity engaged in cardiology) in any capacity.

The panel did correctly acknowledge well-established precedent that a non-compete may not bar an employee from working in "any capacity" for a competitor. In other words, a former employee may not be barred from working for a competitor in "an area . . . not involved" directly in the business of the employer. *Faces Boutique v. Gibbs*, 455 S.E.2d 707 (S.C. Ct. App. 1995);¹ *Preferred Research v. Reeve*, 357 S.E.2d 489 (S.C. Ct. App. 1987).²

However, the court distinguishes the Columbia Heart non-compete by holding that it allows a Columbia Heart employee to work for a cardiology practice "as an employee" provided he does not assist "a person" to practice cardiology. (slip op. at 11). This is not what the plain language of the Columbia Heart non-compete states. The panel effectively deleted the language that explicitly defines "assist" as being a " **director, officer, employee, agent, consultant, lender, lessor or otherwise.**" Notably, this definition is a non-exclusive list of examples of ways that employees might improperly assist. In addition, the panel mistakenly interpreted "person" to mean a person practicing cardiology. However, the agreement actually uses the defined term "Person" which is specifically defined to include not just an

¹ (an employee involved in cosmetics sales for the employer could not be barred from working in non-cosmetic department of a competitor).

² (an attorney performing title work cannot be barred from working for a competitor in "any capacity.").

individual doctor practicing cardiology but any type of entity (e.g. a teaching hospital or Veterans Administration Hospital) that practices cardiology as a component of its business or operation. Once this omitted language is considered, it is clear that the Columbia Heart restriction attempts to prohibit employee-doctors from working in any capacity for any person or entity that provides cardiology services. It explicitly states that working as an "employee" "or otherwise" or even being a lender, etc, is expressly prohibited. This restriction is a prohibited "any capacity" restriction just like the restrictions in *Preferred Research* and *Faces Boutique*. In fact, it is broader than those restrictions because it also prohibits the provision of services ("lessor" "landlord") to an entity that provides cardiology services.

The panel, therefore, erred in reversing Judge Keesley's conclusion that:

The Agreement goes beyond restricting the Plaintiffs from doing what they did for CHC and seeks to expand restrictions into areas wholly unrelated to the Plaintiffs' CHC employment. The Agreements are, therefore, not narrowly drawn to protect legitimate interests of the employer as South Carolina courts require.

(slip op. at 22, internal quotations and citations removed).

The panel is, therefore, simply not correct that former employees of Columbia Heart can work for a cardiology practice in any capacity. The plain language of the agreement prohibits this and goes on to prohibit working for, or providing services to, any entity that provides cardiology services in its mix of services.

The Panel Should Have Construed the Non-Compete Against Columbia Heart and Should Have Applied the Appropriate Standard of Strict Scrutiny

The panel's finding that the non-compete allows Drs. Baugh and Feldman to work for a cardiology practice or business in a capacity that does not assist a doctor/cardiologist is contrary to the plain language. However, even if the language were capable of a narrow interpretation, doing this would require interpreting the Columbia Heart non-compete heavily in favor of the employer. The non-compete prohibits **"directly or indirectly . . . assisting any Person [i.e. any entity providing cardiology services] (as director, officer, employee, agent, consultant, lender, lessor or otherwise)."** Finding that this would still allow employment within an entity engaged in cardiology requires twisting the language to Columbia Heart's favor. Such an exercise is contrary to long-standing precedent recognizing that non-competes are a special breed of agreement. Unlike any other contractual agreement, they are **"strictly construed against the employer."** See, e.g., *Rental Uniform Service Dudley*, 301 S.E.2d 142 (S.C. 1983) (emphasis added); *Sermons v. Caine & Estes Insur.*, 273 S.E.2d 338 (S.C. 1980) (emphasis added). Other contracts are merely construed against the drafter, and then, not strictly. In South Carolina, non-competes are also regarded with **"high disfavor."** *Carolina Chemical Equipment v. Muckenfuss*, 471 S.E.2d 721 (S.C. 1996) (emphasis added). In other words, they are **"greatly disfavored"** by the Courts. *Moser v. Gosnell*, 334 S.C. 425, 513 S.E.2d 123 (1999) (emphasis added). There are, therefore, strict rules under which the validity of such provisions must be considered. If a covenant not to compete is defective in any way, the covenant is totally defective and cannot be

saved. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995)

[citations omitted].

In only one non-compete case³ in the last fifty years has a South Carolina appellate court upheld a non-compete whose restrictions went beyond protecting existing customers with whom the employee had contact.⁴ They are held in that much disfavor.

In interpreting the language greatly in favor of Columbia Heart, the panel failed to apply the required level of scrutiny.

The Panel Overlooked the Evidence and Factual Findings of Judge Keesely that made Clear the Non-Compete is Overly Broad and, Therefore, Failed to Properly Defer to Judge Keesley's Factual Findings

The panel also overlooked the evidence, and therefore, factual findings that Judge Keesley made on the meaning of the non-compete after he heard a week of testimony and evidence.

³ That case was *Rental Uniform Service v. Dudley*, 301 S.E.2d 142 (S.C. 1983). Even so, the plaintiff's lawyer in *Dudley* failed to argue that the non-compete was unenforceable because it barred the plaintiff from working in any capacity in the rental uniform business. If he had, the Rental Uniform Service non-compete would have been found unenforceable as well. Excluded from this count are non-compete cases dealing with restrictions against former owners. Because owners are not usually employees, they do not get the benefit of the disfavor placed on provisions drafted by an employer. See, e.g., *Sermons v. Caine & Estes Insur.*, 273 S.E.2d 338 (S.C. 1980).

⁴ *Eastern Business Forms v. Kistler*, 189 S.E.2d 22 (S.C. 1972); *Sermons v. Caine & Estes Insur.*, 273 S.E.2d 338 (S.C. 1980); *Almers v. S. Carolina Nat. Bank of Charleston*, 217 S.E.2d 135 (S.C. 1975); *Stringer v. Herron*, 424 S.E.2d 547 (S.C. Ct. App. 1992); *Oxman v. Sherman*, 122 S.E.2d 559 (S.C. 1961); *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533 (S.C. 1961); *Faces Boutique v. Gibbs*, 455 S.E.2d 707 (S.C. Ct. App. 1995); *Preferred Research v. Reeves*, 357 S.E.2d 489 (S.C. Ct. App. 1987); *Team IA, Inc. v. Lucas*, 717 S.E.2d 103 (S.C. Ct. App. 2011); *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 621 S.E.2d 352 (S.C. 2005); *Carolina Chem. Equip. Co., Inc. v. Muckenfuss*, 471 S.E.2d 721 (S.C. Ct. App. 1996); *Caine & Estes Ins. Agency, Inc. v. Watts*, 293 S.E.2d 859, 860 (S.C. 1982); *Wolf v. Colonial Life & Acc. Ins. Co.*, 420 S.E.2d 217 (S.C. Ct. App. 1992); *Collins Music Co., Inc. v. Parent*, 340 S.E.2d 794, 796 (S.C. Ct. App. 1986); *Rental Uniform Service Dudley*, 301 S.E.2d 142 (S.C. 1983); *Oxman v. Profitt*, 126 S.E.2d 852 (S.C. 1962).

The panel should have deferred to Judge Keesley's factual determinations.⁵ Even if *de novo* review is appropriate (Respondent asserts it is not) the panel incorrectly failed to review the factual evidence that made clear the non-compete was overly broad.

The panel correctly noted that where a judge tries an action in equity, his findings are reviewed *de novo*. However, "a suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 400 S.E.2d 781, 782 (S.C. 1991). As in *Felts*, where "the action was one to construe [an] employment contract [it is] at law. *Id.* (citing *Hofer v. St. Clair*, 381 S.E.2d 736 (S.C. 1987). Accordingly, the panel should have applied the "any evidence" standard of review. That is, any "findings of fact should not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence." *Townes Associates, Ltd. v. City of Greenville*, 221 S.E.2d 773, 775-76 (S.C. 1976). The construction of a contract such as the one at issue in this lawsuit presents a question of law for the trial judge to determine when the contract is plain and ambiguous. When it is ambiguous, such that the parties' intent must be considered through the admission of evidence, the construction of those ambiguities in the contract becomes a question of fact. *Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership*, 503 S.E.2d 184 (S.C. Ct. App. 1998).

Judge Keesley found, based on the evidence and testimony, that the provisions would preclude Drs. Baugh or Feldman from serving as "a consultant,

⁵ Columbia Heart did not argue to the panel that the panel should review the facts *de novo* and the parties had no prior notice that the court would do so. Therefore, the panel's slip opinion was the first notice that the court would apply a *de novo* standard of review.

director of a hospital's cardiology department, as a marketer of cardiology services, as a manager of a business or practice in the cardiology field nor even provide services such as renting property to a medical practice engaged in the field of cardiology." (*slip op* at 20, R. 20). Columbia Heart's witness Mr. Summer, who drafted the non-compete, admitted that the provision would prohibit Drs. Baugh and Feldman from working, for example, in a teaching hospital. (R. p. 1057-1058) (Trial Tr. pp. 449-450). He also testified:

If you're in any way affiliating with a cardiology practice in the marketplace, that is probably prohibitive [sic] conduct under the language"

(*Id.* at 1056, 1061) (emphasis added). He further admitted it would violate the prohibitions to loan money or be a landlord to a cardiology practice. (*Id.* at 1056-1057, 1063). Obviously, none of these activities would be competitive with Columbia Heart. The use of these examples makes clear that Drs. Baugh and Feldman could not work for, or be involved with, a practice or entity engaged in cardiology in any capacity. Contrary to the panel's determination, they clearly could not be employed in any manner in the cardiology field. The Columbia Heart non-compete is, therefore, an "any capacity" restriction which is unenforceable under South Carolina law.

The panel should have deferred to Judge Keesley's factual determinations and, even barring this, should have considered the clear factual evidence that Columbia Heart intended the non-compete to be read in an impermissibly broad manner.

The Panel Improperly Failed to Take Into Account that the Geographic Restriction Was Much Greater than 20 miles

The Respondents also argued that the effective scope of the geographical restrictions was overbroad because it would force them to relocate at least 55 miles in order to practice their specialty. The panel and the circuit court incorrectly held that the restriction was not unreasonable because the Respondents still had places in the state where they could practice and they could have dropped some services they provided in order to avoid the greater restrictions.

In practical reality, the geographical restriction is much broader than twenty miles provided for in the Columbia Heart non-compete. In order to practice their medical specialty, “interventional” cardiologists like Drs. Baugh and Feldman require frequent access to a medical facility authorized to perform elective invasive procedures like stenting and angioplasty. (*R. pp 834-836, 1188-1189*) (*pp. 238-240, 592-593*). In addition, they must live within thirty minutes of the medical facility at which they take call. Although the panel noted that interventional procedures form a small percentage of the procedures performed by the doctors, this ignores the importance of the ability to practice this sub-specialty. All of Columbia Heart’s offices are located on hospital campuses. (Providence, Richland and Lexington). There is a reason for this. CHC’s own witnesses admitted the ability to perform interventional procedures was an important medical distinction and valuable to their individual practices. Dr. Shulze agreed it required a big effort to become an interventional cardiologist (as opposed to a cardiologist who did not do interventional procedures) and he became offended when it was inferred in questioning that he was not certified. (*R. p. 839*) (*Tr. p. 243*). Dr. Baugh explained that, although a small component time-wise, the ability to do invasive

procedures was critical to an interventional cardiologist's practice. (R. p. 881-886) (Tr. pp. 285-290).

At the time Drs. Baugh and Feldman left Columbia Heart, the Palmetto Health/Richland, and Providence Hospitals were the only medical facilities in the Midlands authorized to perform elective invasive procedures. Even CHC's physicians agree that, to avoid violating the Agreement, the next nearest locations Drs. Baugh and Feldman would have to move their practices include Aiken, Anderson, Greenville, Florence, Spartanburg and Charleston. (R. p. 835) (Tr. 239). The effective restriction therefore is at least 55 miles to the Aiken Regional Medical Center. This is far beyond what was reasonably necessary to protect CHC.

At least one court has recognized the practical effect of such provisions regarding physicians and has struck down a provision whose practical effect was much larger than what was stated in the contract. *Cardiovascular Surgical Specialists v. Mammana*, is remarkably similar to the facts of this case. 61 P.3d 210 (Ok. 2003). In that case, surgeons were subject to a geographical non-compete within a twenty mile radius of CSS offices that prohibited them from engaging in the practice of cardiovascular surgery. However, like Drs. Baugh and Feldman, in order to practice his specialty, Dr. Mammana needed access to a hospital at which such surgeries could be performed. The nearest of these were approximately 100 miles away. This, the court noted, was far beyond the area where CSS drew patients and was therefore unreasonable. CSS argued that Dr. Mammana could simply drop cardiovascular surgeries and continue to perform other types of surgeries he was qualified to perform. This is the same argument CHC makes when it argues Drs. Baugh and Feldman could simply stop doing interventional

procedures (even though they are interventional cardiologists). The *Mammana* court rejected this possibility as an unreasonable alternative for such specialists and so should this court.

The Panel Improperly Found the Non-Compete Was Supported by Consideration

The panel ruled that the consideration provided by Columbia Heart to the doctors in exchange for the new non-competes was valid. However, the practical effect is that Drs. Baugh and Feldman are held to a non-compete pushing them 55 miles away from their practice areas, they forfeit \$240,000 each in accounts receivable-based payouts, must pay a penalty of \$591,710, and must pay Columbia Heart's attorney fees for enforcing the non-compete. In exchange for this, they receive----nothing.

The Agreements purport, in section 4.5(l), to provide consideration by offering \$60,000 to be paid after termination of the Agreement—but only if the physician obeys the terms of non-competition clause.

Such a promise is illusory, and therefore insufficient, because any physician who chooses to compete and incur the substantial penalties in the Agreement does not receive the \$60,000 and, therefore, has incurred obligations without receiving anything in return.

The panel held that the consideration was not illusory but merely contingent on Drs. Baugh and Feldman performing their part of the bargain. This is incorrect. Because of the way section 4.5(l) is worded, Dr. Baugh and Dr. Feldman did not receive and will never receive any additional compensation for signing the 2004 Employment Agreement that included the non-competition provision. Drs. Baugh

and Feldman received only a conditional promise of future compensation subject to a complete forfeiture if the restrictive covenants were violated. The South Carolina Supreme Court's decision in *Poole* requires the payment of additional, valuable consideration. CHC's decision not to provide additional, valuable consideration to Drs. Baugh and Feldman is fatal to CHC's attempt to enforce the restrictive covenants. *Poole v. Incentives Unlimited*, 525 S.E.2d 898 (S.C. 1999).

The North Carolina Court of Appeals' decision in *Moses Cone Memorial Health Service Corp. v. Triplett*, 605 S.E.2d 492 (N.C. Ct. App. 2004) is instructive. In *Triplett*, a non-compete case involving a physician and her former employer, the North Carolina Court of Appeals held that the amount of money (\$53,340.16) paid to the physician as consideration for her agreement to the non-competition provision was not a proper element of damages in a non-compete case, and could not be recovered by the former employer as damages. The court of appeals in *Triplett* recognized that the \$53,340.16 was the consideration paid by the employer to Dr. Triplett in exchange for her agreement to the covenant not to compete, and therefore could not be retained by the employer because of a violation of the non-compete. The same logic applies here. There must be consideration that is paid for the obligations incurred by Drs. Baugh and Feldman.

It is true that mutual promises can afford sufficient legal consideration for the support of each other. See, e.g., *Carolina Chemical Equipment Co., Inc. v. Muckenfuss* 471 S.E.2d 721, 728 (S.C. App., 1996); *Evatt v. Campbell*, 106 S.E.2d 447

(S.C. 1959).⁶ However, here there was no mutual promise. According to CHC, Drs. Baugh and Feldman were required to pay \$591,710 each if they competed in violation of the terms. In return for incurring this obligation, they received nothing—the \$60,000 is not paid if the non-competition provisions are breached. And a breach occurs even if the penalty is paid. The agreement itself is an executory agreement (for which no consideration was paid) which is a concept separate from executory consideration. Courts do not enforce executory agreements without actual valuable consideration. *See, e.g., Black v. Gettys*, 119 S.E.2d 660, 669 (S.C.1961) (“Equity will never enforce an executory agreement unless there was an actual valuable consideration”) (quoting *Kaiser v. Cobbey*, 79 N.E.2d 604, 607 (Ill. 1948)). In some instances, an executory agreement can be enforced if fully performed. An example would be if one party agrees to accept a future payment for an existing obligation. Until the payment is received and accepted, however, the executory agreement is voidable by either party. *See, e.g., McManus v. Little*, 163 S.E.2d 613, 615 (S.C. 1968) (“when the executory contract is fully performed, as agreed, there is an accord and satisfaction and the previous existing claim is discharged. The original liability is not discharged by an executory accord, and; as long as the accord is executory, it is revocable at will by either party.”). However, the CHC 2004 Agreement is not even of that type because CHC does not promise to do anything if a physician departs, competes, and pays the \$591,000 penalty.

⁶ “executory consideration is conceptually adequate to support enforceability of the contract.” *See, e.g., Marshall Durbin Food Corp. v. Baker*, 909 So.2d 1267, 1276 (Miss.App.,2005); *Jim Murphy & Assoc., Inc. v. LeBleu*, 511 So.2d 886, 891 (Miss.1987).

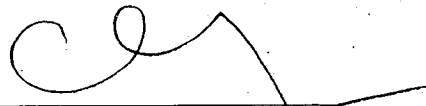
Because no consideration was ever provided to support the new non-competition provisions, the panel should have found them unenforceable for lack of consideration.

Respondents' Award Under the Wage Payment Act Must Be Affirmed if the Non-Compete is Unenforceable

The panel reversed the trial court's award of \$155,277 to Dr. Baugh and \$128,750 to Dr. Feldman. The trial court awarded these amounts based on the Accounts Receivable-based payout in Article 4 of the Agreements (after giving Columbia Heart a deduction for amounts they alleged the doctors owed the practice). The panel reversed this award based solely on its determination that the payout was forfeited because the Columbia Heart non-compete was valid and Respondents violated it. If the panel's ruling on the non-compete is reversed, therefore, the trial court's award under the Wage Payment Act should be affirmed.

CONCLUSION

Based on the above, the Respondents therefore respectfully request the decision of the panel be reheard and suggests that the decision be reviewed *en banc* so as to maintain consistency between the decisions of this court.



Charles F. Thompson, Jr.
Michael D. Malone

Malone, Thompson, Summers & Ott, LLC
339 Heyward Street, Suite 200
Columbia, SC 29201
Telephone: (803) 254-3300
Facsimile: (803) 254-0309

January 30, 2013

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

C. A. NO. 2006CP32-0371

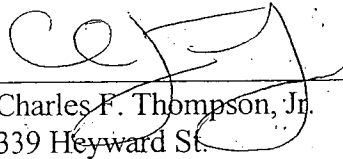
J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. Respondents,

v.

Columbia Heart Clinic, P.A. Appellant.

PROOF OF SERVICE

I certify that Respondents' motion for rehearing and suggestion for rehearing en banc was served this day upon counsel for the Appellant, Keith Babcock, PO Box 11208, Columbia, SC 29211 and filed with the South Carolina Court of Appeals


Charles F. Thompson, Jr.
339 Heyward St.
Columbia, S.C. 29201
803-254-3300

January 30, 2013

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JAN 30 2013
SC COURT OF APPEALS

1605

The South Carolina Court of Appeals

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D.,
Respondents,

LAW OFFICES

v.

MAR 14 2013

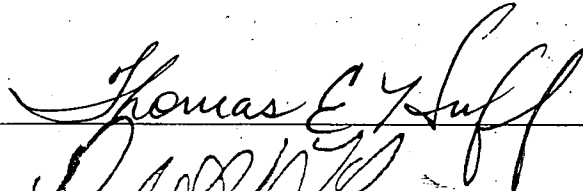
Columbia Heart Clinic, P.A., Appellant.

MALONE, THOMPSON
SUMMERS & OTT, LLC

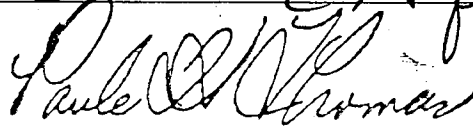
Appellate Case No. 2010-176767

ORDER

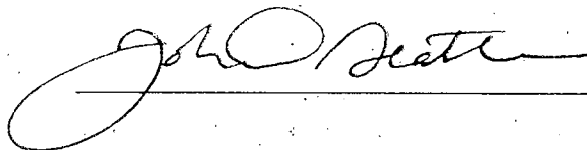
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Keith M. Babcock

Ariail Elizabeth King

Charles Franklin Thompson, Jr.

FILED

1606

March 13, 2013

A. Camden Lewis
William P. Keesley