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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authoritiesi

Argument1

 A. The restrictive covenant is necessary for the protection of the legitimate interests of the Practice and is distinguishable from *Faces Boutique v. Gibbs*.....1

 B. The Respondent has failed to show the restrictive covenant is unduly harsh or oppressive in curtailing his legitimate efforts to earn a livelihood.....5

Conclusion.....8

TABLE OF AUTHORITIES

CASES

Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013)1, 5

Faces Boutique v. Gibbs, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995)1

Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 362, 563 SE.2d 331, 333 (2002)2

McAlpin v. Coweta Fayette Surgical Assocs. P. C., 217 Ga. App. 669, 672, 458 S.E.2d 499, 501
(1995).....4

McLaughlin v. Williams, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008).....2

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005).....5

Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999)3

Palmetto Dunes Resort v. Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985).....3

Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998).....3

Team IA, Inc. v. Lucas, 395 S.C. 237, 245, 717 S.E.2d 103, 106 (2011).....2

Wall v. Firelands Radiology, 666 N.E.2d 235, 247, 106 Ohio App. 3d 313, 332 (1995).....4

RULES

Rule 56(c), SCRPC.....2

ARGUMENT

A. The restrictive covenant is necessary for the protection of the legitimate interests of the Practice and distinguishable from *Faces Boutique v. Gibbs*.

Respondent's assertion that the restrictive covenant at issue is "very similar" to the blanket prohibition in *Faces Boutique v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), and therefore is invalid ignores critical distinctions between the language at issue in the restrictive covenants. (Brief of Respondent, p. 11). Respondent similarly fails to adequately address this Court's treatment of a similar restrictive covenant between a medical practice and departing interventional cardiologists that is directly on point in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013). (*Id.*). It is precisely because the restrictive covenant between Advanced Cardiologist Consultants, P.C. (hereinafter "ACC" or "the Practice") and Respondent does not contain an overly broad and sweeping prohibition against Respondent being employed "in any capacity" or "in any manner" by an entity engaged in the practice of cardiology that makes *Baugh* and not *Faces Boutique* controlling law here.

Accordingly, the restrictive covenant between the parties that does not restrict Respondent from being employed "in any capacity" by an entity engaged in the practice of cardiology within the geographic radius of the covenant is valid and necessary to protect the legitimate interests of the Practice. The trial court erred in finding otherwise. The trial court likewise erred in failing to view the evidence submitted by the Appellants regarding the legitimate interests that would be threatened if Respondent practiced cardiology within the bounds of the covenant in a light most favorable to the Appellants as the non-moving party in granting summary judgment to the Respondent. (*See* Oct. 21, 2019 Order, p. 5) (R. p. 8).

Summary judgment is appropriate where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. “In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party.” *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). *See also Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). “Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of law.” *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). This standard was recently applied by this Court to a non-competition dispute where it held that the trial court erred in granting summary judgment because the decision required the trial judge to accept as true the facts advanced by one party to the contract while disregarding the facts advanced by the opposing party. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 106 (2011).

That portion of the restrictive covenant relevant to this appeal prohibits Respondent from becoming “employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination.” (Employment Agreement, Exhibit A to Complaint, pp. 3-4) (R. pp. 31-32). The trial court found, and the Respondent argues, that the restrictive covenant is overbroad and unenforceable under *Faces Boutique v. Gibbs* as a blanket prohibition against Respondent seeking any type of

employment with the two hospitals in the Florence, South Carolina area. (See Oct. 21, 2019 Order, p. 3) (R. p. 6). This contention ignores critical differences between the restrictive covenant at issue here and in *Faces Boutique v. Gibbs*.

First, where the parties in *Faces Boutique v. Gibbs* evidenced a clear intent to prohibit a former employee from being employed with a competitor in the geographic radius of the covenant no matter what service that former employee was providing, that intent is clearly lacking here. Not only did the restrictive covenant in *Faces Boutique v. Gibbs* prohibit the employee from “be[ing] connected in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces],” the owner of the spa brought suit to enjoin the former employee from performing services that were wholly unrelated and unconnected to the services the employee had provided while being employed as a esthetician at Faces. 318 S.C. 41 (emphasis added).

“Restrictive covenants are contractual in nature,’ so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998) (citing *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985)). See also *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (“In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract.”). It was not the parties’ intent to prohibit Respondent from being employed “in any capacity” by an entity engaged in the practice of cardiology as the restrictive covenant itself does not contain this prohibition. See *Moser*, 334 S.C. at 430 (“When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract’s force and effect and the court must construe it according to its plain, ordinary, and

popular meaning.”). Additionally, the restrictive covenant between Respondent and the Practice here contains the modifying phrase “nor will he otherwise engage directly or indirectly in the practice of cardiology,” that makes clear the parties’ intent to prohibit Respondent from engaging in the practice of cardiology within the radius of the covenant, and not in some wholly unrelated profession. (Employment Agreement, Exhibit A to Complaint, pp. 3-4) (R. pp. 31-32).

The Respondent does not appear to dispute the evidence in the record submitted by the Appellants showing the Practice’s legitimate interests in prohibiting Respondent from practicing *as a cardiologist* within the bounds of the covenant. As detailed in Appellants’ initial brief, those interests include preventing the Practice’s business, patient base, and referral sources from being cannibalized by Respondent practicing cardiology at Carolinas Hospital¹ in Florence, South Carolina—one of the locations that Respondent treated patients while employed by the Practice. (See Initial Brief of Appellants, pp. 18-19). Respondent developed referral connections as a result of his employment with the Practice after relocating from Orlando, Florida in April 2008 and accepting a position with ACC. (May Depo., pp. 4-7) (R. pp. 200-03). The protection of a medical practice’s goodwill within the community, patient bases, referral sources in the area, resources spent and invested in bringing on a new physician are interests that courts have repeatedly recognized as valid in upholding such physician non-competition agreements. *See Wall v. Firelands Radiology*, 666 N.E.2d 235, 247, 106 Ohio App. 3d 313, 332 (1995) (“It would eviscerate entirely the protection of restrictive covenants to allow a physician to practice, contrary to the restrictive covenant, after her employment enabled her to establish the very contacts which would allow her to destroy a practice that was established before her employment.”); *McAlpin v.*

¹ Carolinas Hospital has been purchased by the Medical University of South Carolina (“MUSC”) and is now MUSC Health Florence Medical Center. (See Transcript pp. 13:24 -14:4) (R. p. 70, lines 24-25, p.71, lines 1-4).

Coweta Fayette Surgical Assocs. P. C., 217 Ga. App. 669, 672, 458 S.E.2d 499, 501 (1995) (noting medical practice provided physician with patient base after relocating, office space, supplies, and other “necessities of practice”); *Baugh*, 402 S.C. at 16-17 (medical practice maintained legitimate interests in preventing departing cardiologists from establishing competing medical practice within the covenant despite closure of practice’s local office). Respondent’s purpose in bringing this action was to free himself from the restrictive covenant so that he could continue practicing the very same medical specialty in Florence, South Carolina that he had practiced while employed by ACC. (*See generally* Complaint) (R. pp. 13-35). When the evidence is viewed in a light most favorable to Appellants, as is required on Respondent’s motion, it is clear that the trial court erred in granting summary judgment on these grounds.

B. The Respondent has Failed to Show the Restrictive Covenant is Unduly Harsh or Oppressive in Curtailing his Legitimate Efforts to Earn a Livelihood.

The trial court erred in finding that the restrictive covenant “is unduly harsh and oppressive in curtailing the legitimate interests of Dr. May to earn a livelihood” and in finding the covenant prohibited him from performing “a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology.” (*See* Oct. 21, 2019 Order, p. 3) (R. p. 6). Respondent has yet to introduce any evidence showing that he has made any efforts, whether legitimate or otherwise, at seeking any one of these “myriad of jobs . . . unrelated to the practice of cardiology.” (*See id.*). Respondent, as the moving party, carries the initial burden of showing there is no genuine issue of material fact as to the burden that the covenant has placed on any efforts to seek out such alternate employment in one of these positions. *See Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (“Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case . . . the nonmoving

party must come forward with specific facts showing there is a genuine issue for trial.”) (internal citation omitted).

The Respondent has utterly failed to carry this burden. It is undisputed that the evidence Respondent has introduced regarding his efforts to obtain employment shows that the only employment that he seeks is as a practicing cardiologist at Carolinas Hospital, within the geographic radius of the covenant.² Although Respondent argues that the covenant is “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood within the field of medicine,” and that “[t]here is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if Dr. May chooses to pursue employment at the hospitals, for example, as a physician assistant, hospitalist, or as a general practitioner,” Respondent notably never contends that he actually intends to or has expended any efforts to seek employment as an “assistant, hospitalist, or as a general practitioner” at all. (Brief of Respondent, p. 10). Respondent’s entire purpose in bringing this action was to free himself from the restrictive covenant to practice *as a cardiologist* in Florence, South Carolina. Therefore, even if Respondent’s interpretation of the restrictive covenant were correct and it prohibited him from seeking employment in any capacity with an entity engaged in the practice of cardiology, summary judgment would still be inappropriate. Respondent has failed to introduce evidence that he has expended any effort in seeking employment in one of these positions unrelated to the practice of cardiology, let alone that the covenant has been unduly harsh or oppressive on these efforts.

Respondent attempts to make much of alleged evolution of the Practice since its founding in 1994 and of the medical community in Florence since he relocated from Orlando in 2008,

² Respondent received an offer of employment to practice interventional cardiology at Carolinas Hospital in February of 2019, conditional upon him receiving a waiver of the restrictive covenant at issue from Dr. Lew A. Rowe. (See Complaint, pp. 8-12) (R. pp. 23-27).

contending that while the physicians' employment agreements remained the same through the years, "[b]y 2018, ACC was no longer in competition with any other private cardiology group within the Florence service area . . . [and] all of the other cardiology practices and physicians had become direct employees of the two hospitals." (Brief of Respondent, pp. 12-13). To the extent Respondent would attempt to rely on such changes to excuse performance of a valid non-competition agreement, the effort is unavailing for several reasons. The restrictive covenant at issue in the current appeal is contained in the parties' most recent employment agreement, a one-year contract with a term commencing March 30, 2018 and ending March 31, 2019. (Employment Agreement, Exhibit A to Complaint, pp. 3-4) (R. pp. 31-32).³ This agreement signed by the Respondent is dated March 30, 2018, well into the time period that Respondent alleges that these shifts from private cardiology practice had occurred. (*Id.* at 1) (R. p. 29). At the time of the agreement's execution in 2018, Respondent again averred by signing it that its provisions were "fair and reasonable."⁴

Additionally, the distinction Respondent makes between the Practice facing competition between "private" cardiology practices and hospital-based cardiology services has little bearing on determining the validity of the restrictive covenant at issue here. The Practice provides many of the same cardiology and attendant medical services that the local hospitals provide and would

³ The parties entered into three separate employment agreements over the course of Respondent's employment, each with virtually identical terms except for their duration. (R. p. 17) (Complaint, p. 2).

⁴ The restrictive covenant in the employment agreement signed by Respondent contains language which states:


Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(Employment Agreement, Exhibit A to Complaint, p. 4) (R. p. 32).

therefore face the same harms of the erosion of its patient base, referral sources, and goodwill in the local medical community whether a former employed physician took advantage of those resources from a hospital or private practice. Dr. Lew A. Rowe, the President and sole shareholder of ACC, has submitted testimony to this effect, stating that allowing Respondent to practice cardiology in a hospital setting at Carolinas Hospital would “cannibalize” the Practice’s business and erode its patient base. (Rowe Depo., pp. 79:6-25; 81:16-82:12) (R. p. 162, lines 6-25, 16-25-p.163, lines 1-12). The trial court erred in discounting the negative effects that the Respondent’s practice of cardiology, which Respondent has not introduced evidence to contradict, would have within the bounds of the restrictive covenant.

CONCLUSION

For the reasons set forth above, the Appellants respectfully request that the Court grant their appeal in its entirety and reverse the trial court’s grant of summary judgment to the Respondent.

By:  _____

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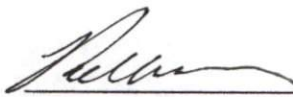
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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants certifies that this **Final Reply Brief of Appellants** complies with Rule 211(b), SCACR.

By: _____


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Dated: August 24, 2020