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.

APPELLANTS' PETITION FOR REHEARING

Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

Pursuant to the provision of Rule 221(a), Appellants, through their undersigned counsel, respectfully petition this Court for rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

The May 18, 2022, Opinion of this Court is likely to create additional unwarranted confusion and uncertainty on the part of both employers and employees who have entered into, or will enter into, agreements seeking to appropriately address post-employment competition. While it is inarguable that restraints on post-employment competitive activities are permitted, and while the May 18 Opinion does not expressly overrule *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), the Opinion makes *Baugh* an unreliable precedent while inappropriately expanding the holding of *Gibbs v. Faces Boutique*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995). Appellants respectfully petition for rehearing so as to avoid this result.

The Opinion of the Court Is Erroneous on the Merits

Apart from citations to authorities which generally govern the parameters of employment-related non-competition agreements, the Opinion of this Court addresses the specific covenant at issue in this case as follows:

> We hold the Covenant was unenforceable because by its plain language, it restrained Dr. May from having any position with a business entity, including a hospital, engaged in the practice of cardiology; such a restriction was not necessary to protect Advanced Cardiology's interests and was unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

May 18, 2022, Opinion, p. 1.

This holding fails to consider the inconsistency between the upholding of the covenant in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) and the rejection of the covenant at bar. Correction requires recognition that while the covenant in *Baugh* and that used by Appellant Advanced Cardiology cannot be meaningfully distinguished from each

other, they are easily distinguished from the covenant found invalid by *Gibbs v. Faces Boutique*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995).

The three covenants are set out below. The highlighted language explicates the material distinctions between them.

***Baugh*:**

> 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 . . .
>
> ***"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."

Baugh, 402 S.C. at 9 (emphasis added).

Advanced Cardiology:

> **Restrictive Covenant; Liquidated Damages**. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that ***he will not become 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. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

(Employment Agreement, Exhibit A to Complaint, pp. 3-4) (R. pp. 31-32) (emphasis added).

Faces:

> 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 [Faces].***

Faces, 318 S.C. at 41.

With appropriate elisions made in service to clarity, the highlighted portions of the three covenants read as follows:

Baugh

> "Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart . . . C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the [practice of medicine in the field of cardiology].

Baugh, 402 S.C. at 9.

Advanced Cardiology

> [H]e will not become 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.

(R. pp. 31-32).

Faces Boutique

> [T]he Employee will not . . . directly or indirectly . . . be employed by . . . 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 [Faces].

Faces, 318 S.C. at 41.

If, as this Court has opined, a hospital is to be deemed a business entity engaged in the practice of cardiology, then anyone employed by the hospital is assisting it to engage in the practice of medicine in the field of cardiology, and the *Baugh* decision erred in sustaining the covenant placed at issue there. Making loans to the hospital, leasing to it, or otherwise assisting the hospital would also violate the terms of the *Baugh* covenant.

In fact, the typical hospital provides a broad range of medical services which sometimes, though not always, include practice in the field of cardiology. Even when cardiology services are provided by a hospital, being employed at that hospital should not be deemed synonymous with being employed by "*another* business entity, engaged in the practice of cardiology," – the quote is the precise language used in the covenant executed by Dr. May while employed at Advanced Cardiology, a business entity engaged *only* in the practice of cardiology. (R. pp. 31-32). Dr. May's covenant is intended to preclude Dr. May from being employed by another cardiology practice, or "*otherwise* engage directly or indirectly in the practice of cardiology." This is the same intent and meaning which has to have been ascribed to the covenant that has been approved in *Baugh.* Otherwise, the *Baugh* covenant reaches all who are assisting a hospital ["Person"] which, according to the May 18, Opinion of this Court, must be deemed to be engaged in the practice of medicine in the field of cardiology. *See Baugh,* 402 S.C. at 9.

The covenant in *Faces* serves to illustrate these points. There, the former employee is prohibited from "being employed by" or becoming "connected in any manner with "any business in direct competition with the type of business conducted by [Faces]." *Faces,* 318 S.C. at 41. The *Faces* covenant fails to even suggest a relationship between the activities of the employee while employed by Faces and the employee's prohibited post-employment activities.

The owner of Faces Boutique had conceded this at trial:

> Gibbs would be in violation of the covenant not to compete if Gibbs became employed ***at*** any place of business engaged in the selling of cosmetics or giving facials, even if Gibbs herself did not participate in these activities. Owens also admitted the covenant would have this effect even though, in such a situation, her business would not be threatened. Thus, by Owens's own admission, the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Faces] legitimate business interests.

Faces, 318 S.C. at 43 (emphasis added).

Reconciling *Faces* with both *Baugh* and the case currently before this Court is easily accomplished by acknowledging the difference between the phrases "employed at" and "employed by." The *Faces* opinion interprets a phrase: "employed by" or "becoming connected in any manner with" any business in direct competition with the type of business conducted by Faces. The *Faces* interpretation is that such a relationship constitutes being "employed at" the business – regardless of what relationship there may be between the actual employment and the competitive activities of the business. Indeed, as the *Faces* opinion notes, and the *Faces* employer conceded, such employment may involve no participation whatsoever in properly prohibited competitive activities. *See id.* However, "employed by" a business "engaged in" a particular business activity should be read to mean "employed in service to" or "assisting" that business activity. For purposes of restraints on competition, being employed by a business engaged in the practice of cardiology is quite different from being employed at a business where your employment has nothing whatsoever to do with cardiology. The restraint on the former, permitted by the *Baugh* and the Advanced Cardiology covenants, should be upheld. The latter, struck down by *Faces*, was properly declared invalid. As this Court has held, there is no ambiguity in Dr. May's covenant, it should enforce it and reverse its May 13 Opinion. After all, Dr. May, has testified under oath to the unambiguous meaning of the covenant. He understood the covenant only prohibited him from

practicing cardiology at one of the hospitals in town, not from working in a capacity *other* than as a cardiologist:

Q. Okay. In fact, and when it says -- when you say in your complaint that it purports to prevent you "from being employed as a cardiologist for a period of two years after termination within a 25-mile radius of McLeod Regional Medical Center, Florence, South Carolina, that's how you read that provision," correct?
A. I can read it the same as you. Yes, sir. That's what it says.
Q. Okay. It doesn't say anything more than that?
A. That's correct.
Q. Okay. So the plain language or as you understand it, the plain language of the contract is that you simply can't be employed as a cardiologist for a period of two years after termination within a 25-mile radius of McLeod Regional Medical Center, correct?
A. That's right.
Q. Okay.
A. That's what it says.
Q. Doesn't say you can't be employed as anything else?
A. I -- I have no idea what you're talking about right now.
Q. Well, it's not important. It's just the question is whether or not this agreement says you can't be employed --
A. I'm a cardiologist, so I wouldn't be seeking employment as a bottle washer or a dishwasher.
Q. Okay. And you don't read this agreement to keep you from being a bottle washer or a dishwasher, correct?
A. I haven't looked at that document in quite some time, so I haven't hashed that out, exactly what the document says.
Q. But this is what you put in your complaint?
A. What it's stating about the restrictive covenant?

2 Q. Yes.
3 A. Okay.
4 Q. Okay. I mean, the answer to that is
5 yes?
6 A. There is a restrictive covenant, yes.
7 Q. And it says, according to you, that
8 it's intended to prevent you "from being employed
9 as a cardiologist for a period of two years after
10 termination within a 25-mile radius of McLeod
11 Regional Medical Center, Florence, South Carolina"?
12 A. Yeah.
13 Q. And that's all it says?
14 A. That's all it says.

(Deposition of Dr. Gregory A. May, p. 22:11-24:14) (R. 141-142).

The foregoing argument is buttressed by the Appellants' Brief seeking reversal of the Trial Court's grant of summary judgment, and portions of that Brief are incorporated hereafter with slight modifications.

1. **The Restrictive Covenant is Valid and Enforceable.**

Sound public policy generally requires the enforcement of contracts freely entered into by the parties. *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 221 (Ct. App. 1992). "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). Restrictive covenants not to compete are therefore generally disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

In South Carolina, a restrictive covenant that arises out of an employment relationship between the contracting parties will be upheld if it:

(1). is necessary for the protection of the legitimate interest of the employer;

(2). is reasonably limited in its operation with respect to time and place;

(3). is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;

(4). is reasonable from the standpoint of sound public policy; and

(5). is supported by a valuable consideration.

Id. at 675-76. Only the first and third prongs of the test from *Dudley* are at issue in this current appeal, as the trial court found the covenant not to compete deficient in these two respects.[1] (Order p. 3) (R. p. 6). "In South Carolina, 'contracts against competition are held to be unenforceable unless they meet certain criteria . . . [because] they constitute a restraint upon trade[,] which is against public policy.'" *Fay*, 419 S.C. at 630 (quoting *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961)). "Despite the general disposition against such agreements, South Carolina courts have upheld non-compete agreements if they comport with the above requirements." *Hagemeyer N. Am., Inc. v. Thompson,* 2006 U.S. Dist. LEXIS 19468, at *11 (D.S.C. March 1, 2006).

"[C]ases concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on their own facts." *Stringer v. Herron*, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992) (internal citation omitted). The South Carolina Supreme Court has held that the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245-246, 717 S.E.2d 103, 107 (Ct. App. 2011) (citing *Poynter Invs., Inc. v.*

[1] The Parties do not dispute whether the other requirements from *Dudley* are met. The Respondent did not move for summary judgment in the lower court on the issue of whether the covenant was reasonably limited in its operation with respect to time and place, supported by valuable consideration, or otherwise reasonable from the standpoint of sound public policy. (*See* Resp't Memo. in Supp. Mot. Summ. J. p. 10) (R. p. 110).

Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). South Carolina courts may not "blue pencil" the restrictions contained in a non-competition provision "by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable."[2] *Id.* at 246.

Similarly, where an employer later expresses at trial an intention to enforce the covenant in a way that narrows the scope of the written agreement, the covenant cannot be upheld. *See Faces Boutique*, 318 S.C. at 43-44. However, "*[c]onstruing* the terms of a contract is not the same as changing the terms of a contract by reformation." *Herring v. Lapolla Indus.*, 2013 U.S. Dist. LEXIS 195826, at *4 (D.S.C. Nov. 26, 2013) (applying South Carolina law to determine enforceability of non-compete agreement). "Blue penciling" does not refer to "a cannon of contract construction but a directive to . . . explicitly rewrite the terms of a contract." *Id.* at *5. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)).

The restrictive covenant at issue meets the requirements for enforceability as articulated in *Dudley* and the trial court erred in finding otherwise. It is both necessary for the protection of the

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[2] While courts in South Carolina generally have declined to "blue pencil" non-competition provisions, "South Carolina has not outright rejected the 'blue pencil test.'" *Fournil v. Turbeville Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 116469, at *16 (D.S.C. Dec. 29, 2008) (discussing South Carolina courts' treatment of the "blue pencil test"). Where the restrictive covenant's excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract enforced, but an indivisible covenant may not be enforced even to a reasonable extent. *See id. See also Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 687 (D.S.C. 2003) (citing *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972)).

legitimate interest of the employer and not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology.

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

The noncompetition provision which restrains Respondent from being "employed by or associated (with) … another business entity[] engaged in the practice of cardiology," or "otherwise engag[ing] directly or indirectly in the practice of cardiology" is necessary for the protection of the legitimate interests of the Practice and it is an interest that courts have repeatedly recognized. *See Baugh*, 402 S.C. at 16 (recognizing medical practice's interests in upholding covenant against former physicians). *See also Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller,* 127 P.3d 121, 128 (2005) (discussing medical practice's protectable interests in in its proprietary information, its referral sources, and patient relationships "established and/or nurtured" by employed physician during his employment with the practice).

In *Baugh v. Columbia Heart Clinic, P.A.*, this Court upheld a restrictive covenant very similar to the one at issue here that purported to prevent physicians from engaging or "assisting any [p]erson to engage" in the practice of cardiology for a period of one year within a twenty-mile radius of the defendant's offices. 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). The factual background and restrictive covenant at issue in *Baugh* are, in fact, strikingly similar to the instant case. In *Baugh*, the defendant Columbia Heart was a comprehensive cardiology practice similar in many ways to ACC. *Id.* at 1. The plaintiffs in *Baugh* were interventional cardiologists who departed the practice and sought to practice cardiology within the radius of a restrictive covenant, like the Respondent. *Id.* at 2-6. The cardiologists in *Baugh* were subject to the following restrictive covenant:

> 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 . . .
>
> "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, lendr, 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."

Id. at 8-9 (emphasis added). The lower court in *Baugh* found the activity restriction which prohibited the cardiologists from "assisting any person . . . to engage in the [practice of medicine in the field of cardiology]" was overbroad and unenforceable under *Faces Boutique Ltd. v. Gibbs*. *Id.* at 11-12. The trial court similarly found that this restriction was not necessary to protect a legitimate interest of Columbia Heart, as it "goes beyond restricting [Respondents] from doing what they did for" Columbia Heart and would bar them from assisting any cardiology practice "in any capacity." *Id.*

This Court disagreed with the lower court, finding the activity restriction to be reasonable and necessary to protect Columbia Heart's legitimate interests. *Baugh*, 402 S.C. at 16-17. In recognizing the legitimate interest that Columbia Heart had in imposing this restriction, the court reasoned:

> 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.

Id. at 16. The *Baugh* court found that "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." *Id.* The practice employer retained these legitimate interests, even though the practice's office location at issue in Lexington, South Carolina had closed just months after the plaintiff cardiologists had left the practice. *See id.* at 5-6. In coming to this conclusion, the *Baugh* court noted that the restrictive covenant, like the one between Dr. May and the Practice, does not contain the "any capacity restrictions" prohibiting the physician from being associated "*in any capacity*" that the court in *Faces Boutqiue* had found was overbroad. *Id.* at 19-20.

Stretched to its broadest possible meaning, the restraint found enforceable in *Baugh* against "indirectly . . . assisting" another person as an agent or employee "to engage in the practice of . . . cardiology" could conceivably prohibit a wide range of activities that take place in a medical practice or in hospital facilities that the interventional cardiologists in *Baugh* did not perform. With this interpretation, an office administrator who assists the physician with billing, scheduling, compensation, and secures the facilities for a medical practice "indirectly assists" in the practice of cardiology. Similarly, a cardiac nurse who assists the physician during a diagnostic procedure could be deemed to "indirectly assist" the practice of cardiology. The *Baugh* court did not construe the restrictive covenant in the broadest possible sense in finding that the restraint against "assisting any Person . . . to engage in [the practice of medicine in the field of cardiology]" was not as broad as the "in any capacity" prohibitions found overbroad by South Carolina courts. *Id.* (citing *Faces Boutique*, 318 S.C. at 41; *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987)). "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." *Baugh*, 402 S.C. at 19-20.

The restrictive covenant at issue here which restrains Respondent from being "employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology" is necessary to protect the Practice's legitimate business interests. The restraint is necessary to protect "the goodwill in the Florence medical community that [ACC] has spent building up since 1994, as well as protecting its patient base from being unfairly encroached upon by a former physician practicing his same specialty in the same geographic area almost immediately after his employment with the Practice ended." (*See* Appellants' Memo. in Supp. Mot. Summ. J. p. 14) (R. p. 137). Dr. Rowe has testified that the Plaintiff's practice of cardiology in Florence at Carolinas Hospital would have the enormously negative impact of "cannibalizing" the Practice's business. (Rowe Depo. p. 79:6-25) (R. p. 162, lines 6-25). Dr. Rowe further testified:

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Q. Do you think Dr. May working at Carolinas Hospital right now would have an adverse impact on Advanced Cardiology since the practice doesn't intend to do any work there?
A. It would.
Q. How is that? How so?
A. Because he would be working at, say, Carolinas, and he would be doing cardiology. Now, a very small part of our daily work is actually doing interventional cardiology. The vast majority

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in this area, and this is not everywhere but it's in this area, it's seeing patients, interpreting stress tests, echoes, that sort of thing that don't involve interventional cardiology whatsoever. So

it would have a huge impact on us.
Q. So you're thinking that the patients that he currently sees would see him at Carolinas rather than come to your office?
A. It's possible that some might.
Q. So that's your fear?
A. I wouldn't say it's a fear. I think it's a pretty good estimate of what would happen.

(*Id.* at 81:16-82:12) (R. p. 162, lines 16-12).

Like the restrictive covenant in *Baugh* that prevented the physician from "assisting any Person . . . to engage in . . . the practice of . . . cardiology," the language here against Respondent being "employed by" another entity "engaged in the practice of cardiology . . . *nor will he otherwise engage directly or indirectly in the practice of cardiology*" prevents Respondent "from indirectly engaging in activities [he] clearly could not participate in directly." *See Baugh*, 402 S.C. at 16. Like the departing cardiologists in *Baugh*, Respondent does not dispute his practice of cardiology within the geographical limit of the covenant would violate the agreement. This Court in *Baugh* made clear that a medical practice has a legitimate, protectible interest in restraining a formerly employed physician from continuing to practice his medical specialty within the geographic bounds of a noncompetition agreement. The restrictive covenant is necessary to prevent Respondent from continuing to practice cardiology in Florence, South Carolina and therefore should be deemed enforceable by the Court.

B. The Covenant is not Unduly harsh and Oppressive in Curtailing the Legitimate Efforts of Respondent to Earn a Livelihood.

The trial court also erred in its finding that the restrictive covenant was "unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood." (Order p. 3) (R. p. 6). In coming to this conclusion, the trial court relied on *Faces Boutique v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995). In *Faces Boutique,* a facial spa brought suit to enjoin the

defendant from being employed at a competing business. *Id.* at 41. The noncompetition agreement in *Faces Boutique* provided:

> 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 [Faces].

Id. (emphasis added). The defendant was employed by Faces Boutique as an esthetician. *Id.* The defendant in *Faces Boutique* had demonstrated legitimate efforts to earn a livelihood providing services not related to her former job as an esthetician with Faces Boutique. After she left employment at the facial spa, the defendant went to work in a different profession as a manicurist[3] in a Hilton Head beauty salon. *Id.* Faces Boutique brought suit seeking to enjoin the former employee from providing services as a manicurist, because the defendant's new employer derived part of its revenue from performing facials. *Id.*

The court in *Faces Boutique* held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's legitimate business interests and was unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. *Id.* at 43-44. The court relied on the fact that the owner of Faces Boutique admitted at trial that the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [Faces'] business would not be threatened." *Id.* The trial court erred in finding *Baugh* distinguishable but *Faces Boutique* controlling in granting summary judgment to the Respondent. (Order p. 3-5) (R. pp. 6-8).

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[3] An esthetician is a licensed skin care professional, while a manicurist is licensed to practice manicuring or pedicuring the nails or similar work. *See id.* at 41 n. 1-2.

An evaluation of both the language and the circumstances dictates a conclusion that *Baugh*, not *Faces* is controlling and the covenant should be upheld on these grounds. There are several factors which distinguish this case from *Faces Boutique*. The most important distinction between the two restrictive covenants is that the restrictive covenant here does not contain the "in any capacity/manner" language that is present in the covenant in *Faces Boutique*. *See Faces Boutique*, 318 S.C. at 41. The *Baugh* court upheld the agreement at issue there because the covenant did not contain the sweeping "in any capacity/manner" language that the courts in *Faces Boutique* and *Preferred Research* court found so objectionable. *Baugh*, 402 S.C. at 19-20. The restrictive covenant between the Practice and Respondent does not contain this language that would so clearly demonstrate an intent to prevent the Respondent from being employed or connected *in any manner* with an entity engaged in the practice of cardiology.

Additionally, unlike the Respondent, the defendant in *Faces Boutique* made legitimate efforts and sought employment in a different profession than she had provided for her previous employer. *See Faces Boutique*, 318 S.C. at 41. The trial court found the restrictive covenant to be "unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood" because it would restrain him from performing "a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology"--jobs which it is undisputed that the Respondent has no intention of seeking. (Order p. 3) (R. p. 6). The Respondent has made clear that he intends to practice interventional cardiology if he is not bound by this covenant. Respondent does not appear to contend that the covenant is unduly oppressive in curtailing his legitimate efforts to earn a livelihood as a cardiologist. Rather, the covenant threatens his efforts to earn a livelihood in a variety of unrelated and hypothetical professions that he has expressed no interest in pursuing and would not even perform if hired by one of the local hospitals. (*See* Resp't Depo. pp. 23:14-17;

Transcript pp. 13:11-16:8) (R. p. 177, lines 14-17; R. p. 70, line 11-p. 73, line 8). Respondent has not articulated interest in or expended *any* legitimate effort in earning a livelihood in one of these theoretical jobs "wholly unconnected to the practice of cardiology." (Order p. 3) (R. p. 6). Respondent filed suit against these Appellants for the very purpose of freeing himself from the restrictive covenant that he agreed to so that he could practice the same medical specialty in Florence within the bounds of the covenant. (*See generally* Complaint) (R. pp. 16-27). A sense of reality must always influence the interpretation of contract language. Noncompetition agreements entered into with board certified cardiologists are created to restrain them from providing services related to their practice of cardiology—not services provided by employees holding positions board certified cardiologists would consider entirely unsuitable. Respondent acknowledged that he would not be "seeking employment as a bottle washer or dishwasher" because he is a cardiologist. (Resp't Depo. p. 23:14-16) (R. p. 177, lines 14-16).

The *Faces Boutique* court relied upon critical testimony from the employer's owner regarding the construction of the restrictive covenant that is not present here from Dr. Rowe. The owner of Faces Boutique had conceded at trial that:

> Gibbs would be in violation of the covenant not to compete if Gibbs became employed at any place of business engaged in the selling of cosmetics or giving facials, even if Gibbs herself did not participate in these activities. Owens also admitted the covenant would have this effect even though, in such a situation, her business would not be threatened. Thus, by Owens's own admission, the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Faces] legitimate business interests.

Faces Boutique, 318 S.C. at 43. In fact, the defendant Gibbs was apparently performing work as a manicurist that was unrelated to her services as an esthetician when Faces Boutique brought suit against her. *See id.* at 41.

The agreement at issue here does not prohibit Respondent from being employed "in any capacity" for an entity practicing cardiology, nor was it intended by the parties to have that meaning. The inclusion of the phrase "nor will he otherwise engage directly or indirectly in the practice of cardiology" immediately following the prohibition against Respondent being "employed by or associated (with) ... ... another business entity[] engaged in the practice of cardiology" makes the parties' intent clear in this respect. (Employment Agreement p. 3) (R. p. 31). The parties to the agreement clearly contemplated and intended to restrict Respondent's future employment as a cardiologist *only* and not in some other, unrelated field. (*See* Resp't Depo. pp. 22:11-24:14) (R. p. 177, lines 11-14). The trial court's finding, insofar as it is inconsistent with this intent, fashions a new agreement between the parties that was never intended. *See Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (declining to add geographical limitation to restrictive covenant because it would bind the parties to a "term that does not reflect the parties' original intention."). *See* also *E. Bus. Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter). The trial court erred in finding that construing the covenant consistent with the parties' intent in this respect amounts to an impermissible re-writing or "blue penciling" of the agreement. (Order p. 4) (R. p. 7). "[C]onstruing the terms of a contract is not the same as changing the terms of a contract by reformation." *Herring*, 2013 U.S. Dist. LEXIS 195826, at *4.

The restrictive covenant is not unduly oppressive in curtailing Respondent's legitimate efforts to earn a livelihood as a practicing cardiologist. The effect of the restrictive covenant is to restrain Respondent from actively practicing cardiology at either of the two local Florence hospitals that he maintained privileges with while he was employed by the Practice in Florence so

that the Practice may protect its patient and referral base and goodwill in the community that it has been developing since 1994. (*See* Employment Agreement pp. 3-4) (R. pp. 31-32). Respondent may practice cardiology anywhere outside of the twenty-five mile radius of the covenant and the fact that he is restrained from practicing cardiology within this very limited geographical area is not itself overly burdensome or oppressive.

The Respondent still has "ample opportunity to work within his industry," and has not alleged or shown that he would have difficulty finding employment practicing interventional cardiology outside of the twenty-five-mile radius surrounding McLeod hospital. *See Vessel Med., Inc. v. Elliott*, 2015 U.S. Dist. LEXIS 122436 at *17 (D.S.C. Sept. 15, 2015) (applying South Carolina law to uphold eighteen month and twenty-mile non-solicitation restriction). *See also Pearl Ins. Grp., LLC v. Baker*, 2018 U.S. Dist. LEXIS 146849 at *13 (D.S.C. Aug. 29, 2018) (applying South Carolina law to uphold two-year non-solicitation provision). Respondent is not even necessarily shut out of practicing his specialty within the state itself if he were to abide by the restrictive covenant. Hospitals with the cath lab facilities Plaintiff contends he needs to practice interventional cardiology are located in the Grand Strand, Columbia, and Loris, South Carolina. (Rowe Depo., 65:10-20; Saleeby Depo. p. 6:9-16) (R. p. 158, lines 10-20; R. p. 187, lines 9-16). The restriction at issue does not prevent Respondent from practicing in his field "far beyond the technical terms of the provision." *Baugh*, 402 S.C. at 25. The Respondent can continue to work in his field of interventional cardiology—just not inside the twenty-five mile radius. The fact that Respondent is restrained from practicing cardiology within Florence does not render the restrictive covenant unduly harsh or oppressive. *See id.* Moreover, the fact that the parties' employment agreement contains a provision explicitly ratifying that the terms of the restrictive covenant are

"fair and reasonable"[4] to the contracting parties is another practical consideration that weighs against the covenant being found unduly harsh or oppressive to the Respondent. *See Thompson*, 2006 U.S. Dist. LEXIS 19468 at *11 (noting the fact that defendant signed the noncompete which explicitly described its restrictions as reasonable weighed in favor of finding noncompete enforceable).

In finding that the covenant would prohibit the Respondent from being employed or associated in any manner with an entity engaged in the practice of cardiology, the trial court construed the language of the agreement to its broadest possible sense and far beyond what the parties intended. Just as the court in *Baugh* did not construe the restrictive covenant at issue in that case so broadly past its plain meaning, so should the Court decline to do so here. All the inferences and conclusions arising from the evidence submitted about the alleged burden placed upon the Respondent's efforts to earn a livelihood must be viewed by this Court in a light most favorable to the Appellants, the non-moving party in the trial court. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 562-63, 564 S.E.2d 94, 96 (2002). When this evidence is considered in the light most favorable to the Appellants, it is clear that the restrictive covenant is necessary for the protection of the legitimate interest of the Practice and is not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology.

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[4] The restrictive covenant contains the following language:

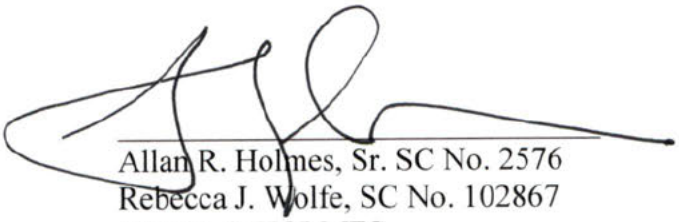
> Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(Employment Agreement p. 4) (R. p. 32) (emphasis added).

CONCLUSION

For the foregoing reasons, the Appellants seek a grant of rehearing.

All of which is respectfully submitted.



Allan R. Holmes, Sr. SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

June 1, 2022

Charleston, South Carolina

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.

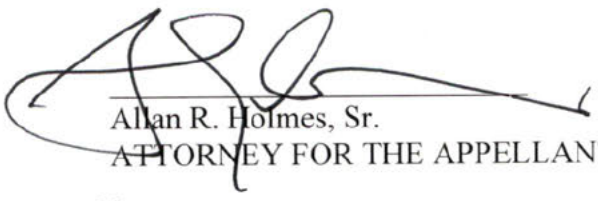
Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

PROOF OF SERVICE

I, Allan R. Holmes, Sr., do hereby certify that I have served all counsel in this action with a copy of the foregoing Petition for Rehearing by U.S. mail to the following addressees this 1st day of June, 2022:

Mark W. Buyck, III, Esq.
WILLCOX, BUYCK, & WILLIAMS, PA
248 West Evans Street
Florence, SC 29501
ATTORNEY FOR RESPONDENT



Allan R. Holmes, Sr.
ATTORNEY FOR THE APPELLANTS

LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
POST OFFICE BOX 938
CHARLESTON, SOUTH CAROLINA 29402-0938

ALLAN R. HOLMES
PARTNER
CERTIFIED SPECIALIST IN LABOR
AND EMPLOYMENT LAW

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
aholmes@gibbs-holmes.com

June 1, 2022

FEDERAL EXPRESS OVERNIGHT

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

RE: *Dr. Gregory May v. Advanced Cardiology*
Appellate Case No. 2019-002114

Dear Ms. Kitchings,

Please find enclosed for filing the original and six copies of the Appellants' Petition for Rehearing in the above-referenced matter. Please return a clocked-in copy in the self-addressed envelope provided for your convenience. We have also enclosed a check in the amount of $50.00 for the filing fee for this Petition.

By copy of this letter, we are serving a copy of the above on counsel for Respondent, Mark W. Buyck, III, Esq.

With kind regards, I am

Allan R. Holmes

Cc: Mark W. Buyck, III, Esq. [via email and regular mail]
WILLCOX, BUYCK, & WILLIAMS, PA
248 West Evans Street
Florence, SC 29501

ORIGIN ID:RBWA (843) 722-0033
ALLAN R. HOLMES, ESQ.
GIBBS & HOLMES
171 CHURCH STREET
SUITE 110
CHARLESTON, SC 29401
UNITED STATES US

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