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Case Number 382,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRADLEY BAKOTIC and JOSEPH HACKEL,	)	
Plaintiffs-below, Appellees,	)	**No. 382, 2021**
v.	)	**On Appeal from the Superior Court of the State of Delaware**
BAKO PATHOLOGY LP, BPA HOLDING CORP., AND BAKOTIC PATHOLOGY ASSOCIATES, LLC,	)	**C.A. No. N17-C-12-337 WCC**
Defendants-below, Appellants.	)	

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF THE PROCEEDINGS

Plaintiffs Bradley Bakotic and Joseph Hackel are two of the founders of Defendant Bako Pathology Associates, LLC, a national pathology reference laboratory located in Georgia ("Bako"). Plaintiffs founded Bako in 2007.

In 2011, Plaintiffs sold Bako to Ampersand, a private equity firm, and in 2016 Ampersand (with Plaintiffs' consent) sold Bako to Consonance Capital, another private equity firm. These transactions resulted in the agreements at issue in this case, to wit: Plaintiffs' Employment Agreements (2011), the Merger Agreement (2015), and the Partnership Agreement (2016). As a consequence of such transactions, Defendant BPA Holding Corp. ("Defendant BPA") was created in 2011 as a holding company and sole owner of Bako; and in 2016, Defendant Bako Pathology, LP ("Defendant LP"), a limited partnership, was created as the sole owner of Defendant BPA. Neither Defendant BPA nor Defendant LP perform any commercial business or have any customers; they are merely parent corporations to Bako.

In September 2017, Defendant BPA terminated Plaintiff Bakotic from Bako. Plaintiff Hackel quit Bako a few weeks later. Shortly thereafter, in October 2017, Plaintiffs started a new 501(c)(3) non-profit entity named the Rhett Foundation (named after Plaintiff Bakotic's dog, Rhett). Through the Rhett Foundation, Plaintiffs provided sponsorships, unrestricted grants and medical lectures at

podiatric continuing medical education conferences ("CMEs"). Unlike the for-profit companies that also sponsor such CMEs, the Rhett Foundation never asked for, or purchased, exhibition booth space at any CMEs because the Rhett Foundation had no products or services to sell or market. (A505 at pp. 263-264).

In late December 2017, Plaintiffs filed the underlying action in Superior Court against Defendant LP and Defendant BPA to determine the enforceability and scope of certain non-competition provisions found in certain agreements executed by some or all of the parties. Specifically, Plaintiffs, who are both physicians, argued that 6 Del. C. § 2707 ("Section 2707") should apply to void their non-competition provisions because such provisions indisputably restricted Plaintiffs' ability to practice medicine.

On February 12, 2018, Defendants filed counterclaims in the Superior Court action for (i) declaratory judgment; (ii) breach of contract; (iii) breach of the duty of loyalty; (iv) unjust enrichment; (v) tortious interference with business relations, contractual and employee relations; and (vi) slander. Defendants' Counterclaims (iii), (iv) and (vi) were dismissed on the pleadings pursuant to the trial court's Memorandum Opinion entered December 10, 2018. (A281-A300)

As part of its breach of contract claim, Defendants alleged that Plaintiffs violated the confidential clause in the parties' Partnership Agreement's by soliciting

employees and by misappropriating Bako's confidential information.[1] Defendants abandoned this claim before trial by not including it in the Pretrial Order.[2]

Pursuant to the same Memorandum Opinion (A281), Defendants' tortious interference claim (Counterclaim (v)) against Plaintiff Hackel was also dismissed in its entirety, but Defendants' tortious interference with contract claim against Plaintiff Bakotic survived. Such claim against Plaintiff Bakotic was the sole tortious interference claim propounded by Defendants in Superior Court to survive Plaintiff's motion for judgment on the pleadings.

After Defendants LP and BPA sought and received a Status Quo Order in the Court of Chancery, the parties agreed to consolidate that action into the underlying action in Superior Court. Thereafter, Defendants recast their dismissed slander allegations as the basis for their breach of contract claim.[3] Bako was added as a party before trial by stipulation of the other parties, following discussions with the Superior Court.

On December 11, 2019, the Superior Court denied Plaintiffs' motion for summary judgment seeking a declaration that Section 2707 applied to void the non-

[1] (A273).
[2] (B50-B51).
[3] Compare (A269-A270) with (B13-B16). Defendants' COO and President, Mr. Spragle, testified in deposition as Defendants' representative that (B13-B16) constitutes "all facts known" to Bako concerning what Plaintiffs did to cause customers to leave Bako. Mr. Spragle reaffirmed at trial (A662, pp. 219-220), and these documents were admitted into evidence as P78 and P79.

compete provisions at issue, and granted Defendants' motion on the same issue. (A491) Without any analysis, the Superior Court also denied Plaintiffs' argument on summary judgment that Defendants lacked standing to pursue their claims under the Merger and Partnership Agreements. (*Id*.)

In January 2020, the Superior Court conducted a seven-day bench trial. On November 2, 2021, the Superior Court issued a Decision After Bench Trial ("DAT," Exhibit A to Appellant's Opening Brief ("OB")) finding that Plaintiffs breached (1) the non-compete covenants contained in their Employment Agreements ("Employee Non-Competes"); (2) the non-solicitation covenant contained in the Merger Agreement; (3) the non-compete covenant contained in the Partnership Agreement ("Partnership Non-Compete"); and (4) the non-disclosure and non-use of proprietary information covenants contained in their Employment Agreements. (*Id*.) The Superior Court determined that Plaintiffs did not breach the non-compete covenant of the Merger Agreement and did not tortiously interfere with any contracts. (*Id*.)

The Superior Court awarded $1,740,254 in damages for Plaintiffs' breaches of the Employee Non-Competes and Partnership Non-Compete, but denied Defendants' request for damages related to Plaintiffs' breach of the Employee Agreements' confidentiality provision, and denied damages related to Plaintiffs' breach of the non-solicitation covenant in the Merger Agreement. (*Id*.)

Plaintiffs appeal the Superior Court's finding of liability and damages under the Employee Non-Competes and Partnership Non-Competes; the Superior Court's reformation of the Partnership Non-Compete; and the Superior Court's denial of Plaintiffs' motion for summary judgment to apply Section 2707 and dismiss Defendants' claims under the Partnership Agreement for lack of standing.

SUMMARY OF ARGUMENTS

I. Plaintiffs' Answer to Defendants' Summary of Arguments on Appeal

1. Agree in Part and Denied in Part. Plaintiffs agree that the Superior Court abused its discretion by applying an arbitrary growth rate that had no support in the record. Plaintiffs deny that the Superior Court abused its discretion by failing to award lost business value because neither the evidence nor the law supports Defendants' request for such damages.

2. Denied. The Superior Court did not abuse its discretion and did not erroneously apply Delaware law by not awarding attorneys' fees to Defendants. Not only did the Superior Court correctly apply Delaware law, Defendants failed to prove the amount of attorney's fees they incurred and failed to provide any evidence supporting the reasonableness of such fees. Defendants also failed to provide any mechanism with which the Court could attribute Defendants' attorneys' fees to specific claims or agreements.

II. Plaintiffs' Summary of Argument on Cross-Appeal

1. The Superior Court erred in its interpretation and application of 6 Del. C. § 2707 to the non-competition agreements at issue in this case. The Superior Court's interpretation of Section 2707 conflates the terms "between" and "among," reading the latter term out of existence. Such interpretation also results in an absurdity that contradicts the express purpose of the statute and materially undermines its practical effect.

2. The Superior Court erred in not dismissing Defendants' breach of contract claims under the Partnership Agreement due to Defendants' lack of standing. Bako, a subsidiary of the other two defendants, is neither a signatory nor a third-party beneficiary to the Partnership Agreement, and only Bako alleged, or presented evidence concerning, an injury-in-fact as a result of Plaintiffs' alleged misconduct.

3. The Superior Court erred by finding that Plaintiffs' lecturing, sponsoring and brand-building activities on behalf of a non-profit entity proximately caused Defendants calculable damages.

4. The Superior Court erred by finding that Plaintiffs' sponsoring and lecturing activities at continuing medical education conferences constituted a breach of the Employment and Partnership Agreements.

5. The Superior Court erred by reforming the Partnership Agreement's non-competition provision rather than declaring such provision void, and erred by finding that the parties intended such provision to prohibit non-business activities like lecturing and sponsoring at CMEs.

STATEMENT OF FACTS

I. Parties.

Plaintiffs are licensed pathologists and two of the founders of Defendant Bako Pathology Associates, LLC, a national pathology reference laboratory located in Georgia ("Bako"). (DAT 1). Plaintiffs founded Bako in 2007. (Id.)

In 2011, Plaintiffs sold their majority interest in Bako to Ampersand, a healthcare investment fund. (A505 at 31:10-12; 34:2-12). Then in 2015, Ampersand (with Plaintiffs' consent) sold Bako to Consonance Capital, a private equity firm (A505 at 34:9-12). As a consequence, in 2016 Plaintiffs and Ampersand became limited partners in Defendant LP, with Consonance Capital taking over as Defendant LP's *de facto* general partner. (B56)

Defendant BPA is a holding company that owns 100% interest in Bako. (B22) Defendant LP is the sole owner of Defendant BPA. (*Id*.) Neither Defendant LP nor Defendant BPA sell products or services, and neither entity has any customers. (A662 at 152:2 to 153:11). They are merely parents of Defendant Bako. (*Id*.)

II. Plaintiffs' Agreements.

Between 2011 and 2016, Plaintiffs entered into three different agreements with one or more Defendant: (i) each Plaintiff entered into a substantially similar Employment Agreement with Defendant BPA ("Employee Non-Compete"), with Plaintiff Bakotic's Employment Agreement specifically granting him a "non-exclusive, perpetual license" to use research and educational materials developed

during his employment; (ii) each Plaintiff entered into a Merger Agreement with Defendants LP and BPA ("Merger Non-Compete"); and (iii) each Plaintiff entered into a Partnership Agreement with Defendant LP ("Partnership Non-Compete"). (DAT 5-9). Defendant Bako is neither a signatory nor third-party beneficiary to the Partnership Non-Compete. (B108). Moreover, the Partnership Agreement waives all fiduciary duties owed between partners. (B79)

Each of the above agreements contain non-competition provisions that prohibit Plaintiffs from, *inter alia*, practicing medicine as pathologists. Because each agreement at issue elected Delaware law as the governing law of the agreement, Plaintiffs argued that Section 2707 voided each non-compete provision at issue in its entirety.

III. DAT Findings of Fact Related to Liability.

Relevant to this appeal, the Superior Court found Plaintiffs' liable for breach of the Employee Non-Compete and the Partnership Non-Compete, as follows:

> There is no doubt that Dr. Bakotic intended to duplicate [Bako's] success at the Rhett entities using the same marketing strategy [i.e., lecturing and sponsoring at podiatric continuing medical education conferences ("CMEs")] and to replace Bako as the leader in this industry. While perhaps the Rhett Foundation was not yet a functioning laboratory, it is clear Dr. Bakotic was planting the seed that would lead Bako's clients to his new enterprise. It is the duplication of this marketing process, to the detriment of Bako, that was prohibited under the [Employee] Non-Compete.

(DAT 23.)

1. Findings Relevant to the Employee Non-Compete.

In finding liability under the Employee Non-Compete, the Superior Court interpreted such provision as prohibiting Plaintiffs from performing "similar duties" for the benefit of any Bako customer. (DAT 22-23.)

The Superior Court further found that Plaintiff Bakotic's duties as a Bako's CEO included lecturing at podiatric CMEs and choosing which podiatric CMEs to sponsor. (DAT 23.) The Superior Court did not make a finding of "similar duties" in regard to Plaintiff Hackel, so it is unclear how Plaintiff Hackel breached the Employee Non-Compete.

Incongruently, the Superior Court found that Plaintiffs would not have breached any non-compete at issue had Plaintiffs merely lectured at conferences as an unaffiliated individual. (DAT 20-21.) According to the Superior Court, the factor that changed lecturing from non-breaching conduct to breaching conduct was that it was performed "in conjunction with the formation of the Rhett entities and Plaintiffs other activities." (DAT 21.) Specifically, the Superior Court found that Plaintiffs' lecturing and sponsoring on behalf of Rhett Foundation showed that Plaintiffs "intended to duplicate" Bako's marketing success so that eventually Plaintiffs could "lead Bako's clients to [Plaintiffs'] new enterprise." (DAT 23.)

The lynchpin to liability in this case was the Superior Court's unsupported finding that Plaintiffs "Rhett" branding activities (i.e., lecturing and sponsoring at

podiatric CMEs) "benefitted customers or clients of Bako." (DAT 24.) The nature of such benefit, when it was conferred, how it was conferred, and to whom it was conferred was left unexplained in the Judgment. Moreover, no evidence exists in the record concerning the nature of such benefit, when it was conferred, how it was conferred, or to whom it was conferred.

2. Findings Relevant to the Merger Non-Compete.

The Superior Court denied Defendants' claims under the Merger Non-Compete on the ground that the Merger Non-Compete is limited by the definition of "business" therein and Bako is not in the "business" of sponsoring and lecturing. (DAT 27). Why this definition of "business" did not apply to the Partnership Non-Compete, despite the latter incorporating the terms of the Merger Agreement (including its definitions)[4], was left unexplained. Also unexplained is why the Merger Agreement's definition of Bako's business as a pathology lab was controlling as to the scope of prohibited activities (DAT 27), while the Employee Non-Compete's definition of Bako's business as a "provider of anatomic pathology testing services" (A93) did not control the scope of prohibited activities thereunder.

3. Findings Relevant to the Partnership Non-Compete.

[4] (B56 at Section 2.98 and Section 12.8.)

The Superior Court found Plaintiffs liable under the Partnership Non-Compete based on the same lecturing and sponsoring activities the Superior Court found to be in violation of the Employee Non-Compete. (DAT 33-36.)

In finding liability under the Partnership Non-Compete, the Superior Court initially determined such provision to be overly broad because as written it would "prohibit [Plaintiffs] from any business of any nature." (DAT 35.) Without any record support, the Superior Court found that this could not have been the intent of the parties. (DAT 35.) Instead, the Superior Court found that the parties' intended the Partnership Non-Compete to only prohibit Plaintiffs from engaging in "similar and competitive activities detrimental to the partnership." (DAT 35.)

This reformation is at once a diminishment of the Partnership Non-Compete's scope and an unwieldy expansion of such provision. By limiting the Partnership Non-Compete to "activities" that are detrimental to the partnership, the Superior Court removed the term "business" as a limitation on the kinds of activities that are prohibited. This omission is crucial because the Partnership Agreement incorporates the definition of "business" from the Merger Agreement. (B56 at Sections 2.98 and 12.8.)

IV. DAT's Finding of Fact Related to Causation and Damages.

The Superior Court's findings of fact related to causation and damages is unusual. The Superior Court found that Plaintiffs breached their non-competes by

building goodwill for a future lab during the non-compete period with the intent of competing with Bako. (DAT 21-23.) However, the Superior Court based its findings of causation, not on Plaintiffs' brand-building activities, but on Plaintiffs' non-actionable conduct (i.e., Defendants' recast slander allegations) that occurred incidental to and independently from Plaintiffs' sponsoring and lecturing. (DAT 46, citing B9-B12).

Specifically, the list of "lost" customers tendered by Defendants at trial (identified as "Exhibit D" at DAT 46) (B9-12) only relate to customers that, according to Defendants, were either (1) contacted by Plaintiffs directly; (2) signed the Tarr Petition; or (3) received emails from Plaintiffs requesting witness affidavits. (B9-B12). Defendants did not track customers who attended CMEs at which the Rhett Foundation lectured or sponsored (A662 at p. 141-142); nor did they track customers who received a benefit from Plaintiffs' lecturing and sponsoring (assuming such tracking is even practicable). (*Id*.)

The document identified as Exhibit D at DAT 46 (B9-B12) is entirely consistent with the documents tendered into evidence as P78 and P79 (B13-B16), which are the documents that Defendants produced pursuant to a 30(b)(6) notice and swore under oath set forth "all facts known" in support of Defendants' claim that Plaintiffs breach of contract caused Bako to lose customers. (A662 at pp. 219-228) (B13-16). Such documents were then reaffirmed by Defendants at trial (A662 at pp.

219-220) and tendered into evidence. Therein, Defendants fail to identify a single customer who left because of Plaintiffs breaching conduct (sponsoring, lecturing and brand-building).

Ultimately, Defendants failed to identify a single customer whose business with Bako diminished as a result of the conduct for which Plaintiffs were found liable, i.e., lecturing, sponsoring, and brand-building. Defendants failed to call a single customer to testify and instead relied on the anecdotal testimony of Bako's own account managers concerning what certain customers said about the reasons for their decreased business. However, none of the account managers could identify a single customer who left Bako as a result of Plaintiffs' lecturing, sponsoring, or branding activities. Indeed, as with P78 and P79 (B13-B16), Bako's account managers testified that for each allegedly lost customer, such customer left Bako for non-actionable reasons.

The only Bako customers who did testify at trial did so on behalf of Plaintiffs; and all such customers uniformly refuted Defendants' allegations about the cause of their diminished business.

V. Summary Judgment.

1. The Superior Court Erroneously Interpreted 6 Del. C. § 2707.

The synopsis to Senate Bill 294, which became 6 Del. C. § 2707, is titled "An act to amend Title 6, Chapter 27, of the Delaware Code by Prohibiting Physicians

from Entering Into Agreements Not To Compete." *See* S.B. 294, 132nd Gen. Assem., Reg. Sess. (synopsis) (Del. 1983)). 6 Del. C. § 2707 provides in pertinent part:

> Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void ….

In denying Plaintiffs' request for summary judgment, the Superior Court found that 6 Del. C. § 2707 ("Section 2707") did not apply to the agreements at issue. While the Superior Court discussed the issues addressed in *Dunn v. FastMed Urgent Care, P.C.* (A491 at p. 7), its decision was entirely based on its conclusion that Section 2707 only applies to agreements between physicians (A491 at p. 9, 12).

In deciding whether Section 2707 applied, the Superior Court stated that it "must first determine if the disputed agreements are between physicians." (A491 at p. 9.) Why the Superior Court did not also analyze whether the agreements were "among" physicians is left unexplained.

The Superior Court found that Plaintiffs are physicians practicing medicine as defined by Delaware law. (A491 at p. 11). Nevertheless, the Superior Court concluded that, because Defendants are not physicians but "corporate entities", Section 2707 is inapplicable because the agreements at issue are not agreements "between and/or among physicians." (A491 at p. 12.)

2. The Superior Court Denied Plaintiffs' Argument on Summary Judgment that No Defendant Had Standing to Pursue Defendants' Breach of Contract Claims Under the Partnership Agreement.

Plaintiffs also moved for summary judgment due to Defendants' lack of standing under the various agreements. After consulting with the Superior Court, the parties agreed to add Defendant Bako as a party before trial, but such addition had no effect on Plaintiffs' standing argument under the Partnership Non-Compete.

Without any analysis or explanation, the Superior Court denied Plaintiffs' request for summary judgment due to Defendants' lack of standing under the Partnership Non-Compete. (A491 at p. 1.)

ARGUMENT

PLAINTIFFS' ANSWERING ARGUMENT ON APPEAL

I. The Superior Court Abused Its Discretion by Applying an Arbitrary Growth Rate Without Providing any Calculation or Record Support, but Did Not Abuse Its Discretion by Failing to Award Damages in the Form of Lost Business Value.

A. Question Presented.

Whether the Superior Court abused its discretion by awarding damages to Defendants based upon an arbitrary growth rate that had no record support, and whether the Superior Court abused its discretion by failing to award Defendants damages for lost business value. Plaintiffs agree that these issues were preserved for appeal.

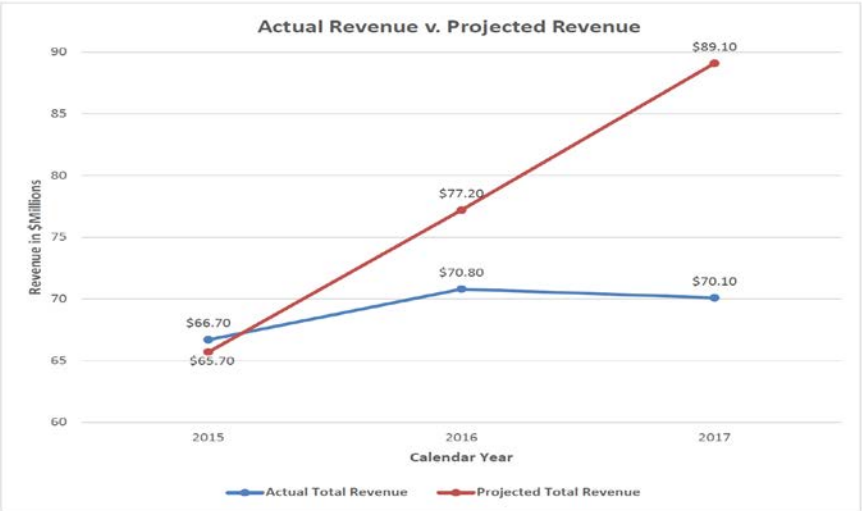
B. Scope of Review.

A trial court's factual findings concerning causation and damages will not be disturbed on appeal so long as such findings are not clearly erroneous. *See SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015). The clearly erroneous standard applies to factual determinations based on credibility and the evidence. *Id*. Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous. *Id*.

C. Merits of Argument.

1. No Evidence Supports Application of But-For Growth Rate of 1.5% for 2018 and 2019.

Plaintiffs agree that the Superior Court abused its discretion by awarding damages based upon an arbitrary growth rate. Because Defendants failed to provide any evidence concerning Defendants actual growth rate in 2018 and 2019,[5] nothing in the record supports the Superior Curt's application of a 1.5% but-for growth rate during those years. As Defendants' own financial evidence shows, Bako's growth rate began flattening in 2015, and began declining in 2016, well before Plaintiffs left their employment and started the Rhett Foundation:



(Projected Total Revenue is based on Mr. Hosfield's rejected analysis (A346, pp. 29-30); Actual Total Revenue is based on the financial data included with Mr. Hosfield's report (A346, Appendix E, Schedule 2).

The evidence shows that Bako's revenue experienced negative growth between 2016 and 2017 and thus was already in decline prior to 2018. (*Id*.) When

[5] DAT p. 49.

one combines Bako's already declining revenue with the Court's finding that (i) Plaintiffs' departure from Bako, by itself, "greatly reduced" Bako's 2018 revenue (DAT 48), and (ii) other industry causes also negatively impacted Bako's 2018 revenue (DAT 48-49), there is simply no justification in law or fact for the Court's award of damages based on applying an arbitrary but-for growth rate of 1.5% to Bako's 2018 revenue.

A reversal on this issue would not help Defendants because they entirely relied on Mr. Hosfield's rejected analysis at trial, and do not seek to reverse the Superior Court's rejection of Mr. Hosfield's analysis on appeal (OB 4). Because Defendants failed to present any non-speculative basis for damages at trial, should the Supreme Court's use of an arbitrary 1.5% growth rate be reversed, Defendants would be left without any record support for its lost profits claim.

Thus, Plaintiffs agree that the Superior Court committed clear error by applying a 1.5% growth rate, but deny that Defendants submitted any competent evidence of damages that could possibly increase their damages award should this Court reverse the Superior Court on this issue.

2. The Superior Court Correctly Rejected Mr. Hosfield's Lost Profit Analysis.

Even if Defendants were seeking to reverse the Superior Court's rejection of Bako's proposed but-for growth rate, such argument would fail because the Superior

Court's rejection of Mr. Hosfield's but-for growth rate is supported by ample evidence.

Specifically, Mr. Hosfield indisputably relied upon Bako's 2015 revenue projections to compute Defendants' 2018 and 2019 but-for growth rates (DAT 49-50). The evidence showed that the 2015 projections significantly overstated Bako's actual revenue in 2016 and 2017. *Compare* (A346, pp. 29-30) *with* (A346, Appendix E, Schedule 2).

Moreover, the 2015 projections predicted that Bako's revenue would grow by 11.2% in 2016 and then 11.6% in 2017 (A346 at p. 29). In reality, Bako's revenue only grew by 6% in 2016 and suffered a negative growth rate in 2017 (A346, Appendix E, Schedule 2). Thus, the evidence supports the Superior Court's rejection of Mr. Hosfield's proposed growth rates.

The Superior Court also rejected Mr. Hosfield's analysis because it failed to take into account other material causes that were non-actionable. This finding is also amply supported by the evidence, including without limitation the lengthy testimony of Plaintiffs' rebuttal expert, Mr. Taylor. (A784 at p. 41-51.)

3. The Superior Court correctly rejected Defendants' claim for lost business value.

The Superior Court correctly rejected Defendants' claim for lost business value. First, such damages are unavailable in a case involving breach of a non-compete provision. "Under Delaware law, consequential damages in the form of

good will, lost future profits, and lost customers are not awarded in breach of contract claims. The Delaware courts have consistently found these damages to be speculative in nature, and; therefore, have barred recovery for them." *Crowell Corp. v. Himont USA, Inc.*, 1994 Del. Super. LEXIS 557, 1994 WL 762663, at *3 (Del. Super. Ct. Dec. 7, 1994) (citation omitted).

Even if lost business value damages were recoverable in this type of case, Defendants' argument on appeal fails because the Superior Court's rejection of Defendants' lost business value claim is supported by ample evidence. Specifically, the Superior Court correctly found as follows:

> In light of what has occurred in this industry, certainly a growth rate of around 9% suggested by Mr. Hosfield is unrealistic and would have caused the "but for" figure to be inflated and unreliable. Since Mr. Hosfield's subsequent projections as to the lost profits and loss of business value rely upon the acceptance of his growth rate, they will not be adopted by the Court.

(DAT 48.)

The Superior Court's finding that Mr. Hosfield's lost business analysis is based on his calculations of lost profits is undisputed. Indeed, Mr. Hosfield expressly admitted this during his testimony:

> Q. And can you tell then what the -- using that multiple, what the loss in business value is and how you got there?
>
> A. I took the 2018 lost profits of $6,664,671, multiplied it by that multiple of 9.9 [from the 2015 Projections] and got a lost in business value of $65,980,243.

(A729, at pp. 89-90.)

Moreover, as shown *supra*, Mr. Hosfield's lost profit calculation for 2018 relied on an outdated 2015 Projection that significantly overstated Defendants' actual revenue in 2016 and 2017 and failed to take into account the myriad other non-actionable causes of Bako's declining revenue. Thus, the Superior Court's finding that Mr. Hosfield's lost business value analysis was unrealistic and unreliable is supported by the evidence.

The evidence also amply supports the Superior Court's finding that Mr. Hosfield's calculations were unreliable. For instance, Mr. Hosfield's lost business calculations results in Bako Diagnostics being currently valued at over $500 million—a whopping $258 million more than Bako's purported 2015 value of $242 million.[6] As Plaintiffs' expert noted in his testimony, this calculation is particularly preposterous given the fact that Bako's purported 2015 value was based on an EBITDA multiple of 10x that the Court in its colloquy noted would not apply today.

Finally, the Superior Court's found that "Defendants simply have not met their burden to establish a sufficient causal connection between the actual conduct of the Plaintiffs and the proposed nearly 66-million-dollar loss in business value." (DAT 50.) This finding is also amply supported by the evidence, including without

[6] A784 at pp. 63-71; 107-108.

limitation the report and testimony of Plaintiffs' rebuttal expert, Mr. Taylor. (A784, at pp. 63-64, 103-105).

Because the evidence supports the Superior Court's finding that Defendants failed to prove causation and damages related to their claim for lost business value, Defendants' argument on appeal concerning this specific issue should be denied.

II. The Superior Court's Decision Not to Award Attorney's Fees Was Neither an Abuse of Discretion Nor an Erroneous Application of Delaware Law.

A. Question Presented.

Whether the Superior Court erred in not awarding attorneys' fees to Defendants, where the Superior Court found that neither party was the "prevailing party" under Delaware law.

B. Scope of Review.

A trial judge's decision not to award attorneys' fees is reviewed for abuse of discretion. "When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Mahani v. EDIX Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007) (citation omitted). Thus, to prevail on this appeal Defendants must establish either that the Superior Court failed to assess whether an award of attorneys' fees was reasonable, or that the Superior Court's decision not to award attorneys' fees was capricious or arbitrary.

C. Merits of Argument.

1. The Superior Court Did Not Abuse its Discretion.

Defendants failed to show how the Superior Court abused its discretion or misapplied Delaware law by denying the Defendants' request for attorneys' fees.

In denying Defendants' request for attorneys' fees, the Superior Court found that neither party "prevailed" because the parties "equally split the core issues of litigation" and both parties "recovered much less than sought." (DAT 53.) Moreover, because the Superior Court found that both parties "failed to exercise good business judgment and used the justice system to obtain some form of revenge," the Superior Court concluded that "[j]ustice demands that both parties pay for litigation [themselves]." (DAT 50-51.)

This finding is particularly apt given the procedural posture of the case. Specifically, the Superior Court had personal jurisdiction over the parties' claims due to the forum-selection clause in the Employment and Partnership Agreements. Defendants were allowed to pursue their claims for tortious interference with contract because such claims were materially related to Defendants' claims under those agreements. Defendants subsequently lost all of its claims for tortious interference with contract. Thus, Defendants did not prevail on all claims related to the Employee and Partnership Agreements.

Moreover, several claims that Defendants initially brought (A248) were subsequently dismissed (A281), either by the Superior Court on the pleadings or by Defendants themselves after the close of discovery (B16 at p. 49-51). Thus, the list of Defendants' failed claims is even longer than what is referenced in the Judgment.

Finally, Defendants did not win all of their claims under the Employee and Partnership Agreements. In their initial counterclaim, Defendants asserted that Plaintiffs "solicited employees in breach of . . . the Confidential Information clause in the Partnership Agreement." (A248 at p. 25.) Defendants further alleged that Plaintiffs "used" other confidential information in breach of the Confidential Information clause in the Partnership Agreement. (A248 at p. 26.)

Indisputably then, Defendants did not prevail on all claims brought under the Partnership Agreement because the above pleaded claims, pursued in discovery, were not granted. The Superior Court did not specifically deny such claims in the DAT because Defendants failed to include those claims in the Pretrial Stipulation. (B16, pp. 16-17.) Either way, Defendants certainly brought those claims, pursued those claims in discovery, did not seek leave of court to dismiss such claims, then (apparently) discarded those claims right before trial. Because Defendants did not prevail on such claims, their argument on appeal is inapposite.

Because the Superior Court had broad discretion to find that neither party "prevailed" in the underlying case, and because such finding was considered and reasoned as opposed to arbitrary and capricious, Defendants' appeal on this issue should be denied.

2. Defendants Failed to Provide Any Evidence of Amount or Reasonableness of their Attorneys' Fees.

Even if the Superior Court abused its discretion in finding that no party was entitled to attorneys' fees, Defendants' appeal on this issue still fails because Defendants failed to tender any competent evidence showing the amount or reasonableness of the attorneys' fees they incurred.

The only evidence that Defendants tendered on the issue of attorney's fees was the following testimony from Mr. Spragle:

> Q. What is Bako's goal in this litigation?
>
> A. [W]e want [Plaintiffs] to honor those commitments and pay for damages and attorney fees we've sustained due to their competitive activity.
>
> Q. Do you know what the attorney's fees are?
>
> A. Through December it was roughly $2.3 million.
>
> Q: I have no further questions, Your Honor.

(A662, at p. 148.)

This is the only evidence that Defendants tendered in support of their request for attorneys' fees. Therefore, Defendants failed to prove the amount and reasonableness of their requested attorneys' fees as a matter of law.

First, Mr. Spragle's testimony that Defendants' fees were "roughly $2.3 million through December" is far too vague to support an award of attorneys' fees. Not only did Mr. Spragle fail to explain how he came to his "rough" estimate, he failed to provide any information that would enable the Superior Court to determine

what Mr. Spragle meant by "roughly." Does it mean within $100,000? Within $50,000? Defendants left the Superior Court with no way of knowing.

Defendants' failure to prove attorneys' fees is insurmountable when one also considers that Defendants had the burden to prove not just the amount, but the reasonableness of their attorneys' fees. *See Mahani v. EDIX Media Grp., Inc.*, 935 A.2d 242, 246 (Del. 2007). "Even with a fee shifting provision [in contract], the court must determine whether the requested fees are reasonable." *The Boeing Co. v. Spirit Aerosystems, Inc.*, 2017 Del. Super. LEXIS 630, at *9 (Del. Super. Ct. Dec. 5, 2017).

Under Delaware law, to prove the reasonableness of attorneys' fees the requesting party must provide evidence in support of the "reasonableness" factors set forth in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct.:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

See Mahani, 935 A.2d at 247-48.

In the instant case, Defendants failed to tender ***any*** evidence in support of ***any*** of the factors enumerated above. Defendants tendered no evidence of time spent and labor required; no evidence establishing the hourly rate charged by Defendants' various attorneys; no evidence of the amount of fees customarily charged in similar circumstances; no evidence concerning the experience of Defendants' counsel, and so on. Because there is no record basis on which the Court could determine on remand the amount or reasonableness of Defendants' attorneys' fees, Defendants' appeal on the issue of attorneys' fees must be denied.

Defendants' appeal also fails because Defendants failed to provide the Superior Court with any mechanism by which to segregate fees attributable to Defendants' Employment Agreement and Partnership Agreement claims versus fees Defendants incurred in pursuit of failed claims or claims involving the Merger Agreement. Moreover, as shown above, the list of Defendants' failed claims is not limited to the claims Defendants lost at trial. Such a list must also take into account Defendants' claims that were dismissed on the pleadings by the Superior Court after approximately one year of litigation, Defendants' tortious interference with business relations claim that Defendants abandoned (*compare* A304 at p. 34-38 *with* B16 at p. 49-51) just before trial.

Because Defendants failed to prove the amount or reasonableness of its fees and failed to provide the Court with a mechanism by which to segregate fees based on claims and/or agreements, Defendants' appeal on this issue should be denied.

PLAINTIFFS' ARGUMENT ON CROSS-APPEAL

This is a contract case. Defendants' tort and equitable claims were unsuccessful and only Defendants' breach of contract claims were granted, so indisputably this case must be viewed through the prism of Delaware contract law. When viewed through that lens, this case is difficult to understand.

These are the core facts. The Superior Court found Plaintiffs in breach of an employee non-compete in the amount of $1.75 million ***despite the following undisputed facts***:

- Plaintiffs never opened a competing lab (A576 at pp. 64-66).
- Plaintiffs never provided pathology services to anyone, *gratis* or otherwise. Indeed, Plaintiffs never practiced medicine (A729 at p. 57).
- Plaintiffs sold no products or services whatsoever (A505 at pp. 263-264).

The above facts already make this case unique in Delaware law. Plaintiffs could not find any other case in which an employee was found liable under a non-compete provision even though the employee neither sold nor marketing competing products or services, solicited no customers, and performed no commercial transactions whatsoever.

Nevertheless, Plaintiffs were assessed $1.75 million in damages, not for competing commercially with Bako, but for "intending" to commercially compete

with Bako. Moreover, Plaintiffs' contractual liability was entirely based the Superior Court's unsupported finding that Plaintiffs' lecturing and sponsoring conferred a prohibited benefit on Bako's customers (DAT 24-26). What benefit was conferred is not identified by the Superior Court, and no evidence exists concerning the nature of such benefit, when such benefit was conferred, to whom such benefit was conferred, or the effect of such benefit on Bako's profits. For these and other reasons, the DAT should be reversed.

I. The Superior Court Erroneously Interpreted and Applied 6 Del. C. § 2707.

A. Question Presented.

Whether the Superior Court erroneously interpreted 6 Del. C. § 2707 as not applying to a physician non-compete agreement between a physician and a corporate entity. This issue was preserved by Plaintiffs' motion for summary judgment (A494; B127).

B. Scope of Review.

When a trial court interprets and applies a statute, the appellate court conducts a *de novo* review. *See State v. Barnes*, 116 A.3d 883, 888 (Del. 2015).

C. Merits of Argument.

The synopsis to Senate Bill 294, which became 6 Del. C. § 2707, is titled "An act to amend Title 6, Chapter 27, of the Delaware Code by Prohibiting Physicians from Entering Into Agreements Not To Compete." *See* S.B. 294, 132nd Gen. Assem., Reg. Sess. (synopsis) (Del. 1983)). 6 Del. C. § 2707 provides in pertinent part:

> Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void ….

The plain meaning of 6 Del. C. § 2707 "requires this Court to ***strike*** any [contractual] provision . . . which would restrict [a physician's] right to practice

[medicine]." *Palekar v. Batra*, 2010 Del. Super. LEXIS 257, 2010 WL 2501517, at *6 (Del. Super. May 18, 2010) (emphasis added).

The Superior Court's interpretation of Section 2707 in the instant case is erroneous because (1) it reads the term "among" out of existence and renders it superfluous, and (2) it renders an absurd result that would undermine, if not completely frustrate, the express public policy purpose behind the statute.

1. The Superior Court's Interpretation of Section 2707 Renders the Term "Among" Superfluous.

According to the Superior Court in the instant case, to decide whether Section 2707 applied to the agreements at issue the court first had to determine whether "the disputed agreements are between physicians." (A491, p. 9.) As stated above, it is unclear why the Superior Court ignored the term "among" in its statement of the issue to be determined. Limiting its analysis to the term "between," the Superior Court held that because the counter-signatories to Plaintiffs' non-compete agreements were corporate entities, such agreements are not within the purview of Section 2707 (A491, p. 11-12).

The Superior Court's interpretation of Section 2707 is erroneous because it renders the term "among" superfluous. *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 343-44 (Del. 2012) (holding that reading "true" to mean the client's entire rightful recovery was erroneous because such a

reading “would yield surplusage in the statutory phrase ‘full and true’”) (citations omitted).

When interpreting a statute, the Court must “give effect to the whole statute, and leave no part superfluous.” *Id*. The General Assembly "is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.” Id. “[E]very word chosen by the legislature (and often bargained for by interested constituent groups) must have meaning.” *Id*. Thus, when one looks to Section 2707, one must begin with the presumption that “between” and “among” do *not* mean the same thing.

Webster’s Third New International Dictionary defines “between” as “an intermediate position in relation to two objects”; and “through a space limited by two objects.” Black’s Law Dictionary defines "between" as “space which separates . . . [s]trictly applicable only with reference to two things.” Thus, as used in Section 2707, the term “between” has the same meaning as that ascribed by the Superior Court, so that “an agreement between physicians” only refers to an agreement between two physicians.

The term “among,” however, is far broader. For instance, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), the United States Supreme Court defined “among” as meaning “intermingled with . . . [a] thing which is among others, is intermingled with them.” *Id*. Likewise, Black’s Law Dictionary defines “among” as

meaning "intermingled with; [a] thing which is among others is intermingled with them.[7] *See also B.F. Goodrich Co. v. Aircraft Braking Sys. Corp.*, 1994 U.S. Dist. LEXIS 21537, at *26 (D. Del. Nov. 10, 1994) (discussing how "between" and "among" have different meanings).

Thus, when one reads Section 2707's reference to agreements "between and/or among physicians," the only plausible interpretation is that such statute applies not just to agreements "between" two physicians, but also to agreements in which a physician or physicians are "intermingled" as parties, such as the agreements at issue in the instant case.

This interpretation is further supported by the expansive language in the rest of the statute, and indeed by the title of the bill itself, which references a general prohibition on physician non-compete. Section 2707 by its own terms applies to "any" employment, partnership or corporate agreement. Indeed, the statute's inclusion of the broad term "corporate agreement" (such a term encompasses quite a few agreement types) shows the legislature was expressly targeting the type of agreements at issue in this case.

When one gives meaning to all of the terms in Section 2707, the Superior Court's interpretation of such statute cannot withstand scrutiny. Because the Superior Court's interpretation of Section 2707 renders the term "among"

[7] See https://thelawdictionary.org/?s=among

superfluous, and because the agreements at issue in the instant case indisputably have physicians as intermingled parties, the Superior Court's denial of Plaintiffs' motion for summary judgment on this issue should be reversed and all agreements in this action should be declared void.

2. The Superior Court's Interpretation of Section 2707 Yields an Absurd Result That Substantially Frustrates the Purpose of the Statute.

The starting point for the interpretation of a statute begins with the statute's language.; however, if uncertainty exists, rules of statutory construction are applied. *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989). "To that end, the statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided." (*Id*.)

Delaware courts have been very clear about the public policy animating Section 2707:

> The General Assembly also has recognized the importance of maintaining the continuity of care by protecting the physician-patient relationship. [This] is the source of Delaware's statute [i.e., Section 2707] prohibiting restrictive covenants in physician "employment, partnership or corporate agreements."

Total Care Physicians, P.A. v. O'Hara, 2002 Del. Super. LEXIS 493, at *22-23 (Del. Super. Ct. Oct. 29, 2002).

In the instant case, the Superior Court's interpretation of Section 2707 effectively neuters Section 2707's protection of the physician-patient relationship

because "today most doctors are either directly employed by or engaged as independent contractors by hospitals and other large corporate entities." *Hermanson v. MultiCare Health Sys., Inc.*, 196 Wash. 2d 578, 600, 475 P.3d 484, 495 (2020) (citing Carol K. Kane, Am. Med. Ass'n, Updated Data on Physician Practice Arrangements: For the First Time, Fewer Physicians Are Owners than Employees (May 2019).[8] Such an interpretation would also work great mischief because to avoid Delaware's prohibition on physician non-competes, the employer or business purchaser only has to incorporate.

If Section 2707 applies to all physician non-competes except those that have a corporation as a counter-signatory, its impact on the modern practice of medicine would be neutered. Moreover, such an interpretation would prioritize the economic interests of corporations over the public health interest and thereby entirely upend Section 2707's express purpose. There is no clearer example of an "absurd" result than interpreting a statute in such a way that its practical effect is the exact opposite than the legislature intended.

For these reasons, Plaintiffs request that the Superior Court's denial of Plaintiffs motion for summary judgment on this issue (and its granting of summary judgment to Defendants) be reversed.

[8] Located at https://www.ama-assn.org/system/files/2019-07/prp-fewer-owners-benchmark-survey-2018.pdf.

II. The Superior Court Erred by Not Dismissing Defendants' Breach of Contract Claims Under the Partnership Agreement Due to Defendants' Lack of Standing.

A. Question Presented.

Whether the Superior Court erroneously denied Plaintiffs' motion on summary judgment to dismiss Defendants' claim for breach of the Partnership Non-Compete due to no Defendant having both privity and injury-in-fact standing to pursue such claim. This issue was preserved by Plaintiffs' motion for summary judgment. (B127, p. 2).

B. Scope of Review.

The Superior Court's determination of standing is reviewed *de novo*. *See Office of the Comm'r v. Del. Alcoholic Bev. Control Appeals Comm'n*, 116 A.3d 1221, 1226 (Del. 2015).

C. Merits of Argument.

To have standing to pursue a breach of contract claim for damages, a claimant (i) must be a signatory or third-party beneficiary to the agreement and (ii) must have suffered an injury in fact. A claimant is "not conferred standing solely by virtue of its status as a contracting party in the absence of any showing of injury." *HLSP Holdings Corp. v. Fortune Mgmt.*, No. 08C-08-175 WCC, 2009 Del. Super. LEXIS 130, at *6 (Del. Super. Ct. Mar. 31, 2009).

"The quintessence of standing is that a plaintiff must have suffered an injury in fact." *Ritchie CT Opps, LLC v. Huizenga Manager's Fund, LLC*, C.A. No. 2018-

0196-SG, 2019 Del. Ch. LEXIS 198, at * 21 (Del. Ch. May 30, 2019). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, n.1, 112 S. Ct. 2130 (1992) ("[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

It is well-settled that "[w]rongdoing to a subsidiary does not confer standing upon the parent company, even where the parent is the sole shareholder of the subsidiary." *Acrisure Holdings, Inc. v. Frey*, No. 18-1514-RGA-MPT, 2019 U.S. Dist. LEXIS 48639, at *20 (D. Del. Mar. 25, 2019).

"As a general proposition, injury done to a subsidiary does not create a claim that may be asserted in a direct action by the subsidiary's parent corporation because the claim is the property of the subsidiary, not the parent." *Case Fin. v. Alden*, 2009 Del. Ch. LEXIS 153, at *21, 2009 WL 2581873 (Del. Ch. Aug. 21, 2009) (citation omitted).

> Where a parent corporation desires the legal benefits to be derived from organization of a subsidiary that will function separately and autonomously in the conduct of its own distinct business, the parent must accept the legal consequences, including its inability later to treat the subsidiary as its alter ego because of certain advantages that

> might thereby be gained. In short the parent cannot 'have it both ways.'

In re Beck Indus., Inc., 479 F.2d 410, 418 (2d Cir. 1973).

At trial in the instant case, Defendant BPA is a holding company for Bako and performs no independent business. (B22). Defendant LP, as the sole owner of BPA, is even further removed from Bako. (B22).

Mr. Spragle testified that neither Defendant BPA nor Defendant LP have any customers, and that "all of [Defendants'] claims for loss of customers and lost profits [are] related to customers . . . of [Bako]." (A662, pp. 152-153.) Therefore, Bako is the only Defendant who could possibly have injury-in-fact standing to pursue the breach of contract claims at issue in this case.

The irresolvable flaw in Defendants' claims under the Partnership Non-Compete is the fact that Bako is neither a signatory nor a third-party beneficiary to the Partnership Agreement. *See Acrisure*, 2019 U.S. Dist. LEXIS 48639, at *20 (dismissing parent corporations' breach of contract and tortious interference claims for lack of standing, where parent corporation was a party to non-compete agreement but injured subsidiary was not); *Tullett Prebon, PLC v. BGC Partners, Inc.*, 2010 U.S. Dist. LEXIS 60783, at *13-14 (D.N.J. June 18, 2010) (dismissing for lack of standing parent corporation's unfair competition and tortious interference claims where allegations of loss of goodwill was focused on non-party subsidiaries).

The fact that Defendant LP is two steps up the parent-subsidiary ladder from Bako makes the Superior Court's enforcement of the Partnership Non-Compete even more problematic, because where a corporate parent is itself wholly owned by yet another entity, the latter entity's interests in the subsidiary's lost revenue are "even more remote" and "far too indistinct and nonparticular to establish standing." *Acrisure*, 2019 U.S. Dist. LEXIS 48639, at *20; see also *CRC Health Grp., Inc. v. Town of Warren*, 2014 U.S. Dist. LEXIS 76239, at *96-97 (D. Me. Mar. 31, 2014) (dismissing on summary judgment where complainant's expert had "done no evaluation of damages to [parent corporation] separate from those to [subsidiary] and has lumped losses for the two together and offered one opinion").

Because no defendant in the instant case had both (i) "real party in interest" standing (privity standing) to sue under the Partnership Agreement, ***and*** (2) injury-in-fact standing regarding such claims, the Superior Court erred by not dismissing Defendants' breach of contract claims under the Partnership Agreement, including without limitation Defendants' claims under the Partnership Non-Compete. Accordingly, Plaintiffs respectfully request that the Superior Court's denial of summary judgment on this issue be reversed.

III. The Superior Court Erred by Finding that Plaintiffs' Brand-Building Efforts for a Non-Profit Entity Proximately Caused Defendants Any Damages.

A. Question Presented.

Whether the Superior Court committed clear error by tacitly finding that Plaintiffs' lecturing, sponsoring, and brand-building activities on behalf of their 501(c)(3) non-profit foundation proximately caused Defendants any damage. This issue was preserved by Plaintiffs' motion for summary judgment (B127) and the trial testimony of Plaintiffs' rebuttal expert, Mr. Taylor (A784).

B. Scope of Review.

A trial court's factual findings concerning causation and damages will not be disturbed on appeal so long as such findings are not clearly erroneous. *See SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015). The clearly erroneous standard applies to factual determinations based on credibility and the evidence. *Id*. Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous. *Id*.

C. Merits of Argument.

1. No Evidence that Plaintiffs' Breaching Conduct Proximately Caused Damages.

The Superior Court clearly erred when it tacitly[9] found that Plaintiff's brand-building efforts for a non-profit entity—i.e., Plaintiffs' sponsoring and lecturing activities at podiatric CMEs on behalf of the Rhett Foundation—proximately caused any of Defendants' purported damages. Such finding has no support in the record.

Recall that the Superior Court defined Plaintiffs' breaching conduct as preparatory and prospective:

> There is no doubt that Dr. Bakotic intended to duplicate [Bako's] success at the Rhett entities using the same marketing strategy and to replace Bako as the leader in this industry. While perhaps the Rhett Foundation was not yet a functioning laboratory, it is clear Dr. Bakotic was planting the seed that would lead Bako's clients to his new enterprise. It is the duplication of this marketing process, to the detriment of Bako, that was prohibited under the [Employee] Non-Compete.

(DAT 23.)

In other words, the Superior Court found that Plaintiffs breached the Employee Non-Compete by performing pre-operational marketing for a future lab

[9] Plaintiffs used the term "tacitly" here because the Superior Court did not make an express finding that Plaintiffs' ***breaching*** conduct caused any damages to Bako. Instead, the Superior Court found that that Plaintiffs' "conduct" in general caused Bako some injury. This is an issue because Defendants made Plaintiffs' non-actionable conduct (writing a public *apologia* ("True Story") about his termination, disparaging Bako, circulating a petition, etc.) a centerpiece of their non-compete case (B9; B13), and because the DAT addresses far more conduct by Plaintiffs than Plaintiffs' sponsoring and lecturing (DAT 9-17). See also the testimony of Bako's account managers, at A627 at pp. 41-128 and A662 at pp. 53-82, which testimony uniformly focuses on customers purportedly leaving Bako for non-actionable causes.

that Plaintiffs intended to ultimately replace Bako in the industry. If that is true, Bako could not possibly be harmed until after Plaintiffs opened the competing lab; only then could Plaintiffs reap the "seeds" they planted; only then could Defendants even possibly begin to lose business as a result of Plaintiffs' branding activities. *See SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, No. 2471-VCS, 2009 Del. Ch. LEXIS 106, at *58-59 (Del. Ch. June 16, 2009) (holding that Immunomedics was not harmed by defendant's attempt to secure an overly broad patent in violation of a non-compete because "the patent claim never issued and [therefore] Immunomedics was never prevented from making the separate FR4 determinations that it had been making for years.")

As the record shows, the "conduct of Plaintiffs" discussed by the DAT encompasses Plaintiffs' sponsoring and lecturing activities, but also non-actionable conduct like publishing his *apologia* about his termination ("True Story"), disseminating a petition, or sending emails to witnesses asking for affidavits (DAT 9-17). At trial, ***all*** of Defendants' evidence of causation and damages exclusively focused on the conduct that Defendants alleged in support of their previously dismissed claims (slander and tortious interference with business relations). (B13-B16; *see also* the testimony of Bako's account managers, at A627 at pp. 41-128 and A662 at pp. 53-82, which testimony uniformly focuses on customers purportedly

leaving Bako for non-actionable causes like "friendship with Plaintiffs" and "liking a Facebook post".)

This is the disconnect at the heart of the DAT. Plaintiffs were found liable for building a competitive brand whose goodwill Plaintiffs could eventually transfer to a competing lab. However, the DAT's finding of causation was exclusively based on the negative statements that Plaintiffs made about Defendants, which statements comprised Defendants' previously dismissed slander claim. This constitutes clear error. *See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 Del. Ch. LEXIS 76, at *52 n.252 (Del. Ch. Feb. 27, 2020). "The law does not hold one liable for all injuries that follow a breach of contract, but only for such injuries as are the direct, natural and proximate result of the breach." *Id*. (citations omitted).

Likewise, Defendants' expert report quotes Mr. Spragle (Defendants' COO, President and corporate representative) (A662 at p. 150) deposition testimony that Plaintiffs' sponsoring and lecturing activities harmed Defendants because by performing such activities "[Plaintiffs] created a new brand that this is the good brand, if you will, and Bako is kind of the evil corporate brand -- has an impact to our organization. It hurts our goodwill with the community. It obviously dilutes our brand as well." (A346, p. 20.)

At trial, Mr. Spragle reiterated Defendants' position that the type of harm Defendants incurred as a result of Plaintiffs' lecturing and sponsoring activities was limited to reputation and goodwill injuries:

> Q. Nowhere on here (P78 and P79) does Bako allege that it lost customers as a result of the Rhett Foundation's branding activities; correct?
>
> A. It may not say it on here, but it's inferred because that's what drove a lot of this was Rhett's branding and sponsorships, and building their brand and, again, creating that false narrative and negative marketing, so it's definitely a part of this document. It may not specifically tie back, but we believe that it is.

(A662, p. 226; B13-B16)

Later in his testimony, Mr. Spragle characterized Plaintiffs' sponsoring and lecturing activities as "competition" in the sense that Plaintiffs were competing for the "attention" of Bako's customers (A662, p. 238)—not the business of Bako's customers, the attention. When asked by the Superior Court how Plaintiffs were competing when they sold no products or services and merely "went to a convention and made a speech," Mr. Spragle responded that Plaintiffs were competing because they "wanted to destroy the goodwill of another company through a negative marketing campaign and basically try to divert the attention [of our customers away from Bako], basically." (A662, p. 239.)

What Mr. Spragle is describing is not commercial competition. At most, such allegations might support a breach of non-disparagement or tortious interference claim, but those claims were not before the Superior Court.

The record is entirely devoid of any evidence that the specific conduct for which Plaintiffs were found liable (sponsoring and lecturing at podiatric CMEs) proximately caused Bako's reduced specimen volume. Indeed, the mechanism of causation remains entirely vague and theoretical, even after the DAT. Against this absence of evidence, the record is replete with evidence that any loss in revenue suffered by Bako in 2018 and 2019 resulted from non-actionable causes. For these reasons, the Superior Court committed clear error in tacitly finding that Plaintiffs' breaching conduct proximately caused Defendants any damages.

2. No evidence that a benefit was conferred and received as a result of Plaintiffs' breaching conduct.

Defendants also failed to tender any evidence that a specific customer received any "benefit" as a result of Plaintiffs' lecturing and sponsoring activities.

As the Superior Court concluded, a "benefit" to a customer is a condition precedent to a finding of liability under the Employee Non-Competes. (DAT 21-22.) Under Delaware law, Defendants had the burden to prove that such a benefit was conferred by Plaintiffs and actually received by a Bako customer. *See Daystar Constr. Mgmt. v. Mitchell*, 2006 Del. Super. LEXIS 286, at *14 (Del. Super. Ct. July 12, 2006) (plaintiff bears the burden of proving its breach of contract claim).

Nevertheless, the record is entirely devoid of any evidence that a specific customer received any benefit from Plaintiffs as a result of Rhett branding activities. Thus, the Superior Court's finding of liability under the Employee Non-Compete is clearly erroneous. Lecturing might provide a benefit *in theory* (e.g., education, social engagement), but theory alone is legally insufficient to support a judgment of $1.75 million. Even if such evidence exists, a prohibition on providing a non-competing, non-commercial, intangible benefits to an employer's customers is unenforceable under Delaware law because it is far too vague and encompasses far more activities than are necessary to protect Defendants' legitimate business interests.

The DAT fails to specify how the purported "benefit" conferred by Plaintiffs caused Defendants to lose specimen volume, and no evidence exists in the record that anything like this actually happened. The mechanism of causation is certainly not obvious. After all, a customer receiving a "lecture benefit" does not naturally or result in Defendants losing profits. As Defendants themselves admitted at trial, Bako itself benefits when podiatrists are educated in dermatopathology, regardless of the affiliation of the educator. (A662 at pp. 169-170, 241-244.) This is because only podiatrists educated in matters of dermatopathology are in a position to use Bako's lab services. (*Id*.)

Plaintiffs' appeal on this issue does not just depend on the complete lack of evidence supporting the trial court's tacit finding of causation. It is also based on

Defendants' own evidence and admissions. Specifically, Plaintiffs point with great emphasis to the list of customers that Defendants identified as lost (B9-B12), the testimony of Defendants own witnesses (A627 at pp. 41-128 and A662 at pp. 53-82), Defendants own admissions in deposition and at trial (B13-B16), and the testimony and report of Defendants' own expert (A346; A729).

3. Defendants' List of Identified Customers ("Exhibit D") Contradicts and Rebuts the Superior Court's Tacit Finding of Causation.

The Superior Court relied on Appendix D (B9-B12), referred to in the DAT as "Exhibit D" to Hosfield's report, to find that Plaintiffs' general conduct caused some customers to decrease their business with Bako (DAT 46). However, on its face this document does not support the DAT finding of causation. As the document shows, and as Defendants testified, Defendants categorized each customer based on Defendants' understanding of what Plaintiffs did to cause such customer to reduce its business. All such causes identified therein are nonactionable.

With Appendix D (B9-B12), Defendants identified three categories of disputed conduct that they contend caused specific customers to reduce their business with Bako, as follows: (1) customers who were purportedly directly contacted by Plaintiffs or otherwise expressed displeasure with the way Plaintiffs were treated by Bako; (2) customers who signed the Tarr Petition, which was a petition created by a non-party Bako customer to encourage Bako to drop its request

in the Court of Chancery to enjoin Plaintiffs from lecturing at CMEs; and (3) customers who received emails from Plaintiffs asking for a witness affidavit. (B9-B12).

In Appendix D, Defendants failed to identify a single customer who decreased its business with Bako as a result of Plaintiffs' lecturing, sponsoring, or branding activities. (B9-B12). Nevertheless, the Superior Court expressly stated that it was relying on Appendix D when it found that some customers reduced their Bako business "as a result of the conduct of Plaintiffs." Because Appendix D only references non-actionable conduct of Plaintiffs, and because no evidence exists in the record that Plaintiffs' breaching conduct (lecturing and sponsoring) proximately caused Bako any damages, the Superior Court's tacit finding of causation is clearly erroneous and should be reversed.

4. Defendants' Own Witnesses Contradict and Rebut the Superior Court's Tacit Finding of Causation.

Not one single Bako account manager could identify one single customer who left Bako as a result of Plaintiffs' "Rhett branding" activities. (A627 at pp. 41-128 and A662 at pp. 53-82.) Instead, all customers identified by Bako's account managers as "lost" left Bako for non-actionable reasons. (B13-B16). None of the customers that Bako's account managers identified left Bako as a result of the Rhett Foundation's formation, the "Rhett" brand, "Rhett" marketing, or the purported

"benefit" Bako's customers received as a result of Plaintiffs' lecturing and sponsoring activities. (B13-B16).

The only customers who testified at trial did so on behalf of Plaintiffs to specifically refute Defendants' claims that Plaintiffs' breaching conduct caused such customers to stop doing business with Bako. For instance, the owner of Metroplex, the largest purportedly lost customer of Bako, testified that he stopped using Bako because he heard that Plaintiff Hackel quit and Plaintiff Hackel was the only reason he started using Bako in the first place. (A662 at pp. 8-10). After Plaintiff Hackel left, Metroplex decided to use a much more convenient lab located in Metroplex's home state of Texas. (A662 at pp. 11-12).

No evidence—zero—exists that Metroplex left Bako because of the specific conduct for which Plaintiffs were found liable. Nevertheless, the DAT's award of damages encompasses Metroplex's lost business even though Plaintiffs' sponsoring and lecturing had nothing to do with it.

This is just an example. Regardless of which purportedly "lost" customer one considers (B9-B12), no evidence exists that such customer left Bako because of Plaintiffs' breaching conduct. Nevertheless, the Superior Court relied on Bako's identification of such customers to assess damages against Plaintiffs. This constitutes clear error that requires reversal.

IV. The Superior Court Erred by Finding that Plaintiffs' Sponsoring and Lecturing Activities at Continuing Medical Conferences Constituted a Breach of the Employment Agreements and Partnership Agreements.

A. Question Presented.

Whether the Superior Court erroneously interpreted the Employment and Partnership Non-Competes by finding that they prohibited Plaintiffs from sponsoring and lecturing at podiatric CMEs on behalf of the Rhett Foundation; whether the Superior Court erroneously enforced the Employee and Partnership Non-Competes beyond what was reasonably necessary to protect Defendants' legitimate business interests; and whether the Superior Court committed clear error by finding that Plaintiffs did in fact confer a prohibited benefit to Bako's customers in violation of contract. These issues were preserved below by Plaintiffs' motion for summary judgment and the defenses Plaintiffs advanced at trial.

B. Scope of Review.

The interpretation of a contract is reviewed *de novo*. *See GMG Capital Invs., Ltd. Liab. Co. v. Athenian Venture Partners I, Ltd. P'ship*, 36 A.3d 776, 779 (Del. 2012). The Superior Court's findings of fact are reviewed for abuse of discretion. *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002). "[T]his Court on appeal will test individual findings of fact only to ensure that the factual findings and inferences are supported by 'competent evidence.'" *Id*.

C. Merits of Argument.

1. Employment Agreements Did Not Prohibit Lecturing or Sponsoring on Behalf of Non-Commercial Entity.

The Superior Court erred when it found that Plaintiffs' Employee Non-Competes prohibited Plaintiffs from sponsoring and lecturing at podiatric CMEs on behalf of the Rhett Foundation.

The contractual lynchpin to the Superior Court's finding of competition breach is the provision in the Employment Non-Compete that prohibits Plaintiffs from performing "the same or similar duties" for the "benefit" of Bako's customers. (DAT 22-25). According to the Superior Court, such provision implicated Plaintiff Bakotic's ancillary duties as CEO (choosing which CMEs to sponsor, lecturing himself at CMEs). Moreover, according to the Superior Court, the prohibited "benefit" referenced in the Employee Non-Compete encompasses not just commercial benefits, but apparently a whole galaxy of non-commercial benefits like positive feelings and subjective increases in medical knowledge.

These findings are difficult to square with Delaware law, because it is well-settled in Delaware that a non-competition agreement's definition of "business" governs the scope of the agreement. *See Kan Di Ki, LLC v. Suer*, 2015 Del. Ch. LEXIS 191, at *73 (Del. Ch. Ct. July 22, 2015) (contract's definition of "business" as "the business of providing mobile diagnostic laboratory, pharmacy, ultrasound, rehab and x-ray services" limited application of non-compete provision); *Cincinnati SMSA Ltd. Pshp. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 993-94 (Del.

1998) (definition of "cellular service" business in contract limited application of non-compete provision).

In the Employment Agreements, Bako's business is defined as "a provider of anatomic pathology testing services." Under Delaware law, then, such definition creates a clear demarcation line for the kind of competitive activities that are prohibited. It certainly militates against the kind of "squishy" interpretation of "benefit" relied upon by the Superior Court. *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1024 (Del. Ch. 2006) ("Restrictive covenants in contracts . . . limit[ing] the commercial freedom otherwise available to the parties cannot reasonably be read in [a] squishy and uncertain manner.").

Moreover, the Superior Court's enforces the Employee Non-Compete far beyond what is necessary to protect Bako's legitimate business interests. Again, it was undisputed that Plaintiffs never opened a competing lab and did not solicit customers for a future competing lab. At most, Plaintiffs "competed for the attention of Bako's customers"[10] by sponsoring and lecturing at podiatric CMEs.

The Employee Agreement's only reference to CMEs and lecturing is found in the confidential information carve-out that Plaintiff Bakotic specifically negotiated to allow him to use his lecture materials at CMEs and other educational venues. The Employee Non-Compete itself makes no mention of lecturing or sponsoring.

[10] A662, at pp. 238-239

Even if the Employee Non-Competes expressly prohibited Plaintiffs from lecturing and sponsoring, Delaware law would not enforce the non-compete to such an extent. *See, e.g., KPMG Peat Marwick LLP v. Fernandez*, 709 A.2d 1160, 1164 (Del. Ch. January 6, 1998) (declining to read a prohibition against "indirect" solicitation so broadly "as to prohibit all professional or social contact between Respondents and KPMG clients . . . although such contact may have as its ultimate goal the establishment of a working relationship.")

Moreover, there is no support in Delaware law for interpreting an Employee Non-Compete more broadly than a non-compete ancillary to the sale of a business (such as the Merger Non-Compete). Nevertheless, that is exactly what the Superior Court did when it found Plaintiffs liable under the Employee Non-Competes but not under the Merger Non-Compete. The same arguments that swayed the Superior Court against finding liability under the Merger Non-Compete are even more forceful when applied to the Employee Non-Competes.

2. The Superior Court Improperly Based its Finding of Liability on Plaintiffs' Subjective Intent.

Worse, the Superior Court found liability not because the activities themselves were barred by contract—the Superior Court expressly found that Plaintiffs would not be in breach of contract had they merely performed the same activities as unaffiliated individuals (DAT 20-21, 25). Rather, the Superior Court found that Plaintiffs breached their employee non-compete agreements because Plaintiffs'

otherwise non-breaching activities were "intended to harm Bako and affect their client base." (DAT 23).

This finding cannot support Plaintiffs' liability in this case because a party's subjective intent is not relevant in a breach of contract action. *WaveDivision Holdings, LLC v. Millennium Dig. Media Sys., L.L.C.*, 2010 Del. Ch. LEXIS 194, at *42 (Del. Ch. Sep. 17, 2010) ("[Defendant's] subjective intent does not matter because this is a breach of contract action."). Because the Superior Court's finding of liability in this case turned on its finding of Plaintiffs' subjective intent to benefit the "Rhett" entities at the expense of Bako, the Superior Court's finding of liability is erroneous and should be reversed as a matter of law.

3. No Evidence that Plaintiff's Sponsoring and Lecturing Activities "Benefited" Any Customer.

The Superior Court erred by finding that Plaintiffs' sponsoring and lecturing activities on behalf of the Rhett Foundation violated Plaintiffs' Employment Agreements because no evidence exists in the record that such activities conferred a benefit on any customer.

It was undisputed that Plaintiffs never opened a competing lab and never directly competed against Bako. Thus, as the Court described the issue, whether Plaintiffs breached their Employment Agreements "boil[s] down to whether Dr. Bakotic and Dr. Hackel performed similar duties for the benefit of any Bako customer." (DAT 22-23.) Thus, for Defendants to prove competition liability under

the Employment Non-Compete, Defendants had to present evidence that a benefit was conferred to one or more customers of Bako as a result of Plaintiffs' sponsoring and lecturing activities at podiatric CMEs. More specifically, Defendants had to present evidence that such a benefit was conferred to a customer "to whom [Bako] had provided services within two years of [termination]." (A93).

The Superior Court does not identify the purported "benefit" that Plaintiffs conferred, and does not identify any specific customers who received such "benefit." To support its finding of benefit-actually-conferred, the Superior Court's Judgment merely cites to JX-12, which is a document created by the Rhett Foundation for use at its 30(b)(6) deposition (B1-B8). This document lists all of the CMEs and podiatric events at which the Rhett Foundation sponsored or lectured. (*Id*.) It does not identify a single customer of Bako, nor does it reference any benefit flowing to a customer. (*Id*.) Nothing about such document supports the way it is being used by the Superior Court, i.e., as evidence of a prohibited "benefit" conferred. (*Id*.)

The Superior Court's failure to define the actual "benefit" at issue is compounded by the complete lack of evidence that any benefit—educational, commercial or otherwise—was in fact conferred by Plaintiffs upon any Bako's customers. For instance, no evidence exists that any specific customers actually attended any of the CMEs at which the Rhett Foundation sponsored or lectured (B1-

B8); without this evidence, Defendants failed to show that its customers were even in a position to receive a benefit.

Most significantly, no evidence exists that any specific customer ***in fact*** received a "benefit" as a result of the Rhett Foundation's sponsoring and lecturing. Defendants failed to identify a single customer that received a benefit as a result of Plaintiffs' breaching activities.

The only time the "benefit" issue was addressed at trial was during Mr. Spragle's direct examination. When asked if sponsoring CMEs resulted in an "educational benefit" being conferred, Mr. Spragle responded "[n]ot necessarily" because the primary point of sponsoring is to build goodwill for the sponsor.[11] Later, when asked whether specific doctors benefited from Plaintiffs' medical lectures at CMEs, Mr. Spragle pointed out that some customers admitted receiving an educational benefit from Plaintiff Bakotic's lectures that were given while he was still at Bako.[12] When asked who benefited from Plaintiff Bakotic's lectures given on behalf of the Rhett Foundation, Mr. Spragle admitted that "Bako benefited from those lectures," but that Defendants also "believe" that its customers benefited from such lectures.[13] Mr. Spragle then confirmed that Defendants' "belief" was entirely based on the fact that podiatrists are the ones who attend podiatric CMEs. Other than

[11] A662 at p. 92
[12] A662, at p. 248.
[13] A662 at pp. 250-251.

the testimony referenced immediately above, the record is completely devoid of any evidence that any specific customer actually received a "benefit" from Plaintiffs.[14]

Indeed, Mr. Spragle's testimony is expressly limited to Defendants' ***belief*** that a benefit was conferred. (Id.) As such, it constitutes a legally insufficient basis on which to find that a benefit was actually conferred. *See Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1032 (Del. 1996) ("[Claimant's] subjective belief that wrongdoing has occurred is insufficient to meet the evidentiary burden . . ."); *see also Technicorp Int'l II v. Johnston*, 2000 Del. Ch. LEXIS 81, at *90 (Del. Ch. May 31, 2000) (holding that Defendants' "generic and unspecific belief" was [in]sufficient to satisfy Defendants' evidentiary burden); *Allstate Ins. Co. v. Speight*, 1993 Del. Super. LEXIS 207, *8 (Del. Super. June 30, 1998) (claimant's belief that truck was inoperable was insufficient to meet its burden of proof).

Because the record contains no competent evidence that any customer of Bako actually received a benefit as a result of Plaintiffs' sponsoring and lecturing activities, the Superior Court's non-specific, conclusory finding that Plaintiffs conferred a prohibited benefit is clearly erroneous. Given that this complete failure of proof relates to a core element for which Defendants bore the burden of proof, such error requires reversal.

[14] *Id.*

V. The Superior Court Erred by Reforming the Partnership Non-Compete Rather than Declaring Such Provision Void, and Erred by Finding that the Parties' Originally Intended Such Provision to Prohibit Non-Business Activities Like Lecturing and Sponsoring at CMEs.

A. Question Presented.

Whether the Superior Court erred when it removed the limiting term "business" when reforming the Partnership Non-Compete, and whether the Superior Court committed clear error when it determined what the parties intended when they executed such provision. This issue was preserved by Plaintiffs' motion for summary judgment. (B127 at p. 33).

B. Scope of Review.

The Superior Court's interpretation of underlying contracts is reviewed *de novo*. *See GMG Capital Invs., Ltd. Liab. Co. v. Athenian Venture Partners I, Ltd. P'ship*, 36 A.3d 776, 779 (Del. 2012). Its finding of fact related to contractual intent is reviewed for abuse of discretion. *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002) "[T]his Court on appeal will test individual findings of fact only to ensure that the factual findings and inferences are supported by 'competent evidence.'" *Id*.

C. Merits of Argument.

1. Original Provision Was Void Under Delaware Law.

Under Delaware law, a covenant not to compete must: (1) be reasonable in geographic scope and temporal duration, (2) advance a legitimate economic interest of the party seeking its enforcement, and (3) survive a balancing of the equities in

order to be enforceable. *Lyons Ins. Agency, Inc. v. Wilson*, No. 2017-0092-SG, 2018 Del. Ch. LEXIS 317, at *14 (Del. Ch. Sep. 28, 2018).

In the instant case, Section 6.5.1 of the Partnership Agreement provides that Plaintiffs shall not have "any business interests or engage in business activities in addition to those relating to the Partnership," regardless if such interests or activities are in "direct competition with Partnership or any of its Subsidiaries." (B56 at pp. 29-30.) Because such provision is unlimited in territory and also unlimited in the type of conduct it prohibits, it is void as a matter of law.

The Superior Court agreed, but rather than voiding such provision, the Superior Court reformed it to purportedly match the intent of the parties. (DAT 35). Thus, the Superior Court's decision to reform such provision rather than striking it in its entirety was error requiring reversal. *See Del. Elevator, Inc. v. Williams,* No. 5596-VCL, 2011 Del. Ch. LEXIS 47, at *28 (Del. Ch. Mar. 16, 2011) ("[A] court should not save a facially invalid provision by rewriting it and enforcing only what the court deems reasonable.")

2. The Superior Court's reformation of the Partnership Non-Compete does not alleviate the unlimited nature of Plaintiffs' obligations thereunder.

The Superior Court reformed the Partnership Non-Compete based upon the intent of the parties. (DAT 35). Nevertheless, even with the Superior Court's reformation, Plaintiffs still cannot leave the Partnership without Defendants' consent

because, under the Partnership Agreement, Defendants retain sole and exclusive authority to determine, not just when, but *if* Plaintiffs ever get to withdraw as partners. (B56 at pp. 36-42).

This gives Defendants the *de facto* power to decide if Plaintiffs ever work or teach again in their field of medical expertise. Such unilateral and perpetual discretion by Defendants is far outside the bounds of what Delaware courts consider an enforceable non-compete provision.

Defendants will not even consent to Plaintiffs' *abandoning* approximately $24 million in Partnership shares to allow them to withdraw from the Partnership, Plaintiffs' obligations under the Partnership Non-Compete remain effectively unlimited in duration. (A784 at p. 119.) This is true even with the Superior Court's reformation. (B56 at pp. 36-42).

Because the Partnership Non-Compete is unenforceable even as reformed, the Superior Court's enforcement of such provision requires reversal.

3. No Evidence of Intent Exists in the Record.

The other reversible issue with the Superior Court's finding of intent is that there is absolutely no evidence in the record to support it. Neither Plaintiffs nor Defendants tendered any evidence whatsoever concerning the specific intent of the Partnership Non-Compete.

The only time the parties' intent with regard to the Partnership Non-Compete was addressed at trial was during Mr. Spragle's testimony, and even then only indirectly. (A662, at pp. 232-234) When was asked on direct examination what the Partnership Non-Compete meant to him as a limited partner, Plaintiffs' counsel objected on the ground that no party contends that the provision is unambiguous so Mr. Spragle's personal beliefs as to its intent were irrelevant. *Id*. The Superior Court essentially sustained the objection by opining that it did not see how Mr. Spragle's beliefs were relevant and that Defendants' counsel could instead ask Mr. Spragle about the ways in which Plaintiffs breached the Partnership Non-Compete as written. *Id*. Other than this brief but ultimately aborted attempt to inquire into the parties' intent surrounding the Partnership Non-Compete, no evidence was propounded on this issue at trial.

Thus, there is a complete lack of evidentiary support for the Superior Court's finding that Defendants included the Partnership Non-Compete to protect against Plaintiffs' misappropriating Defendants' confidential information. There is also no support for this finding in the Partnership Agreement itself. If the Superior Court is correct that the parties negotiated the Partnership Non-Compete to protect Defendants' confidential information, then Section 6.8 of the Partnership Agreement (confidentiality provision) is rendered superfluous (B56). *See Khan v. Del. State Univ.*, 2017 Del. Super. LEXIS 96, 2017 WL 815257, at *4 (Del. Super. Ct. Feb. 28,

2017) ("When interpreting contracts, this Court...gives meaning to every word in the agreement[,] and avoids interpretations that would result in superfluous verbiage.")

Moreover, the Superior Court's finding of breach under the reformed Partnership Non-Compete is erroneous because it removed "business" as a term that limits what activities are prohibited (*Compare* DAT 35 *with* B56 at pp. 29-30). The Superior Court does not explain why it modified the Partnership Non-Compete's prohibition against "business activities" into a restriction on non-business activities like medical lectures and charitable sponsorships.

Such a finding completely conflicts with the terms of the Partnership Agreement, because the Partnership Agreement expressly incorporates the Merger Agreement's limiting definition of "business" as only referring to the sale of pathology services and therapeutics. (B56, at Section 2.98 and Section 12.8).

By reforming the Partnership Non-Compete into a prohibition against "activities detrimental to the partnership," the Superior Court in essence drafted a do-no-harm provision into the Partnership Agreement. Such a reformation is in error because the Partnership Agreement expressly waives all fiduciary duties owed by limited partners "to the fullest extent permitted under applicable law." (Partnership Agreement, Section 6.1.1, at p. 24.) Moreover, because the Superior Court discarded the limiting term "business," Superior Court's reformation actually constitutes a significant broadening of the Partnership Non-Compete. By reforming the

Partnership Non-Compete to encompass non-business activities to effectively impose upon Plaintiffs a fiduciary do-no-harm duty to the Partnership (a duty the parties themselves waived in the same agreement), the Superior Court erred in a manner that requires reversal.

CONCLUSION

FOR THE FOREGOING REASONS, Plaintiffs respectfully requests that Defendants' arguments on appeal be denied except as stated herein, and that Plaintiffs' arguments on cross-appeal be granted.

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