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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.	)	

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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CROSS-APPELLANT'S REPLY

I. The Superior Court Erroneously Interpreted and Applied 6 Del. C. § 2707 ("Section 2707").

A. The Superior Court Ignored the Term "Among" in its Analysis.

Defendants argue in their response that the Superior Court did not ignore the term "among" when applying Section 2707 because the Superior Court included the term "among" when directly quoting the statute in its conclusion. (Cross-Appellee Answering Brief, p. 14.) Defendants, however, ignore the Superior Court's actual analysis of Section 2707, which is expressly and substantively limited to interpreting and applying the term "between." Defendants also fail to show how the term "among" is not rendered superfluous as a result of such interpretation.

When interpreting a statute, one begins with the premise that "every word chosen by the legislature [has] meaning." *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012). In the instant case, that means beginning with the premise that "between" has a different meaning than "among."

The Superior Court's interpretation of Section 2707 is erroneous because it fails to acknowledge, apply or give effect to the fact that "between" and "among" have different meanings. *This* is why the Superior Court's interpretation renders the term "among" superfluous.

Because the Superior Court's interpretation of Section 2707 fails to give effect to the term "among," its decision on this issue should be reversed.

B. The Superior Court's Analysis Renders an Absurdity.

In their response, Defendants' fail to address the absurdity inherent in the Superior Court's interpretation of Section 2707. *See Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) (holding that a statute "must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided.")

Specifically, Defendants fail to address the inherent absurdity in interpreting Section 2707 in a way that prioritizes the interests of corporations over the protection of the physician-patient relationship. Indeed, Defendants argue that giving Section 2707 its intended effect would "upend Delaware law" by barring a corporation from restricting a physician's practice of medicine. (See Cross-Appellee's Answering Brief, pp. 18-19.) Defendants' argument also ignores the liquidated damages provision in Section 2707, which provides a business purchaser or employer with economic protection against competition by a physician while still protecting the sanctity of the physician-patient relationship.

If, as Defendants acknowledge, the physician-patient relationship is sacred, interpreting Section 2707 in a way that renders the physician-patient relationship subservient to corporate interests is to turn the express purpose of the statute upside

down. Requiring the question of Section 2707's applicability to turn on whether a corporation is a counter-signatory is to gut the statute's express purpose of not depriving a patient "of the services of the physician of their choice because of an economic contract," because all one must do to deprive the patient of his or her choice of physicians is to incorporate. Such an interpretative outcome directly contradicts the express purpose of Section 2707.

For this reason alone, Plaintiffs' appeal on this issue should be granted.

C. The Superior Court's Decision is Based Solely on its Finding that Agreements Were Not "Between" Physicians.

In their response to Plaintiffs' Section 2707 argument, Defendants contend that Plaintiffs "ignore the numerous other reasons why Section 2707 is inapplicable to the Agreements." (Cross-Appellee Answering Brief, pp. 16-18.) Such contention is irrelevant to the instant appeal because the Superior Court expressly limited its decision on Section 2707 to the "between and/or among" issue:

> At most, the Court would believe the prohibitions found in Section 2707 would not only apply to the treatment or diagnosis of Delaware patients . . . [h]owever, since the agreements are not between physicians, the Court need not definitively decide the issue.

(A491, p. 12.)

Even if such additional hypothetical grounds were relevant to this appeal, Defendants' arguments still fail. For instance, Defendants argue that Section 2707

does not apply because Plaintiffs are not "physicians practicing medicine" as defined by Delaware law because Plaintiffs do not treat patients in Delaware. (Cross-Appellee Answering Brief, p. 16.) Defendants somehow ignore the fact that the Superior Court expressly found that Plaintiffs were physicians practicing medicine under Delaware law. (A491, p. 11.)

Defendants further argue that because the intent of Delaware law is to protect Delaware physician-patient relationships, Section 2707 does not apply to Plaintiffs because they are physicians based in Georgia. (Cross-Appellee Answering Brief, pp. 16-17.) This argument misunderstands the reason why the parties all alleged that Delaware law applied in this case. The parties do not contend that Delaware law applies because Plaintiffs' practice medicine in Delaware or treat Delaware patients. Instead, the parties contend Delaware law applies because they expressly agreed that such law would govern their agreements. *See* 6 Del. C. § 2708 (choice of law provisions).

"Delaware courts enforce contractual choice of law clauses as long as the jurisdiction chosen has a 'substantial relationship to the parties or the transaction' and the choice is not unenforceable under the fundamental public policy of a 'default' and materially-more interested state." *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 Del. Super. LEXIS 182, at *13-14 (Del. Super. Ct. Feb. 26, 2021). "At its core, Section 2708 is intended to provide certainty to parties

who are subject to jurisdiction in Delaware that their choice of Delaware law regarding the construction and enforceability of their contracts will be respected." *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 855 (Del. Ch. Feb. 23, 2016).

Because Delaware freely enforces choice of provisions in contracts, Defendants' argument that Section 2707 was intended to protect Delaware physician-patient relationships is beside the point. Without question, when the Delaware legislature enacts Delaware law, their only concern is Delaware. Such contention is indisputable: the Delaware legislature passes laws to govern Delaware. Why this fact should have any bearing on the freedom of contracting parties to elect Delaware law to govern their contracts is left unexplained by Defendants.

In the instant case, it is undisputed that Defendants are Delaware corporations. It is also undisputed that Delaware law was chosen by the parties to govern all three agreements at issue. To selectively determine that some Delaware law applies to the parties' agreements—e.g., Delaware's non-compete law and Delaware's definition of the practice of medicine—while Section 2707 does not apply is to fundamentally undermine the legislature's express intent behind 6 Del. C. § 2708 and the case law interpreting it.

Given the preference across the country for incorporating in Delaware and choosing Delaware law in business agreements, Defendants' argument, if successful,

would lead to a massive amount of confusion amongst contracting parties who elect Delaware law to govern their agreements.

For the reasons set forth herein and in Plaintiffs' Opening Brief, the Superior Court's determination that Section 2707 is inapplicable to the parties' agreements should be reversed.

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

A. No Third-Party Beneficiary

Defendants argue in their response that Defendant Bakotic Pathology Associates, LLC ("Bako") has standing to sue under the Partnership Agreement because it is an intended but unnamed third-party beneficiary of such agreement. Such argument ignores the fact that the Partnership Agreement contains a "no third-party beneficiary" clause as a result of the Partnership Agreement's express incorporation of the Merger Agreement.

Section 11.2 of the Merger Agreement ("No Third-party Beneficiaries") provides that such agreement "shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns," with a few exceptions that do not apply to this case. (A108, p. 85.) Pursuant to Section 2.98 and Section 12.8 of the Partnership Agreement, the Merger Agreement is considered a "Related Agreement" therein and the provisions of the Merger Agreement are expressly incorporated into the Partnership Agreement. ((B56, pp. 13, 53.)

Because the Merger Agreement's "no third-party beneficiary" clause is expressly incorporated into the Partnership Agreement, Defendants' argument that Defendant Bako has standing to sue thereunder fails. Accordingly, Plaintiffs

respectfully request that the Superior Court's denial of summary judgment on this issue be reversed.

B. No Evidence of Injury to Defendant LP

Defendants claim that there is evidence in the record that Defendant Bako Pathology, LP ("Defendant LP") suffered damages, and cite the report of their expert, Mr. Hosfield, as the sole basis for such claim. In doing so, Defendants willfully ignore Mr. Hosfield's own admission at trial that he did not "break out damages specific to the partnership" in his report. (A729, at 134:8-10.) Moreover, Mr. Spragle admitted at trial 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 [Defendant Bako]." (A662, pp. 152-153.)

Because Defendant LP did not suffer an injury-in-fact for any of the claims it brought below, Defendant LP lacks standing to pursue its claims under the Partnership Agreement. Moreover, because Defendant Bako and Defendant BPA are neither parties nor third-party beneficiaries to the Partnership Agreement, they also lack standing to pursue the claims they each brought under such agreement. For this reason, the Superior Court's denial of this issue on summary judgment should 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. No Evidence Connecting Breach to Damages.

Defendants argue in their response that the Superior Court did in fact find that Plaintiff's breaching conduct proximately caused the lost profits Defendants claimed. This assertion by Defendants misreads the Superior Court's DAT, and relies on a misapplication of Delaware law.

To prove causation in Delaware, a claimant must present evidence that its alleged damages were caused by the specific breach alleged. "[Breach of contract damages] are limited to those that may fairly and reasonably be said to arise naturally from the breach, or that may reasonably be said to have been foreseeable by both parties at the time they entered into the contract." *ATD, Inc. v. Long*, 2005 Del. C.P. LEXIS 2, *10 (Del. C.P. Jan 21, 2005); see also *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 549 (Del. Ch. Ct. June 29, 2001) (holding that claimant's breach of contract claim failed because its "injury does not logically flow from the breach.")

In the instant case, the Superior Court found that Plaintiffs breached the Employee Non-Competes by providing a benefit to Defendant Bako's customers via the performance of "similar duties." (DAT 21-22). The Superior Court, however, never found that Defendants' claimed damages were *proximately caused* by the

provision of such purported benefits. Instead, the Superior Court found that Plaintiffs' conduct in general caused Defendants' injury. This is why Plaintiffs referred to the Superior Court's finding of causation as a "tacit" finding: the Superior Court does not expressly connect the breach (performing similar duties to provide a benefit) to the damages.

Nor is there any evidence connecting Plaintiffs' specific breach to the lost profits Defendants claimed. As shown in Plaintiffs' Opening Brief, Defendants' evidence of causation exclusively concerned non-actionable conduct. No evidence exists in the record that Defendants were injured as a result of a customer receiving an educational benefit from Plaintiffs or from Plaintiffs' lecturing and sponsoring activities in general. Such a theory of damages does not even make sense, particularly given Defendants' testimony at trial that the true harm caused by Plaintiffs' lecturing and sponsoring resulted from Plaintiff Bakotic's personal statements about his termination; not the educational benefit that was theoretically conferred as a result of his lecturing:

> 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).

B. No Evidence of Benefit Conferred.

The lack of any evidence of causation is exacerbated by the complete lack of evidence that any specific customer actually received a prohibited benefit from Plaintiffs while they were performing "similar duties." (*See* Section IV, *infra*.).

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. Defendants Effectively Admit There is No Evidence of a Benefit Conferred.

Defendants, in their response, effectively admit that the Superior Court's finding that Plaintiffs conferred a prohibited benefit has no support in the record. Rather than point to evidence admitted at trial that a benefit was actually conferred to a Bako customer, Defendants instead point to evidence of Plaintiffs' intent when they started the Rhett Foundation. (Cross-Appellee Answering Brief, pp. 40-41.)

Defendants fail to identify any evidence to support a finding of a benefit conferred to Bako's customers because none exists. Instead, Defendants seek to deflect by pointing to Plaintiffs' hopes and purpose and Plaintiff Bakotic's testimony that his lecturing (both before and after his time at Bako) conferred a benefit on pathology labs in general. This latter contention by Defendants is inapposite because the provision at issue in the Employee Non-Compete prohibits Plaintiffs from conferring a benefit *to Bako's customers*, not Bako's competitors.

Because zero evidence exists in the record that Plaintiffs' performance of "similar duties" conferred a benefit on any specific Bako customer, the Superior Court's finding of liability under the Employee Non-Competes should be reversed.

B. The Partnership Agreement Incorporates the Limiting Definition of Business.

Defendants argue that the Superior Court's finding of liability under the Partnership Non-Compete was correct because it was based on a finding that Plaintiffs' activities through the Rhett Foundation constituted "business activities." This argument ignores the fact that the Partnership Agreement's employment of the term "business" is constrained by the definition of "business" in the Merger Agreement.

As shown above, the Partnership Agreement expressly refers to and incorporates the Merger Agreement as a "Related Agreement." (B56, Section 2.98, Section.)

The Merger Agreement defines the term "business" as follows:

> "Business" means the business of providing anatomic pathology, proprietary molecular microbiology and neurology testing services and physician dispensed therapeutics as currently conducted or specifically planned to be conducted by the Company and its Subsidiaries on the date hereof.

(A108, Article 10.1, p. 68)

Because the Merger Agreement defines "business" as the selling of anatomic pathology services and therapeutics, and because such definition is expressly incorporated into the Partnership Agreement, the Superior Court erred when it found that Plaintiffs' activities on behalf of the Rhett Foundation constituted prohibited

"business" activities. After all, there is no claim by any party or finding by the Court that the Rhett Foundation engaged in any activities other than lecturing and sponsoring.

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. The Partnership Agreement Incorporates the Limiting Definition of Business.

As stated above, both Defendants and the Superior Court ignore the Merger Agreement's definition of business and ignore the incorporation of such definition into the Partnership Agreement. By reforming the Partnership Non-Compete to prohibit activities beyond the selling of pathology services or therapeutics, and by doing so without any evidence of the parties' intent, the Superior Court's finding of liability under the Partnership Agreement is erroneous.

B. No Evidence of the Parties' Intention With Regard to the Partnership Non-Compete.

Defendants willfully misconstrue Plaintiffs' argument on the issue of intent. Plaintiffs are not relying on a hypothetical concerning lemonade or the Superior Court's dicta thereon. Instead, Plaintiffs argue against the Superior Court's express finding that "[t]here is no question that [the Partnership Non-Compete] was intended to prevent Plaintiffs from engaging in similar and competitive activity that would be detrimental to the partnership." It is this finding of intent that has zero support in the evidence. The parties' hypothetical intent with regard to lemonade stands is not at issue.

Moreover, the utter lack of evidence supporting the Superior Court's finding of intent under the Partnership Non-Compete is wholly incongruent with its findings concerning intent under the Merger Non-Compete. Again, the Merger Agreement is expressly incorporated therein as "Related Agreement." Additionally, the Merger Agreement and the Partnership Agreement were contemporaneously executed (DAT 8-9), and indisputably such agreements concern the same transaction—i.e., the 2016 sale of Bako to Consonance Capital.

It is well-settled in Delaware that "contemporaneously executed documents executed by the same parties and dealing with related matters should be construed together." *See Simon v. Navellier Series Fund*, 2000 Del. Ch. LEXIS 150, 2000 WL 1597890, at *7 (Del. Ch. Oct. 19, 2000); *see also Weygandt v. Weco, LLC*, 2009 Del. Ch. LEXIS 87, at *7 (Del. Ch. May 14, 2009) ("[A]greements that are part of the same transaction are construed together."); RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.").

In the instant case, Delaware law requires the Merger Agreement and Partnership Agreement to be read together even without the latter's express incorporation of the former. Therefore, the Superior Court's failure to construe the agreements together, its failure to incorporate the Merger Agreement's limiting definition of "business" into the Partnership Non-Compete, and its finding of

divergent intent across the two agreements without any evidentiary support constitutes clear legal error that requires reversal.

CONCLUSION

FOR THE FOREGOING REASONS, Plaintiffs respectfully requests that their arguments on cross-appeal be granted.

Dated: March 31, 2022

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