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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. CARUSO, M.D., P.A. T/A SEASIDE GASTROENTEROLOGY CONSULTANTS,	)	
Plaintiff Below Appellant,	)	C.A. No. 350, 2024
v.	)	Court Below: Superior Court of the State of Delaware C.A. No. N21C-10-248 EMD
HEATHER BARTON, M.D.	)	
Defendant Below Appellee.	)	

PLAINTIFF BELOW-APPELLANT'S

REPLY BRIEF

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I. THE SUPERIOR COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE COURT DID NOT PROPERLY DETERMINE WHETHER THE LIQUIDATED DAMAGES PROVISION OF THE PARTIES' AGREEMENT WAS ENFORCEABLE.

A. The Delaware Case Law Used By The Superior Court And Appellee Is Inapplicable To The Facts Of This Case.

Although Appellee argues that Appellant did not contemplate well-established considerations related to non-compete provisions[1], Appellee fails to apply pre-eminent Delaware statutory law relating to non-compete provisions in agreements among physicians.[2] 6 *Del. C*. § 2707 applies to "any covenant not to compete provision of any employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine." While this statute prohibits covenants not to compete in employment agreements among physicians, it stipulates that the enforcement of liquidated damages provisions which require payment of damages in an amount that is reasonably related to the injury in lieu of injunctive enforcement of a physician noncompetition covenant is expressly permitted.[3]

[1] Appellee's Answering Brief at p. 13-14.
[2] 6 *Del. C*. § 2707.
[3] *Id*.

Rather than applying the Delaware law and legal standards pertaining to liquidated damages in employment agreements among physicians presented by Plaintiff, both the Superior Court and Appellee relied upon two cases relating to non-compete agreements in employment agreements with an insurance agent and accountant: *Lyons Insurance Agency, Inc. v. Wark*[4] and *Faw, Casson & Co., L.L.P. v. Halpen*.[5] In addition to erring in recognizing prevailing Delaware law, the Superior Court and Appellee failed to address the considerable distinctions between *Lyons* and *Halpen* and the present matter.

The fact that the subject matter of *Lyons* and *Halpen* pertain to employment agreements for an insurance agent and an accountant are not insignificant distinctions as Appellee argues.[6] The present matter specifically relates to the enforceability of a liquidated damages agreement in an employment contract between physicians. As stated, Delaware has existing statutory law pertaining to such situations.[7] Although Appellee would rather ignore appurtenant Delaware law in favor of picking and choosing a patchwork of case law to apply in her favor, prevailing, relevant law must be applied. In physician employment agreements in

[4] 2020 WL 429114 (Del. Ch. Jan. 28, 2020).
[5] 2001 WL 985104 (Del. Super. Ct. Aug. 7, 2001).
[6] Appellee's Answering Brief at p. 17.
[7] 6 *Del. C*. § 2707.

Delaware, injunctive relief is generally void in regard to non-compete provisions.[8] However, in lieu of injunctive relief, enforcement of liquidated damages for relief upon breach of non-compete covenants in physician employment agreements are expressly permitted.[9] This unavailability of injunctive relief is a relevant distinction from the circumstances in *Lyons* and *Halpen*. In those cases, injunctive relief was an available remedy for violations of non-compete agreements in employment agreements for insurance agents and accountants.[10] Therefore, distinctions in available remedies for non-compete covenants in different types of employment agreements, and the effect those variances have on the law applied to the Agreement between the Parties, are relevant in the Court's consideration of this matter.

B. The Superior Court Erred In Applying Delaware Law To Analyze The Liquidated Damages Provision In The Parties' Agreement.

The Superior Court failed to conduct an analysis to determine the enforceability of the liquidated damages provision in the Parties' Agreement. Rather, the Superior Court misapplied Delaware law which was not properly related to this case and determined that the liquidated damages provision must be unenforceable because Appellant was only competing for a short period of time after Appellee's

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[8] *Id*.
[9] *Id*.
[10] *Burris Foods, Inc. v. Razzano*, 1984 WL 8230 at *2 (Del. Ch. 1984) (see also *Hub Grp., Inc. v. Knoll*, 2024 WL 3453863 (Del. Ch. 2024)).

breach before it ceased operation.[11] Appellee seeks to uphold the Superior Court's determination that the liquidated damages are unenforceable, however, she opposes that there was any period of competition, and further misapplies prevailing Delaware law.[12]

Under Delaware law, a proper analysis of the validity and enforceability of the liquidated damages provision in the Parties' Agreement should begin with application of Delaware law related to physicians' agreements. Accordingly, Delaware law expressly permits enforcement of liquidated damages provisions which require payment of damages related to competition in an amount reasonably related to the injury in lieu of injunctive enforcement of a physician noncompetition covenant.[13]

The Superior Court's analysis should have thereafter progressed to an assessment of validity of the liquidated damages provision in the Parties' Agreement. Pursuant to Delaware law, liquidated damages are presumptively valid and enforceable, unless the liquidated damages constitute a penalty.[14] A determination of the validity of a liquidated damages provision involves a two-prong analysis, which involves a review of the intent of the parties to the contract at the

[11] Appellant's Opening Brief Appendix at A174-179.
[12] Appellee's Answering Brief at p. 19-20.
[13] 6 *Del. C*. § 2707.
[14] *Kold, LLC v. Croman*, 2014 WL 7008431, at *6 (Del. Super. Ct. Nov. 25, 2014).

time of contracting.[15] In Delaware, such an agreement for liquidated damages will not be disturbed where (1) the damages that would flow from a future breach are difficult to estimate because they are uncertain at the time of contracting, and (2) the amount agreed upon is reasonable.[16] At the time of contracting, the Parties' agreed the amount of damages which would flow from a future breach by Defendant would be difficult to ascertain.[17] At the time they entered the Agreement, the Parties also agreed to contract for liquidated damages in the sum of $100,000.00 due to this uncertain appraisal of the measure of damages.[18]

If the Superior Court properly applied Delaware law, it would have then assessed whether the liquidated damages were reasonable at the time of contracting under the two-prong test.[19] In order for liquidated damages to be reasonable, the amount stipulated must be a reasonable estimate of damages which could conceivably flow from the breach.[20] Accordingly, an amount at issue would be considered reasonable if it were rationally related to any measure of damages a party might conceivably sustain and not unconscionable.[21] The Superior Court should

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[15] *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006).
[16] *Id*. (quoting *Lee Builders v. Wells*, 103 A.2d 918, 919 (Del.Ch. 1954)) (see also *Kold*, 2014 WL 7008431, at *6).
[17] Appellant's Opening Brief Appendix at A24, A32-33.
[18] Appellant's Opening Brief Appendix at A24.
[19] *Lee Builders*, 103 A.2d 918 at 919.
[20] *Delaware Bay*, 900 A.2d 646 at 651 (quoting *Lee Builders*, 103 A.2d 918 at 919).
[21] *Id*.

have properly assessed the Parties' intent at the time of contracting to review whether the amount of liquidated damages, which here was $100,000.00, were a reasonable estimate of damages Plaintiff might sustain upon Defendant's breach.[22] The Court should have reviewed the expenses related to Plaintiff's incorporation of Defendant into his well-established business including training and mentoring in the specialized field of gastroenterology, providing her access to his well-established patient portfolio, and assisting in incorporating her into Seaside's practice and community, as well as the value of the impact that Defendant's departure would cause to Plaintiff's business. The Court should have considered that Defendant was provided an incentive bonus of $10,000.00 and relocation reimbursement of $10,000.00.[23] Accordingly, the agreed upon liquidated damages clause was reasonably tethered to a legitimate business interest in protecting the practice and investment made in Defendant. The Parties agreed that $100,000.00 was a reasonable measure of compensation in the event Defendant choose to provide gastroenterology services in the restricted area after Plaintiff's substantial investment in Defendant related to training, mentoring, and introduction to medical community. Although Appellee would have the Court disregard such factors[24], all of these factors should have been considered by the Superior Court in its assessment of the Parties' intent at the time

[22] *Delaware Bay*, 900 A.2d 646 at 651.
[23] Appellant's Opening Brief Appendix at A20.
[24] Appellee's Answering Brief at p. 14-15.

of contracting to determine whether the liquidated damages were a reasonable estimate of damages which might conceivably flow from Defendant's breach.

Moreover, Appellee asks this Court, as it asked the Superior Court, to deem the liquidated damages unenforceable, reasoning that they functioned as a penalty.[25] However, Appellee instructs the Court to make this determination using the Parties' intent at the time of enforcement.[26] In Appellee's Answering Brief, she incorrectly links the review of the enforceability of the liquidated damages to the Parties' actions after Appellee's breach of the Agreement.[27] As established by Delaware case law, this is the incorrect standard of assessment. Instead, the proper inquiry is whether the liquidated damages are a reasonable forecast of damages a party may sustain or whether they function as a penalty based upon the parties' intent at the time of contracting.[28] Accordingly, "the focus, then, is on damages contemplated at the time of contracting, not the actual damages that may or may not be proved."[29] As stated, if the Court reviews the Parties' intent at the time of contracting, it is clear that liquidated damages in the amount of $100,000 is a reasonable assessment of

[25] Appellee's Answering Brief at p. 19-20.
[26] Appellee's Answering Brief at p. 19-20.
[27] Appellee's Answering Brief at p. 10-11.
[28] *Kold*, 2014 WL 7008431, at *5.
[29] *W & G Seaford Associates, L.P. v. E. Shore Markets, Inc.*, 714 F. Supp. 1336, 1336 (D. Del. 1989).

damages the Parties believed Plaintiff might sustain as a result of Defendant's breach and as such does not function as a penalty.

Appellee further asserts that the liquidated damages are unenforceable because Defendant did not compete with Plaintiff due to the fact that his business was sold and ceased operation after her departure.[30] Appellee reasons that since Plaintiff was forced to sell his business and cease operations after Plaintiff left the practice he is precluded from enforcing the valid liquidated damages provision in the Agreement[31]; however, these assertions are plainly incorrect. Defendant did in fact engage in competition with Plaintiff as she began working at Beebe on June 21, 2021, and Plaintiff's business continued to operate until he commenced employment with EHG GI DE, P.C. on July 18, 2021.[32] Moreover, Plaintiff was harmed as a direct result of Defendant's breach. Following Defendant's resignation and notification that she would be working with a competitor, Plaintiff faced the dilemma of being forced to either bear the unquantifiable expenses of hiring, relocating, and training a new gastroenterologist for his practice or closing his practice and beginning to work for another practice. Accordingly, Plaintiff did suffer harm as a result of Defendant's breach.

[30] Appellee's Answering Brief at p. 18.
[31] Appellee's Answering Brief at p. 18.
[32] Appellant's Opening Brief Appendix at A115.

Additionally, whether a plaintiff sustains actual damages is not relevant to the assessment of the enforceability of the liquidated damages.[33] Pursuant to Delaware law, "[i]f the contract-defined liquidated damages are found to be valid, the party enforcing the liquidated damages provision need not establish its actual damages."[34] Accordingly, "[d]amages are recoverable under a valid liquidated damages provision even though no actual damages are proven as a consequence of that breach."[35] Therefore, although Plaintiff suffered actual damages, regardless of such damages Plaintiff is entitled to recover the allocated damages under the valid liquidated damages provision in the Agreement as a result of Defendant's breach.

Furthermore, although Appellee avers the liquidated damages provision functions as an unreasonable restraint on competition[36], this assertion is inaccurate. Appellee is correct in her assertion that non-compete provisions in matters of employment "are not mechanically enforced."[37] Rather, Delaware courts review non-compete provisions in employment matters upon the consideration that "covenants restricting future employment must be determined to be reasonably

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[33] *Pierce Associates, Inc. v. Nemours Found.*, 865 F.2d 530, 546 (3d Cir. 1988).
[34] *Smart Sand, Inc. v. US Well Servs. LLC*, 2021 WL 2400780 at *9 (Del. Super. Ct. June 1, 2021).
[35] *Pierce*, 865 F.2d 530 at 546 (citing *Piccotti's Restaurant v. Gracie's, Inc.*, 1988 WL 15338, at *2 (Del. Super. Ct. Feb. 23, 1988)).
[36] Appellee's Answering Brief at p. 16-19.
[37] *Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *11 (Del. Ch. Oct. 23, 2002).

limited with respect to both geography and time; they must as well advance a legitimate economic interest of the employer."[38] Here, in the contract between Appellant and Appellee, the non-compete provision was not an unreasonable restraint as it was tailored with limitations as to the geographical and temporal restraints, specifying that it applied if Defendant engaged in the practice of gastroenterology at any location within ten (10) miles of Plaintiff's office during the term of the Agreement and for two years following the separation of her employment.[39] Moreover, the provision advanced the legitimate economic interest of the employer to address the advancement of his practice. Whether Appellee now agrees or not, it was clear to the Parties at the time of contracting that Defendant leaving the business and engaging in the practice of gastroenterology in close geographical and temporal proximity to her employment with Plaintiff would have at least some effect on the business, regardless of the amount of days the competition occurred. The Parties agreed this effect was difficult to ascertain and so agreed upon an amount of liquidated damages to remedy this. Appellee cannot now, after her deliberate breach, attempt to revise or invalidate the Agreement simply because its application is unfavorable.

[38] *Id*.
[39] Appellant's Opening Brief Appendix at A23-24.

CONCLUSION

For the reasons stated herein and in Plaintiff, Below-Appellant's Opening Brief, Appellant respectfully requests this Court to dismiss the lower Court's ruling and grant Appellant's Motion for Summary Judgment. In the alternative, Plaintiff requests this Honorable Court to reverse and remand this matter for a new trial.

Respectfully submitted,

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