IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

HEATHER S. TURNER, M.D.,	)	
	)	CIVIL ACTION FILE
Plaintiffs,	)	NO. 2009V-0746
	)	
v.	)	JUDGE HANKINSON
	)	
PEACHTREE FAYETTE WOMEN'S SPECIALISTS, LLC	)	
	)	
Defendant.	)	

DECLARATORY JUDGMENT

Defendant corporation provides obstetric and gynecological services to patients out of its office at 1267 Highway 54 West, Fayetteville, Georgia, and at Piedmont Fayette Hospital, located at 1255 Highway 54 West, Fayetteville, Georgia. Plaintiff is a physician specializing in these two areas of medicine. In October 2006, Plaintiff began working for Defendant. The parties agreed on and entered into an employment agreement. The agreement contains restrictive covenants relating to post-employment activities, including a two-year non-competition clause. The relevant portions of the agreement state:

> Non-Competition. Employee acknowledges that Employer has expended and will expend considerable time, effort and capital to develop its medical practice, including its patient base and referral sources. Employee further acknowledges that Employer has a legitimate business interest in protecting its medical practice. In furtherance of the foregoing, Employee agrees that she will not, during the Restricted Period, provide obstetrical and gynecology medical services (either for his own account or benefit, or for or on behalf of any other person, firm, partnership association, corporation, business organization or entity other than Employer), within the Restricted Territory.

(See Plaintiff's Complaint, Exhibit "A" - Employment Agreement, Section 15(g).)

> "Restricted Period" means the Term and for two (2) years after the termination of this Agreement.

(See Plaintiff's Complaint, Exhibit "A" - Employment Agreement, Section 15(d)(vii).)

> "Restricted Territory" means (1) a five (5) mile radius from Employer's office located at 1267 Hwy 54 West, Fayetteville, Georgia, (2) at Piedmont Fayette Hospital, Fayetteville Georgia, and (3) at Piedmont Hospital, Atlanta, Georgia. Employee acknowledges that she will provide services on behalf of Employer during the term of this Agreement at each of the locations described in clauses (1), (2), and (3) of this subsection.

(See Plaintiff's Complaint, Exhibit "A" - Employment Agreement, Section 15(b)(viii).)

The agreement also provided that either party could cancel the employment agreement and terminate the employment relationship without cause with ninety days notice. (See Plaintiff's Complaint, Exhibit "A" - Employment Agreement, Section 13(a).) On March 16, 2009, Plaintiff provided Defendant with notice pursuant to that section that she was terminating her employment with Defendant effective June 14, 2009. Plaintiff then commenced this action on April 28, 2009, asking the Court to enter a declaratory judgment finding that the non-competition clause is unreasonable and thereby unenforceable as a matter of law. Defendant counterclaimed for a declaratory judgment as well, for an injunction barring Plaintiff from taking action in contravention to the agreement, and for attorney's fees pursuant to the agreement. The parties came before the Court for a final hearing on June 12, 2009.

The Court of Appeals has ruled on the standard used to evaluate non-compete covenants in employment agreements:

> Generally, contracts in restraint of trade or that tend to lessen competition are against public policy and are void. In considering whether a restrictive covenant is enforceable, a court must first determine the level of scrutiny to apply. . . Because the covenants in this case arise out of an employment agreement, they are subject to the highest level of scrutiny.
>
> Courts will enforce a restrictive covenant in an employment contract only if: (1) the restraint is reasonable; (2)

> founded upon valuable consideration; (3) is reasonably necessary to protect the party in whose favor it is imposed; and (4) does not unduly prejudice the interests of the public. Moreover, such restrictions must be strictly limited as to time, territorial effect, capacity in which the employee is prohibited from competing, and as to overall reasonableness. Whether the restraint imposed by the employment contract is reasonable is a question of law for determination by the court, which considers the nature and extent of the trade or business, the situation of the parties, and all other circumstances.

(Citations and punctuation omitted) *Dent Wizard Inter. Corp. v. Brown*, 272 Ga. App. 553, 555-556 (2005). Because Georgia law does not recognize the "blue pencil theory of severability" with regard to employment contracts, all aspects of a non-competition provision must fail when one aspect is found invalid. *Browning v. Orr*, 242 Ga. 380 (1978).[1]

Plaintiff contends that the territorial restriction is overly broad because she never worked or treated any patients at Piedmont Hospital in Atlanta. The evidence introduced at trial shows that Plaintiff and the other physicians working for Defendant all received staff privileges to treat patients at Piedmont Hospital in Atlanta. At the time of Plaintiff's hiring, Defendant hoped to expand its practice by treating patients at Piedmont Hospital in Atlanta. At some point, this plan was abandoned and the staff privileges were not thereafter renewed. Defendant testified at the hearing that she did not treat a single patient at Piedmont Hospital in Atlanta during her term of employment.

When evidence is introduced that shows that an employee did not work in an entire restricted area, the non-compete restriction is considered to be overly broad on its face unless evidence is introduced which demonstrates a strong justification for such a restriction. "While [a] Court will accept as prima facie valid a territory where the employee worked and the

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[1]HB 173 enacted by the 2009 legislature and to be voted on in 2010 would apparently allow Georgia courts to "blue pencil" contracts.

employer does business, a territory that is only where the employer does business, but the employee did not work is overly broad on its face, absent strong justification for such protection, other than the desire not to compete with the former employee." *Dent Wizard*, Id. at 556; citing *Hulcher Svcs. v. R.J. Corman R. Co.*, 247 Ga. App. 486, 491(4) (2000).

Testimony at the hearing showed that Defendant, by virtue of the other physicians which constitute the medical practice, treated patients at Piedmont Hospital in Atlanta during the time the physicians retained their staff privileges, but have not done so since the privileges expired. Thus, the prospect of regularly practicing in Atlanta was seemingly abandoned by Defendant long before Plaintiff terminated her employment. Defendant's argument that Piedmont Hospital in Atlanta is a consistent source of patient referrals does not alone create a strong justification for allowing the territorial limitation to withstand strict scrutiny. Furthermore, the case upon which Defendant relies to make this argument was clearly resolved using a lesser standard of scrutiny. See *Keeley v. Cardiovascular Surgical Associates*, 236 Ga. App. 26, 20 (1999) ("Keeley was to become an equal owner of CSA within 18 months, which means this covenant was not subject to the strict level of scrutiny accorded normal employment contracts, but to the middle level of reduced scrutiny accorded professional contracts where the parties are considered as having equal bargaining power.")[2] Patient referrals arise through professionally-established relationships, and there is no evidence indicating that Plaintiff was able to develop such relationships since she never personally

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[2]More specifically in footnote 22 of *Keeley*, the Court cited *McAlpin v. Coweta Fayette Surgical Associates, P.C.*, 217 Ga.App. 669 (1995) which held: "there is a distinction between consideration of restrictive covenants in employer/employee situations as opposed to a partnership situation, with the former requiring a stricter scrutiny in determining the reasonableness of the restrictions." See also, *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 246 Ga. App. 398 (2000).

worked at Piedmont Hospital in Atlanta.

The Court finds that the non-competition provision contains a restriction limiting Plaintiff's ability to work in a territorial area in which she did not treat any patients during her professional relationship with Defendant, and that the restriction goes beyond what is reasonably necessary to protect Defendant's interest in its customers. The entire covenant is therefor unenforceable as a matter of law. The Court hereby finds for the Plaintiff, and declares the non-competition and non-solicitation covenants contained in Sections 15(g) and 15(h) of the October 9, 2006 Physician Employment Agreement between the parties are invalid and unenforceable under Georgia law and non binding upon the Plaintiff. The Defendant's counterclaims are hereby dismissed.

SO ORDERED AND ADJUDGED, this 18 day of August, 2009.

TOMMY R. HANKINSON
JUDGE, SUPERIOR COURTS
GRIFFIN JUDICIAL CIRCUIT