Rel: December 20, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180088 and 1180434

William T. DeVos, M.D., and Donald R. Simmons, M.D.

v.

The Cunningham Group, LLC, and Cunningham Pathology, LLC

Appeals from Jefferson Circuit Court
(CV-18-903526)

STEWART, Justice.

William T. DeVos, M.D., and Donald R. Simmons, M.D. (hereinafter referred to collectively as "the doctors"), appeal from a preliminary injunction entered in the Jefferson Circuit Court ("the trial court") in an action filed against

them by The Cunningham Group, LLC, and Cunningham Pathology, LLC. The doctors separately appeal from the trial court's order denying their request to increase the amount of the surety bond for the imposition of the injunction.

Facts and Procedural History

According to the complaint, the doctors had been employed by The Cunningham Group from April 30, 2007, until August 31, 2018, when the doctors terminated their employment without prior notice. The Cunningham Group, also identified in the complaint, other pleadings, and documents in the record as "Services LLC," provided pathology and cytology services for Brookwood Baptist Medical Center through an agreement with Cunningham Pathology. The doctors entered into employment agreements with Services LLC on April 30, 2007, in which they agreed that, if they provided Services LLC less than 12 months' notice of their termination of their employment, they would pay Services LLC an amount equal to one year's annual salary. The doctors also agreed that, for a period of two years after the termination of employment, they would not directly or indirectly

> "(i) solicit any payor contracts from any payor of [Cunningham Pathology] with whom Employee had

> material contact during Employee's employment with Services LLC, or otherwise interfere with the relationship with any such payor, except to provide services in Employee's capacity as a physician in compliance with Section 20(a) hereof and so long as such solicitation does not, in [Cunningham Pathology's] sole discretion, interfere with the Company's relationship with such payor,
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> "(ii) solicit, induce, influence or otherwise interfere with any referral sources of [Cunningham Pathology] or any Affiliate of [Cunningham Pathology], with whom the Employee has had material contact during Employee's employment with Services LLC,
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> "(iii) solicit, induce or influence for the purposes of providing pathology services, any person or entity, including but not limited to a hospital, ambulatory surgery center, medical group, or physician, that is or has been a customer or client of [Cunningham Pathology] and with whom Employee had material contact during Employee's employment with Services LLC, unless in each case the Employee obtains the prior written consent of [Cunningham Pathology], or
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> "(iv) solicit, induce, influence or interfere with any other person or entity with whom [Cunningham Pathology] has a business relationship to discontinue, modify or reduce the extent of such relationship with [Cunningham Pathology]."

Employment Agreement, Section 20(d).

On September 5, 2018, The Cunningham Group and Cunningham Pathology (hereinafter referred to collectively as "Cunningham") sued the doctors seeking damages and injunctive relief. Cunningham asserted that Cunningham Pathology is an

express third-party beneficiary of the doctors' employment agreements with Services LLC. Cunningham asserted claims of breach of contract and breach of fiduciary duty and sought to enforce the restrictive covenants contained in the employment agreements. Cunningham also filed a motion seeking a preliminary injunction to prohibit the doctors from violating the nonsolicitation provisions of the employment agreements. Cunningham asserted, among other things, that since they terminated their employment with Services LLC the doctors had formed a new pathology business and had been soliciting Brookwood's business in violation of the nonsolicitation provisions of the employment agreements.

On September 5, 2018, the trial court issued a temporary restraining order. On September 14, 2018, the doctors filed a motion to dissolve the temporary restraining order and a response in opposition to Cunningham's request for a preliminary injunction.

Following a hearing on September 17, 2018, the trial court, on October 4, 2018, entered an order granting Cunningham's motion for a preliminary injunction. The trial court specifically stated that it would "not address the

enforceability of the non-compete and non-solicitation clauses" contained in the employment agreements because those "matters concern the ultimate merits of the case." After providing a lengthy factual summary, the trial court found as follows:

> "Conclusions of Law
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> > "... [I]t is well settled that a plaintiff seeking a temporary restraining order or preliminary injunction has the burden of proving all of the following:
> >
> > > "1. That without the injunction the party would suffer irreparable injury;
> > >
> > > "2. That the party has no adequate remedy at law;
> > >
> > > "3. That the party has at least a reasonable chance of success on the ultimate merits of the case; and,
> > >
> > > "4. That the hardship imposed on the party opposing the preliminary injunction would not unreasonably outweigh the benefit accruing to the party seeking the injunction. See, e.g., Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1176 (Ala. 2008).
> >
> > "The standards for granting a preliminary injunction are interchangeable with the standards of granting a temporary restraining order. The Court now turns its attention to applying the aforementioned standards to the facts of the case at bar.
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> "A. Irreparable Harm

"The Court finds that Cunningham will suffer irreparable harm should [the doctors] be unrestrained in [their] solicitation of Cunningham's clients. Irreparable [harm] is defined as an injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction. Black's Law Dictionary (10th ed. 2014). The evidence at the preliminary injunction hearing revealed that [the doctors] have not only formed another pathology company, but have also distributed order forms in the lab at Brookwood hospital. Although the evidence did not show that [the doctors] interacted with any of Cunningham's employees, the solicitation of Brookwood's pathology business alone is enough to show that Cunningham will suffer irreparable harm should that practice continue.

"[The doctors] acknowledged that they would 'have substantial contacts with customers, suppliers, advertisers and patients' of Cunningham and would 'have access to a substantial amount of Proprietary Information.' [Employment Agreement,] § 20(a)(A)-(B). Additionally, [the doctors] agreed that they are 'capable of obtaining gainful, lucrative and desirable employment' that does not violate the restrictions contained within the Employment Agreement. ... § 20(a)(D).

"B. Adequate Remedy at Law

"The Court finds that Cunningham does not have an adequate remedy at law. An adequate remedy at law is defined as a legal remedy (such as an award of damages) that provides sufficient relief to the petitioning party, thus preventing the party from obtaining equitable relief. Black's Law Dictionary (10th ed. 2014). '[A] conclusion that the injury is irreparable necessarily shows that there is no adequate remedy at law.' Water Works & Sewer Bd. of the City of Birmingham v. Inland Lake Investments, LLC, 31 So. 3d 686, 692 (Ala. 2009) (citing and

quoting Fleet Wholesale Supply Co. v. Remington Arms Co., 846 F.2d 1095, 1098 (7th Cir. 1988)).

"Plaintiffs have established they will suffer irreparable harm should [the doctors] be permitted to solicit Brookwood and other customers in violation of their respective non-solicitation agreements, and, absent a preliminary injunction, Plaintiffs have shown that there is no adequate remedy at law.

"C. Likelihood of Success on the Ultimate Merits of the Case

"The third element of a preliminary injunction requires the party seeking the injunction to have a reasonable chance of success on the ultimate merits of the case (Cunningham's Breach of Contract Claim). SouthTrust Bank of Alabama, NA v. Webb-Stiles Co., 931 So. 2d 706, 709 (Ala. 2005); White[v. John, 164 So. 3d [1106] at 1116-17 [(Ala. 2014)]. To satisfy this element, Plaintiffs 'need not show with absolute certainty that they will prevail on the merits,' Bd. of Dental Examiners of Ala. v. Franks, 507 So. 2d 517, 520 (Ala. Civ. App. 1986), but only that there is 'at least a reasonable chance of success.' Lott v. E. Shore Christian Ctr., 908 So. 2d 922, 927 (Ala. 2005) (citations omitted).

"[The doctors] have a valid contract with Cunningham; however, the ultimate decision for this Court is whether said contract is void ab initio or is enforceable. Consequently, the evidence establishes, and the Court finds, that Plaintiffs have a reasonable chance of success to prevail on their claims for breach of the non-solicitation agreements. See Digitel Corp. v. Deltacom, Inc., 953 F. Supp. 1486, 1497 (M.D. Ala. 1996).

"D. Hardship Imposed

"The fourth element of a preliminary injunction requires the hardship imposed upon the defendant by

the injunction would not unreasonably outweigh the benefit to the plaintiffs. White, 164 So. 3d at 1117.

"[The doctors] expressly agreed that they are capable of finding 'gainful, lucrative and desirable employment' that does not violate the restrictions contained within the Employment Agreement. Plaintiffs' Exs. 2 and 18, § 20(a).

"Moreover, the evidence shows that [the doctors] each received significant annual salaries of at least $250,000 over the previous ten years. The hardships of a preliminary injunction will not unreasonably outweigh the benefit accruing to Plaintiffs and the equities weigh in favor of issuing a preliminary injunction.

"It is therefore ORDERED, ADJUDGED, and DECREED as follows:

"1. Upon posting a $25,000 surety bond with the Jefferson County Circuit Court Clerk, by the Plaintiffs, this Preliminary Injunction shall issue against [the doctors], restraining and prohibiting each from directly or indirectly soliciting clients or customers of Cunningham Pathology, LLC, including physicians or physician groups affiliated with clients or customers of Cunningham, in accordance with [the doctors'] Employment Agreements with The Cunningham Group LLC.

"Specifically, [the doctors], individually and through Red Mountain Pathology, LLC, and their officers, agents, servants, employees, or attorneys, are hereby restrained and prohibited from directly or indirectly:

> "(a) Soliciting Brookwood, its parent corporation Tenet Healthcare Corporation, or any physicians or practice groups affiliated or located on the Brookwood campus and associated medical or

> professional office buildings in relation to pathology or cytology services;
>
> "(b) Placing requisition forms at Brookwood Medical Center, associated medical or professional office buildings, or any part thereof;
>
> "(c) Sending correspondence in any form, including faxes, emails, letters, and text messages, to any physician or officer at Brookwood about the potential for providing future pathology or cytology services; and,
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> "(d) Entering into, or attempting to enter into, any contractual agreement with Brookwood for the provision of pathology or cytology.

"2. The Clerk of the Court is hereby ORDERED and DIRECTED to receive that amount alluded to, supra.

3. Additionally, [the doctors] are restrained and prohibited from directly or indirectly, individually and through Red Mountain Pathology, LLC, and their officers, agents, servants, employees, or attorneys, restrained and prohibited from:

> "(e) Soliciting any other client or customer of Cunningham, that client or customer's parent entities, or any physicians or practice groups affiliated or located on any other client or customer's campus and associated medical or professional office buildings in relation to pathology or cytology services with whom [the doctors] had material contact during their employment with Services LLC;
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> "(f) Placing requisition forms at any other client or customer of Cunningham's medical facility, associated medical or

> professional office buildings, or any part thereof with whom [the doctors] had material contact during their employment with Services LLC; and,
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> "(g) Sending correspondence in any form, including faxes, emails, letters, and text messages, to any physician or officer at a client or customer of Cunningham with whom [the doctors] had material contact during their employment with Services LLC about the potential for providing future pathology or cytology services.
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> "4. This Preliminary Injunction shall remain in full force and effect until such time as the Court has made a final decision on the ultimate merits of this case ...."

(Capitalization in original.)

On October 5, 2018, Cunningham deposited a surety bond of $25,000 with the trial-court clerk ("the injunction bond"). The doctors timely filed a notice of appeal to this Court, which appeal was docketed as appeal no. 1180088.

On October 9, 2018, the doctors filed in the trial court an emergency motion to stay the preliminary injunction. The trial court entered an order staying the trial-court proceedings pending resolution of the appeal, but denied the request to stay the preliminary injunction. The doctors then filed a motion to stay enforcement of the preliminary

injunction in this Court; that motion was denied on November 13, 2018.

On December 17, 2018, the doctors moved in the trial court to enlarge the amount of the bond Cunningham had posted as security for the preliminary injunction. The doctors supported their motion with affidavits from the doctors. Dr. DeVos testified that he had previously generated an average of $169,296 per month providing pathology services to Brookwood on behalf of Cunningham, and he attached a report from Cunningham Pathology supporting that assertion. Dr. DeVos testified that he had been unable to generate revenue since September 2018 when the temporary restraining order was entered and that he had lost at least $300,000 in revenue that would have been generated if he were able to practice medicine unrestricted. Dr. Simmons submitted an affidavit echoing the testimony in Dr. DeVos's affidavit, but he testified that he had previously generated an average of $119,175 per month providing pathology services to Brookwood on behalf of Cunningham. Dr. Simmons further testified he had lost at least $240,000 in revenue that would have been generated if he had not been restrained by the injunction. Cunningham responded that the trial court had not lifted its stay and should not

consider the doctors' motion and asserted that the doctors' claims were refuted by their prior contractual agreements and testimony. On February 25, 2019, after a hearing, the trial court entered an order denying the doctors' motion to enlarge the amount of the injunction bond. The doctors timely filed a notice of appeal from that order, which appeal was assigned appeal no. 1180434. The Court consolidated the appeals ex mero motu for the purpose of issuing one opinion.

Discussion

I. Preliminary Injunction

> "A plaintiff seeking a preliminary injunction has the burden of demonstrating
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> > "'(1) that without the injunction the plaintiff would suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to the plaintiff.'
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> "Perley v. Tapscan, Inc., 646 So. 2d 585, 587 (Ala. 1994)."

Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003).

> "'When this Court reviews the grant or denial of a preliminary injunction, "'[w]e review the ... [c]ourt's legal rulings de novo and its ultimate decision to issue the preliminary injunction for [an

> excess] of discretion.'" Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1176 (Ala. 2008) (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006)).'"

Slamen v. Slamen, 254 So. 3d 172, 174 (Ala. 2017).

Pursuant to § 8-1-190(a), Ala. Code 1975, contracts that restrain a person "from exercising a lawful profession, trade, or business of any kind" are void unless the contract is for the purpose of preserving a protectable interest and meets one of the enumerated exceptions in § 8-1-190(b), Ala. Code 1975. The doctors argue that, by virtue of a physician's status as a professional, the nonsolicitation provisions in the employment agreements are void because contracts in restraint of trade against professionals are void. The doctors argue that the enumerated exceptions in § 8-1-190(b) do not apply to professionals. Cunningham argues that the nonsolicitation provisions are only a partial restraint on trade and are not void and unenforceable and, further, that the exception contained in § 8-1-190(b)(5) applies.[1]

[1]Cunningham appears to concede that noncompete agreements against professionals are automatically void. "The take-away from these cases is that partial restraints on physicians are not automatically void under § 8-1-1 or § 8-1-190 like non-compete agreements as Defendants contend." (Cunningham's brief at 30.) The agreements, insofar as they seek to prevent

Initially, the doctors argue that the preliminary injunction should be dissolved based on the trial court's refusal to determine the enforceability of the restrictions in the employment agreements before granting injunctive relief. The doctors assert that that threshold issue determines whether Cunningham had at least a reasonable chance of success on the merits. Cunningham argues that the employment agreements are valid and enforceable contracts and that the trial court was not required to make a decision at the preliminary-injunction stage on what Cunningham asserts is the ultimate issue of the case.

This Court has reversed orders entering a preliminary injunction after determining that the underlying contractual provisions are void and unenforceable. See Chavers v. Copy Prods. Co. of Mobile, 519 So. 2d 942, 945 (Ala. 1988)(reversing an order entering a preliminary injunction

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the doctors from soliciting Brookwood or contracting with Brookwood, "are tantamount to a covenant not to compete and operate in the same manner." Cherry, Bekaert & Holland v. Brown, 582 So. 2d 502, 506 (Ala. 1991). See also Associated Surgeons, P.A. v. Watwood, 295 Ala. 229, 231, 326 So. 2d 721, 723 (1976)("'Any bargain or contract which purports to limit in any way the right of either party to work or to do business ... may be called a bargain or contract in restraint of trade.'"(quoting 14 Williston on Contracts § 1633 (3d ed. 1972))).

after determining the noncompetition provisions in an employment contract were void and unenforceable); and King v. Head Start Family Hair Salons, Inc., 886 So. 2d 769, 772 (Ala. 2004)(reversing an order entering a preliminary injunction after determining a noncompete agreement was unenforceable as written).

The trial court's determination of whether Cunningham had a reasonable chance to prevail on the merits, as an element of demonstrating its entitlement to a preliminary injunction, would necessarily require the trial court to determine whether the contractual provisions are void and unenforceable. In order to have a chance of success on the ultimate merits, Cunningham would have to prove that the nonsolicitation provisions are not void. "The burden is upon the person or entity seeking to enforce a contract which restrains a lawful trade or business to show that it is not void ...." Calhoun v. Brendle, Inc., 502 So. 2d 689, 693 (Ala. 1986). See also § 8-1-194, Ala. Code 1975 ("The party seeking enforcement of the covenant has the burden of proof on every element."). The trial court expressly stated that it would "not address the enforceability of the non-compete and non-solicitation clauses" contained in the employment agreements.

Because the trial court could not have determined whether Cunningham had "'at least a reasonable chance of success on the ultimate merits of [its] case,'" Ormco, 869 So. 2d at 1113 (quoting Perley, 646 So. 2d at 587), without determining whether the restrictive provisions are void, we reverse the order entering the preliminary injunction and remand the cause for the trial court to make that determination. Based on our holding, we pretermit discussion of the doctors' arguments related to the other factors required for the issuance of a preliminary injunction. However, before it makes a determination on the preliminary injunction, the trial court must first, on the basis of Part II, reassess the injunction bond.

II. Injunction Bond

Initially, we note that, during the hearing on the doctors' request to increase the amount of the injunction bond, Cunningham asserted that the proceedings remained stayed and that the trial court lacked jurisdiction to consider the doctors' request. During the hearing, the trial court stated: "Well, I am sure if I -- if I changed my -- well, I don't have any jurisdiction now, but if I changed my mind on my order, they would drop the appeal." To the extent the trial court

denied the doctors' motion to increase the amount of the injunction bond based on a belief that it lacked jurisdiction, we note that the filing of a notice of appeal does not divest the trial court of jurisdiction to amend the terms of a preliminary injunction or an injunction bond. See Chunchula Energy Corp. v. Ciba-Geigy Corp., 503 So. 2d 1211, 1215 (Ala. 1987)(quoting Rule 62(c), Ala. R. Civ. P.). See also Alabama Water Co. v. City of Jasper, 211 Ala. 280, 280, 100 So. 486, 487 (1924)(upholding denial of a motion to increase injunction bond).

The doctors argue that the $25,000 injunction bond is insufficient to cover their prospective harm in the event that it is determined that they were wrongfully enjoined. In reviewing a trial court's decision in setting an injunction bond, we review the terms and the amount of the bond to determine whether the trial court exceeded its discretion in setting the bond. See Water Works & Sewer Bd. of Birmingham v. Anderson, 530 So. 2d 193, 198 (Ala. 1988) ("Historically, we have left it to the trial court's discretion in setting bond and have reversed only upon a 'clear showing of an abuse of discretion in fixing the amount of' the bond. Willowbrook

Country Club, Inc. v. Ferrell, 286 Ala. 281, 239 So. 2d 298 (1970)."). See also Raphael Per L'Arte, Inc. v. Lee, 275 Ala. 307, 310, 154 So. 2d 663, 666 (1963).

Rule 65(c), Ala. R. Civ. P., provides:

> "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained ...."

The purpose of an injunction bond is to protect an enjoined party from harm resulting from the issuance of a wrongful injunction. Ex parte Waterjet Sys., Inc., 758 So. 2d 505, 512 (Ala. 1999)("[A] party is wrongfully enjoined 'when it turns out the party enjoined had the right all along to do what it was enjoined from doing.'" (quoting Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994))). The amount of the damages recoverable on the bond, however, is limited to the amount of the injunction bond. 758 So. 2d at 513.

The doctors argue that they moved for an increase in the amount of the injunction bond because, they say, their losses are mounting and far exceed the $25,000 bond amount. See Ex

parte Waterjet, 758 So. 2d at 513 (recognizing authority from other jurisdictions that a "'party could have moved for an increase in the amount of the bond when he saw that his losses were mounting'" (quoting Jay M. Zitter, Annotation, Recovery of Damages Resulting From Wrongful Issuance of Injunction as Limited to Amount of Bond, 30 A.L.R. 4th 273, 276 (1984))). The doctors submitted affidavits in support of their request to increase the amount of the injunction bond that demonstrated that the doctors had previously jointly generated monthly revenues of approximately $288,471 performing pathology services for Brookwood on behalf of Cunningham. The doctors also testified that, as a result of the preliminary injunction, they had been prevented from providing services to Brookwood. Cunningham presented no evidence in opposition to the doctors' request.

There are few decisions from this Court involving the propriety of the amount of an injunction bond. We have recognized, however, that "[j]udges issuing such [injunctions] should be careful to require an adequate bond." City of Birmingham v. Wilkinson, 239 Ala. 199, 206, 194 So. 548, 554-55 (1940). An Alabama federal district court has also

recognized the necessity of setting an adequate bond and the prospective nature of the damages:

> "It would more likely violate Rule 65(c)[, Fed. R. Civ. P.,] to eliminate the bond entirely (or its equivalent, the setting of a nominal bond) than to require a bond in the millions. The court cannot imagine that any seeker of a preliminary injunction would be able to post a bond, whether in cash or with a corporate surety, of $780,000,000, the astronomical amount intervenor-defendants claim to be their potential loss. And, yet, such a figure arguably is within the contemplation of Rule 65(c), and to set it in that amount would not constitute an abuse of discretion if intervenor-defendants can prove prospective damages in that amount."

Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 297 F.R.D. 633, 635 (N.D. Ala. 2014).

In support of their arguments, the doctors rely primarily on the reasoning from a decision of the United States Court of Appeals for the Seventh Circuit:

> "When setting the amount of security, district courts should err on the high side. If the district judge had set the bond at $50 million, as Abbott requested, this would not have entitled Abbott to that sum; Abbott still would have had to prove its loss, converting the 'soft' numbers to hard ones. An error in setting the bond too high thus is not serious. ... See generally Note, Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c), 99 Harv.L.Rev. 828 (1986). Unfortunately, an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond. W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757,

> 770 n.14, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983); Russell v. Farley, 105 U.S. 433, 437–38, 26 L.Ed. 1060 (1882); Coyne–Delany Co. v. Capital Development Board, 717 F.2d 385, 393–94 (7th Cir. 1983)."

Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883, 888 (7th Cir.), opinion amended on denial of reh'g, 209 F.3d 1032 (7th Cir. 2000). The United States Supreme Court has explained: "It is the practice of all courts, in taking bonds of this description, to prescribe a penalty more than enough to cover all possible damages which the respondent may sustain by reason of the injunction." Brown v. Shannon, 61 U.S. (20 How.) 55, 58, 15 L. Ed. 826 (1857)(emphasis added) (determining that evidence of the amount of an injunction bond is too uncertain to be used to determine the actual value of a claim for purposes of establishing diversity jurisdiction). See also Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1280 (N.D. Iowa 1995)("The court prefers to err on the side of caution, and will order an amount somewhat greater than it actually believes to be necessary.").

Many federal district courts have held much higher bond amounts to be sufficient in similar circumstances.[2] See Marsh

[2]"'Federal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama

USA Inc. v. Schuhriemen, 183 F. Supp. 3d 529 (S.D.N.Y. 2016)(requiring a $100,000 bond to protect an employee who was enjoined from soliciting or servicing clients of former employer); North American Prods. Corp. v. Moore, 196 F. Supp. 2d 1217 (M.D. Fla. 2002)(requiring a $500,000 injunction bond to compensate a sales representative who had resigned to run a competing business in the event it was later determined that the preliminary injunction should not have been entered); Curtis 1000, Inc. v. Youngblade, supra (concluding that a $200,000 injunction bond would be adequate where salesperson was temporarily enjoined from violating a covenant not to compete because there was "some financial risk" to the salesperson who had had a salary of $250,000 through his previous employment).

Cunningham argues, as it did in the trial court, that the doctors' evidence is too speculative. But, by its very nature, an injunction bond is speculative.

Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure.' Hilb, Rogal & Hamilton Co. v. Beiersdoerfer, 989 So. 2d 1045, 1056 n. 3 (Ala. 2007)." Sycamore Mgmt. Grp., Inc. v. Coosa Cable Co., 81 So. 3d 1224, 1235 (Ala. 2011).

> "'Necessarily, if a restraining order is granted at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate in light of the circumstances of the case and the fact that the duration of the restraining order is limited in time; even at the preliminary injunction stage the amount remains an estimate ....'"

ABA Distribs., Inc. v. Adolph Coors Co., 505 F. Supp. 831, 837 (W.D. Mo. 1981)(quoting ¶¶ 65-09 of Moore's Federal Practice, pp. 65-94 and 65-95). See also Rathmann Grp. v. Tanenbaum, 889 F.2d 787 (8th Cir. 1989)(finding a $10,000 temporary-restraining-order bond inadequate to serve as a preliminary-injunction bond for an enjoined defendant who presented evidence that he "may lose gross income of $13,000 per month as a result of the injunction"(emphasis added)).

Cunningham argues that the doctors were capable of obtaining employment and that the preliminary injunction did not prohibit the doctors from practicing in north and central Alabama. We note that whether the doctors are currently able to obtain other employment is not a relevant factor for determining the proper amount of the injunction bond. The purpose of an injunction bond is to compensate a wrongfully enjoined party for damages and attorney fees sustained as a result the imposed restriction, which, in this case, prohibits

the doctors from soliciting or providing pathology services to Brookwood. It is important to remember that the doctors would still be required to prove their actual damages should it later be determined that they were wrongfully enjoined. At that point, the trial court could consider mitigating factors (e.g., whether the doctors could have procured some other employment), but at this stage the trial court should be concerned only with setting an injunction bond amount that would adequately cover the doctors' prospective costs, damages, and attorney fees if it is later determined that the doctors were wrongfully enjoined.

Based on the evidence presented to the trial court, a $25,000 injunction bond is simply inadequate to compensate two physicians for damages and attorney fees in the event it is determined that they were wrongfully enjoined from soliciting and continuing to serve Brookwood through their new pathology business.

Conclusion

The trial court's order denying the doctors' request to increase the amount of the injunction bond is reversed, and the cause is remanded for the trial court to increase the

injunction-bond amount in light of the principles discussed in this opinion. After setting a sufficient injunction-bond amount, the trial court is instructed to determine whether the agreements are void and, if not, whether there is a reasonable likelihood that Cunningham will prevail on the merits to warrant the continuation of injunctive relief. If the trial court does not make that determination within 30 days from the date of this opinion, the injunction shall automatically be dissolved.

1180088 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Parker, C.J., concurs in the result.

1180434 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

Bolin and Mitchell, JJ., concur in the result.