NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SURGERY CENTER HOLDINGS, INC., TAMPA PAIN RELIEF CENTER, INC., and ARMENIA AMBULATORY SURGERY CENTER, LLC, Appellants, v. ROBERT GUIRGUIS, D.O., JOHN KEVYN OTERO, M.D., HECTOR CASES, M.D., RODOLFO GARI, JR., M.D., CHARLES K. FRIEDMAN, D.O., P.A., PHYSICIAN PARTNERS OF AMERICA, LLC, and MAN QUANG LE, M.D., Appellees.	)	Case No. 2D19-4889

Opinion filed December 11, 2020.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Steven Scott Stephens, Judge.

Alan Rosenthal, Natalie J. Carlos, and Charles W. Throckmorton of Carlton Fields, P.A., Miami, for Appellants.

John A. Schifino, William J. Schifino, and Justin P. Bennett of Gunster Law Firm, Tampa; and Robert V. Williams and J. Travis Godwin of Burr & Forman LLP, Tampa, for Appellees Robert Guirguis, D.O., John Kevyn, Otero M.D., and

Hector Cases, M.D.

Charles A. Carlson of Barnett, Bolt, Kirkwood, Long, Koche, & Foster, P.A., Tampa, for Appellees, Rodolfo Gari, Jr., M.D., Charles K. Friedman, D.O., P.A., and Physician Partners of America, LLC.

Philip L. Schwartz and Jordan Grimaldi of Schwartz|White, Boca Raton, for Appellee Man Quang Le, M.D.

MORRIS, Judge.

Surgery Center Holdings, Inc. (SCHI); Tampa Pain Relief Center, Inc. (TPRC); and Armenia Ambulatory Surgery Center, LLC (AASC) (collectively referred to as appellants), appeal an order denying their motion for a temporary injunction filed in their action for breach of employment agreements against Robert Guirguis, D.O.; John Otero, M.D.; Hector Cases, M.D.; Man Le, M.D. (collectively referred to as the doctors); Rodolfo Gari, Jr., M.D.; Charles Friedman, D.O., P.A.; and Physician Partners of America, LLC (collectively referred to as the Gari Entities). We reverse the order in part because the trial court erred in concluding that two of the restrictive covenants in the agreements at issue had not been violated.

I. Background

SCHI operates TPRC, a pain relief center, and AASC, a surgery center. Drs. Guirguis, Otero, Cases, and Le were previously employed by TPRC, and Drs. Guirguis, Otero, and Cases had financial interests in AASC. The doctors had agreements with appellants that contained various restrictive covenants. In late 2018 and early 2019, the doctors left their employment with appellants and began working

with the Gari Entities, competitors of TPRC and AASC.[1] Alleging that the doctors violated various restrictive covenants of the two agreements, appellants filed a complaint for breach of contract and a motion for temporary injunction. After a two-day hearing, the trial court denied appellants' motion for temporary injunction.

II. Analysis

This court "employ[s] a hybrid standard of review for orders on temporary injunctions: 'To the extent the trial court's order is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review.' " REV Recreation Grp., Inc. v. LDRV Holdings Corp., 259 So. 3d 232, 235 (Fla. 2d DCA 2018) (quoting Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1258 (Fla. 2017)).

> Where the trial court's temporary injunction concerns matters within the trial court's discretion, "[a]n appellant who challenges the trial court's order [on a motion for temporary injunction] has a heavy burden; the trial court's ruling is presumed to be correct and can only be reversed where it is clear the court abused its discretion."

Id. (first alteration in original) (quoting Atomic Tattoos, LLC v. Morgan, 45 So. 3d 63, 64 (Fla. 2d DCA 2010)).

A temporary injunction should only issue when "the moving party has demonstrated (1) irreparable harm to the moving party unless the injunction issues, (2) unavailability of an adequate legal remedy, (3) a substantial likelihood of success on the

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[1]The Gari Entities are controlled by Dr. Rodolpho Gari, Jr., who previously held a controlling interest in both TPRC and AASC. Dr. Gari sold his interests to SCHI, and lengthy and complex litigation resulted from that transaction. See, e.g., SP Healthcare Holdings, LLC v. Surgery Ctr. Holdings, LLC, 208 So. 3d 775 (Fla. 2d DCA 2016); SP Healthcare Holdings, LLC v. Surgery Ctr. Holdings, LLC, 110 So. 3d 87 (Fla. 2d DCA 2013).

merits, and (4) that the public interest is supported by the entry of the injunction." Atomic Tattoos, LLC, 45 So. 3d at 64-65 (citing Masters Freight, Inc. v. Servco, Inc., 915 So. 2d 666, 666 (Fla. 2d DCA 2005)).

"[E]nforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited." § 542.335(1), Fla. Stat. (2019). In an action seeking enforcement of a restrictive covenant, "[t]he person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant." § 542.335(1)(b).

> The term "legitimate business interest" includes, but is not limited to:
> 1. Trade secrets, as defined in s. 688.002(4).
> 2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
> 3. Substantial relationships with specific prospective or existing customers, patients, or clients.
> 4. Customer, patient, or client goodwill associated with:
> a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
> b. A specific geographic location; or
> c. A specific marketing or trade area.
> 5. Extraordinary or specialized training.
> Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

§ 542.335(1)(b). "The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant." § 542.335(1)(j). However, that presumption is rebuttable. See Variable Annuity Life Ins. Co. v. Hausinger, 927 So. 2d 243, 245 (Fla. 2d DCA 2006).

A. Violations of the restrictive covenants

On appeal, appellants have not met their burden of demonstrating that the trial court erred in regard to the restrictive covenants in the noncompete provisions in the TPRC agreement, and we do not address that issue further. However, the appellants have shown that the trial court erred in regard to one of the restrictive covenants in the nonsolicitation provisions of the TPRC agreement and one of the restrictive covenants in the noncompete provision of the AASC agreement.

Three of the doctors (Drs. Guirguis, Cases, and Otero) entered into an agreement with TPRC that contains a nonsolicitation provision preventing them from providing services to their former TPRC patients without TPRC's written consent.[2] The provision at issue, titled "Prohibition Against Solicitation," states that during a twenty-four-month restricted period, the doctors "shall not provide services to any person who is a patient of the Employer or who was a patient of the Employer during the" restricted period, unless written consent is obtained by the Employer and such services are provided outside of the fifteen-mile radius. This language is clear and unambiguous.

At the hearing, appellants' expert testified that after the doctors left their employment with TPRC, the doctors treated 644 of TPRC's former patients and that those patients receive multiple treatments a year. The evidence showed that if those patients visit twelve times a year, that amounts to 8000 patient visits that TPRC lost.

In its order, the trial court did not explicitly address whether the doctors' treatment of their former TPRC patients violated the agreements. On page seven of its

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[2]Dr. Le also entered into an agreement with TPRC, but appellants do not claim that Dr. Le violated his agreement with TPRC in this regard.

order, the trial court seems to have acknowledged that the doctors are treating their old TPRC patients, by finding that

> [s]ome of the patients may have chosen to follow a doctor over a greater distance, but to some extent that is built into the radius. In some cases the doctor's new location may be closer to the patient. And in any event the doctor is allowed under the agreement to compete as long as the services are provided fifteen miles from plaintiff's installations.

But the trial court did not acknowledge the language of the provision prohibiting the doctors from providing services to former TPRC patients during the twenty-four-month restricted period without the written consent of TPRC. In light of the clear language of the agreement and the evidence presented by appellants that the doctors are treating former TPRC patients, the trial court erred in failing to conclude that Drs. Guirguis, Cases, and Otero violated this particular provision.

Appellants further argue that the trial court misapprehended the AASC noncompete agreement signed by Drs. Guirguis, Cases, and Otero, which states that the doctors may not

> directly, or indirectly, . . . (a) act as a director, officer, manager, employee, member or partner of, or have any equity or other financial interest in, any Person that owns and/or operates an ambulatory surgery center, hospital, licensed surgical facility or other outpatient surgical facility that is located within a twenty-five (25) mile radius of the Center . . . .

This prohibition remains effective for two years. The AASC agreement defines "[p]erson" as "any individual, sole proprietorship, corporation, partnership, limited liability company, association, trust, any unincorporated organization or other entity."

Regarding this agreement, the trial court found as follows:

> There is a separate agreement pertaining to ambulatory or outpatient surgery centers which merits only brief mention. The agreement pertaining to that facility provides that its signatories will not go into operation of a competing business within a 25[-]mile radius. There is no credible evidence that the doctors have taken on an owner or operator role in a competing business facility within the radius, although there is evidence that some sporadic medical treatments or procedures may have been performed there.

Appellants claim that the language of the provision prevents the doctors from working for or managing two ambulatory centers within the twenty-five-mile radius. Appellants point to a list of procedures that Drs. Guirguis and Otero performed at the West Park ASC, which is within the twenty-five-mile radius. This list was presented to the trial court. Also, at the hearing, appellants introduced parts of the depositions of Drs. Guirguis and Otero in which both doctors testified that they "worked" at West Park ASC once a week and that they see at least fifteen patients per day that they work. Appellants also presented evidence that Dr. Guirguis is on West Park ASC's Medical Executive Committee.

Thus, appellants presented evidence that Drs. Guirguis and Otero were "employed" by an entity that operates an ambulatory center within the twenty-five-mile radius and that Dr. Guirguis was an "officer" of an entity that operates an ambulatory center within the twenty-five-mile radius. The trial court erred in interpreting the language of the covenant to only prevent the doctors from having an "owner or operator role in a competing business facility." In doing so, the trial court failed to consider the clear and unambiguous language preventing the doctors from acting as a "director, officer, manager, employee, member or partner of" an entity that owns or operates an ambulatory center within twenty-five miles. When the terms of a noncompete

agreement are clear and unambiguous, the contracting parties are bound by its terms. Morgan v. Herff Jones, Inc., 883 So. 2d 309, 313 (Fla. 2d DCA 2004) (citing Emergency Assocs. of Tampa, P.A. v. Sassano, 664 So. 2d 1000 (Fla. 2d DCA 1995)). The evidence showed that Drs. Guirguis and Otero violated the terms of the AASC agreement.

B. Irreparable injury

As noted above, a showing of irreparable injury is required for a temporary injunction to issue. Atomic Tattoos, LLC, 45 So. 3d at 64. And "[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant." § 542.335(1)(j). Thus, "a party seeking to enforce a restrictive covenant by injunction need not directly prove that the defendant's specific activities will cause irreparable injury if not enjoined." Am. II Elecs., Inc. v. Smith, 830 So. 2d 906, 908 (Fla. 2d DCA 2002). A party only needs to prove a violation of an enforceable restrictive covenant to be entitled to the presumption. Id.

The trial court recognized the presumption of irreparable injury but found that "there is no indication that any such injury that may have occurred is ongoing or threatened in the future." However, this finding was based on the trial court's earlier erroneous finding that the "doctors in this case . . . are practicing only in the area where the contract specifically authorized them to practice." As explained above, the evidence showed that three doctors are treating former patients in violation of the prohibition against solicitation in the TPRC agreements and that two doctors are acting in violation of the AASC agreements. Thus, appellants are entitled to a rebuttable presumption of irreparable injury, and the burden is shifted to the doctors to establish its absence. See

Medco Data, LLC v. Bailey, 152 So. 3d 105, 107 (Fla. 2d DCA 2014) ("[B]ecause Medco Data was entitled to a presumption of irreparable injury based on the findings the court had already made, the court was required to apply the presumption pursuant to subsection (1)(j), shifting the burden to the defendants to establish its absence.").

C. Legitimate Business Interest

In an action seeking enforcement of a restrictive covenant, "[t]he person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant." § 542.335(1)(b). "A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction." § 542.335(1)(c). In its order, the trial court found that appellants had not proven a legitimate business interest as required by section 542.335. But the trial court's conclusion appears to be based on its findings that the doctors did not violate the restrictive covenants because the doctors did not compete within the radius of the TPRC agreement and the doctors did not violate the language of the AASC agreement. As discussed above, the trial court failed to consider whether the doctors violated the nonsolicitation provision of the TPRC agreement by treating former patients and the trial court erred in concluding that the doctors did not violate the AASC agreement. Thus, the trial court failed to specifically consider whether those two restrictive covenants were "reasonably necessary to protect the legitimate business interest or interests justifying the restriction." § 542.335(1)(c). Even where a trial court finds that "a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to

protect the legitimate business interest or interests, [the] court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests." Id.

In light of our determination that appellants proved two specific violations of the agreements and in light of the requirements of section 542.335(1)(c), on remand, the trial court shall reconsider this issue.[3] The legitimate business interests invoked in this case include "[s]ubstantial relationships with specific prospective or existing customers, patients, or clients" and "[c]ustomer, patient, or client goodwill associated with . . . [a] specific geographic location." § 542.335(1)(b)(3), (1)(b)(4)(b). A corporate representative for both TPRC and AASC testified that they both operate a patient-centric business that focuses on a strong patient experience. They invest in physicians, geographies, and markets to best serve their patient population. They implement measures to promote patient goodwill and satisfaction. They strive for continuity of care, where "a patient see[s] the same provider for months or years at a time." Pain management involves "longitudinal patients," those who see their doctors regularly,

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[3]Section 542.335(1)(c) provides in full:

> A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

"potentially every single month." Appellants' expert also testified that eighty-four to eighty-seven percent of TPRC's patients live within the fifteen-mile radius. Appellants also presented evidence that TPRC lost 644 of its patients after the doctors left their employment and that the patients typically visit the doctors twelve times per year. Thus, appellants established patient goodwill within a specific geographic location and substantial relationships with existing patients, proving legitimate business interests that are reasonably related to the restrictive covenants.

D. Other requirements for an injunction

Because the trial court concluded that the doctors had not violated the agreements and that there was no irreparable injury, the trial court did not address the other requirements for granting an injunction. On remand, the trial court shall consider the likelihood of appellants succeeding on the merits in light of our conclusion that the doctors violated the agreements by treating TPRC's former patients and by working at surgical centers within a twenty-five-mile radius.

And because appellants are entitled to a rebuttable presumption of irreparable injury, appellants should be entitled to a rebuttable presumption that there is no adequate legal remedy available.

> The question of whether the injury is "irreparable" turns on whether there is an adequate legal remedy available. *Irreparable* injury means, in essence, that injunction is the only practical mode of enforcement. A negative covenant, where one party promises that he will *not* do certain things, is an apt example. The supreme court observed in Miller Mechanical[, Inc. v. Ruth, 300 So. 2d 11 (Fla. 1974),] that certain types of contractual covenants, like covenants not to compete, by their nature lend themselves principally to enforcement by injunction because of the difficulty of arriving at a dollar figure for the actual damage done as the result of the breach.

Corp. Mgmt. Advisors, Inc. v. Boghos, 756 So. 2d 246, 247-48 (Fla. 5th DCA 2000) (citations omitted) (quoting Jewett Orthopaedic Clinic, P.A. v. White, 629 So. 2d 922, 927 (Fla. 5th DCA 1993)); see also Weinstein v. Aisenberg, 758 So. 2d 705, 708 (Fla. 4th DCA 2000) (Gross, J., concurring specially) ("Florida cases often discuss irreparable harm and the inadequacy of a remedy at law as if they were distinct concepts. However, Florida's application of the irreparable injury rule is consistent with Professor Laycock's observation that '[t]he irreparable injury rule has two formulations. Equity will act only to prevent irreparable injury, and equity will act only if there is no adequate legal remedy. The two formulations are equivalent; what makes an injury irreparable is that no other remedy can repair it. Attempts to distinguish the two formulations have produced no common usage.' " (quoting Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687, 694 (1990))).

And as for the public's interest, section 542.335(1)(i) provides as follows:

> No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

Thus, an injunction cannot be denied on this basis unless the trial court specifically articulates the public policy and how the public policy outweighs the need for the injunction. See TransUnion Risk & Alt. Data Sols., Inc. v. Reilly, 181 So. 3d 548, 551 (Fla. 4th DCA 2015) (holding that trial court's finding that movant "failed to establish that

a temporary injunction will serve the public interest" was inadequate where statute requires trial court to "specifically articulate an overriding public policy reason").

On remand, the trial court shall consider these requirements for an injunction that it did not reach before.

III. Conclusion

In sum, we reverse the order denying appellants' motion for a temporary injunction as it relates to the two violations of restrictive covenants discussed above and remand for further proceedings in compliance with section 542.335 and this opinion. See Medco Data, LLC, 152 So. 3d at 107 (reversing and remanding for reconsideration where there were violations of covenant but trial court failed to apply presumption of irreparable injury under section 542.335(1)(j)); Anarkali Boutique, Inc. v. Ortiz, 104 So. 3d 1202, 1206 (Fla. 4th DCA 2012) (holding that trial court misconstrued agreement and reversing and remanding for trial court to consider whether appellant met burden for temporary injunction, leaving it to the court's discretion to decide whether a further hearing is required).

Affirmed in part; reversed in part; remanded.

LaROSE and ATKINSON, JJ., Concur.