

RENDERED: December 6, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 95-CA-002155-MR

GILBERT, BARBEE, MOORE
& McILVOY, P.S.C., d/b/a
GRAVES-GILBERT CLINIC

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 93-CI-00049

ROBERT P. LANDSBERG, M.D.

APPELLEE

OPINION
REVERSING and REMANDING

* * * * *

BEFORE: COMBS, EMBERTON and KNOPF, Judges.

EMBERTON, JUDGE. Graves-Gilbert Clinic appeals from a summary judgment dismissing its damage claim which arose from Robert Landsberg's breach of non-competition clause of an employment contract. We reverse and remand.

Graves-Gilbert Clinic is a large multi-specialty medical clinic in Bowling Green, Kentucky. In May of 1984, Dr. Landsberg, an orthopedic surgeon, signed an employment contract

with Graves-Gilbert. In December 1985, a second employment contract was executed when he became a shareholder in Graves-Gilbert. Both contracts contain a restrictive covenant providing:

In the event of the termination of employment of Employee, either voluntarily or as otherwise provided, or in the event of the dissolution of this corporation, the Employee shall neither form another partnership or professional service corporation or be associated in the practice of medicine with any other member of this firm, nor shall he practice medicine individually in Warren County, Kentucky, for a period of three years from the date of termination of his employment with the Employer or from the dissolution of same. This restriction may be enforced by injunctive relief from a court of competent jurisdiction. And it is further the understanding and intent of this agreement that said Employee will be liable to the Employer for damages arising out of the breach of this contract relative to his practicing of his profession within Warren County, Kentucky, during the three-year period of time. This restriction may be waived by a vote of 51% of the voting power of the shareholders of the Employer and said notification of waiver must be in writing.

In June 1992, Dr. Landsberg gave the contractually required six-month notice that he was leaving the Clinic's employ. He ceased work on December 31, 1992, and on January 4, 1993, opened an office for the practice of medicine in Bowling Green.

The Clinic initiated this action on January 15, 1993, seeking, among other relief, a permanent injunction prohibiting Dr. Landsberg from practicing medicine in Warren County for a period of three years following the termination of his employment

with the Clinic. Following discovery, the trial court entered an injunction prohibiting Dr. Landsberg from the practice of medicine in Warren County until January 1, 1996. Dr. Landsberg appealed from the injunction and this Court affirmed.

The trial court was left to resolve the question of damages, if any, that were sustained by the Clinic as a result of Dr. Landsberg's breach of the employment contract and his practice of medicine for a ten-month period in 1993 in Warren County.

On July 5, 1995, Dr. Landsberg filed a motion for summary judgment alleging that Ky. Rev. Stat. (KRS) 311.285, effective July 15, 1994, precluded the enforcement of the restrictive covenant, and further, that the Clinic waived its right to enforce the restrictive covenant by allowing the orthopedic department to become dormant following Dr. Landsberg's departure. Following a hearing on July 17, 1995, Dr. Landsberg tendered an order granting summary judgment in his favor. The order, which was ultimately signed by the trial court, states that the injunction is not enforceable because it violates public policy as announced by the legislature in KRS 311.285 and that the damages claimed by the Clinic are speculative. Upon its receipt of a copy of the tendered order, the Clinic promptly filed a response which included an affidavit of the Assistant Administrator of the Clinic setting forth the methodology intended to be utilized to prove damages.

KRS 311.285, upon which the trial court relied, has now been repealed.¹ The statute's life was short, effective only from July 1994, through January 1996, and the public policy expressed in that statute concerning non-compete clauses in employment contracts between health care providers appears no longer viable in this Commonwealth. Additionally, the statute was not in effect when the parties reached their agreement, nor when the permanent injunction was issued. Nothing in KRS 311.285 expressed a legislative intent for it to be retroactive. KRS 446.080. At oral argument, apparently recognizing the futility, Dr. Landsberg waived any argument as to the applicability of the statute.

In his motion for summary judgment Dr. Landsberg argued that the Clinic waived its claim for damages by its temporary closing of the orthopedic department following his departure. On appeal there is no such contention, presumably because this Court previously rejected the same argument. And, we decline to consider it again.

Whether the Clinic's damages are so speculative that summary judgment is appropriate, is the issue upon which the parties have primarily focused. The ability of the Clinic to prove damages as a result of Dr. Landsberg's breach of the contract is clearly a question of fact. On a motion for summary

¹ KRS 311.285 was repealed by Senate Bill 343 during the 1996 Legislative Session.

judgment it is incumbent upon the trial court to determine only if there is an issue to resolve, not to decide any question of fact. Williams v. City of Hillview, Ky., 831 S.W.2d 181 (1992). The party moving for summary judgment has the burden to prove that it would be impossible for the non-moving party to prevail at trial. Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991).

Dr. Landsberg's motion for summary judgment did not mention the ability of the Clinic to prove damages nor did Dr. Landsberg present any proof, by affidavit or otherwise, which demonstrated that the Clinic cannot prove its damages at trial. His motion argued waiver and the applicability of KRS 311.285, and the Clinic's response addressed only those issues. Indeed, the Clinic was not aware there was a factual dispute regarding proof of damages until it received the tendered order. It then filed Mr. Heckman's affidavit which calculated the amount of damages claimed for the period Dr. Landsberg practiced in violation of the agreement.

The trial court found that because the Clinic shut down its orthopedic department for a period following Dr. Landsberg's departure and for the remaining nine months contracted with Bowling Green Orthopedics for temporary coverage of Clinic patients, "[i]t would be too speculative to allow proof tending to hold defendant Landsberg liable for all costs and damages during that time period, since it was not Dr. Landsberg's fault

that the clinic incurred unusual costs in connection with its arrangement with Bowling Green Orthopedics." It is apparent that in reaching such a conclusion, the trial court resolved an issue of fact -- to wit -- whether the Clinic suffered damages as a result of Dr. Landsberg's violation of the agreement. Summary judgment was improperly entered. Steelvest, supra.

This case is reversed and remanded to the Warren Circuit Court for a trial on the issue of damages.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Jerry A. Burns
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

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