STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0241

Mobile Diagnostic Imaging, Inc.,
Appellant,

vs.

Racheal L. Hooten f/k/a Racheal L. Jones, et al.,
Respondents.

Filed November 6, 2017
Affirmed in part, reversed in part, and remanded
Stauber, Judge[*]

Hennepin County District Court
File No. 27-CV-14-7349

William R. Skolnick, Andrew H. Bardwell, Skolnick & Joyce, P.A., Minneapolis, Minnesota (for appellant)

Rachel K. Nelson, Law Offices of Rachel K. Nelson, PLLC, New Brighton, MN (for respondents)

Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Stauber, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On remand, the Minnesota Supreme Court directs this court to consider the extent to which *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017) (*Leiendecker II*), applies to appellant's claims that were dismissed by the district court based on Minn. Stat. § 554.02 (2016) (the anti-SLAPP statute). We conclude that *Leiendecker II* applies to both tort and non-tort legal claims that have a constitutional jury-trial right. We affirm in part, reverse in part and remand to the district court for further proceedings.

FACTS

The facts underlying this matter are more fully set out in our earlier opinion, *Mobile Diagnostic Imaging, Inc. v. Hooten*, 889 N.W.2d 27 (Minn. App. 2016). To briefly summarize, appellant Mobile Diagnostic Imaging, Inc. (MDI), a business not associated with any particular medical practitioner or clinic, offered diagnostic magnetic resonance imaging (MRIs) to chiropractic patients. Respondent Wayne Dahl, who owned a similar business, respondent Stand-Up MidAmerica MRI, P.A. (SUMA), reported MDI to the Minnesota Board of Chiropractic Examiners (board) and to various insurance companies, alleging that MDI offered kickbacks and encouraged chiropractors to violate professional rules. These allegations were based on materials that respondent Rachel Hooten allegedly took from MDI when she left MDI's employment and began working for SUMA.

The board disciplined 11 chiropractors after respondent Dahl anonymously reported professional misconduct involving MDI employees. The insurance companies filed a

federal lawsuit against MDI that was dismissed by the federal district court for failure to state a claim. MDI went out of business, then sued respondents, alleging nine causes of action, comprised of equitable claims and legal claims that included tort and non-tort causes of action. Respondents moved for dismissal under the anti-SLAPP statute, and alleged immunity under Minn. Stat. § 148.103, subd. 1 (2016) (granting immunity from civil liability or criminal prosecution for making a report of chiropractor misconduct to the board).

The district court dismissed appellant's claims against respondents based on the anti-SLAPP statute and Minn. Stat. § 148.103, subd. 1, and also dismissed respondents' claims arising out of Minn. Stat. § 325F.69 (2016) (the consumer fraud act). Both sides appealed to this court. We affirmed the district court's decision granting respondents immunity for reports made to the chiropractic board and dismissing respondents' claims under the consumer fraud act, but we reversed the anti-SLAPP decision, concluding that the statute was unconstitutional as applied to claims that historically enjoyed a jury-trial right, and remanded for further proceedings. *Mobile Diagnostic*, 889 N.W.2d at 28.

Respondents petitioned for further review, arguing that (1) our decision that the anti-SLAPP statute was unconstitutional was erroneous; (2) appellant did not have standing to raise the constitutional issue; (3) the constitutional infirmities of the anti-SLAPP statute could be remedied without invalidating the entire statute; and (4) this court wrongly decided that respondents had no remedy under the consumer fraud act. The supreme court granted review and stayed all proceedings pending its decision in *Leiendecker II*. *Mobile Diagnostic Imaging, Inc. v. Hooten*, A16-0241 (Minn. Mar. 14, 2017) (mem.).

The supreme court concluded in *Leiendecker II* that the anti-SLAPP statute is unconstitutional as applied to tort claims that have a constitutional jury-trial right, and that the unconstitutional clauses of the statute are not severable. In a subsequent order in this appeal, the supreme court denied review on respondents' second, third, and fourth issues, accepted review of the first issue addressing the constitutionality of the anti-SLAPP statute, vacated our decision, and remanded the matter to us "for further proceedings consistent with *Leiendecker II*, to consider the extent to which *Leiendecker II* applies to claims asserted by [appellant] that are not barred by Minn. Stat. § 148.103 (2016) and that are non-tort claims for which a jury-trial right would otherwise exist." *Mobile Diagnostic Imaging, Inc. v. Hooten*, A16-0241 (Minn. Aug. 8, 2017) (mem.).

D E C I S I O N

In *Leiendecker II*, the supreme court held that the anti-SLAPP statute unconstitutionally deprives the nonmoving party to an anti-SLAPP motion of the right to a jury trial by requiring the district court to grant the anti-SLAPP motion before trial unless the nonmoving party is able to produce clear and convincing evidence that the moving party is not immune from liability. *Leiendecker II*, 895 N.W.2d at 635. This places the burdens of proof, production, and persuasion on the nonmoving party, and has the effect of usurping the role of the jury, which is to decide disputed facts. *Id.* The supreme court further concluded that the unconstitutional provisions are not severable from the remainder of the statute. *Id.* at 638. Only tort claims were raised in the *Leiendecker* action and, therefore, the supreme court's holding is limited to actions at law alleging torts. *Id.* at 637-38.

The supreme court's reasoning is based primarily on Minn. Const. art. I, § 4, which states that the "right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." *Id.* at 634. The supreme court reasoned that the tort alleged in *Leiendecker*, malicious prosecution, is one that historically is tried to a jury. *Id.* By requiring the district court to make a pretrial determination of disputed facts, the anti-SLAPP statute usurps the role of the jury. *Id*. at 635. Further, the nonmoving party is required to produce clear and convincing facts to go forward with the claim, which is a higher standard of proof than the preponderance-of-evidence standard that would apply in civil trials. *Id.* at 636.

In this case, MDI alleged nine causes of action against respondents. MDI acknowledges that two of its claims–unjust enrichment and breach of duties–are equitable in nature. Generally, because there was no right to a jury trial in equity when the Minnesota Constitution was adopted, a plaintiff is not entitled to a jury trial on matters raising solely equitable claims. *See Abraham v. County of Hennepin*, 639 N.W.2d 342, 349 (Minn. 2002) (concluding that the constitution provides a jury trial right for any "action at law," which includes not only actions identified in 1857 but also actions that are by their nature one of law). MDI also acknowledges that two of its claims–unfair competition and civil conspiracy–are derivative in nature because they depend on proving underlying claims. But MDI's claims of misappropriation of trade secrets, tortious interference with contract, conversion, and civil theft are all tort claims. *Leiendecker II* applies to these claims. 895 N.W.2d at 638.

MDI's complaint includes a non-tort, non-equitable claim that Hooten breached her employment contract. MDI alleges that Hooten signed confidentiality and noncompete agreements as part of her employment contract, and violated those agreements by entering into employment with SUMA and Dahl, and by disclosing confidential proprietary information and trade secrets to SUMA and Dahl. The contract Hooten signed gave MDI the right to injunctive relief and specific performance, as well as damages, costs, and attorney fees. Although MDI asked for injunctive relief for the breach of contract, it also requested damages resulting from the breach. Noncompete and confidentiality agreements are contracts. *See Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 899 N.W.2d 844, 852 (Minn. App. 2017). Actions that sound in contract and are for money damages are actions at law that give rise to a jury-trial right. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 54-55 (Minn. 2012).

The supreme court's *Leiendecker II* decision is based squarely on the constitutional right to a jury trial under Minn. Const. art. 1, § 4. The decision does not rely on any special quality inherent in tort actions as compared to other types of actions. The breach-of-contract claim is the type of claim for which the right to jury trial is guaranteed, and nothing in *Leiendecker II* suggests that the supreme court's reasoning should be limited to tort actions; rather, the reasoning applies to any claim at law that traditionally enjoys a jury-trial right.

Respondents raise three arguments on remand. First, respondents argue that "[a]ll conduct arising from the reports to the Board of Chiropractic Examiners is absolutely immunized from suit." The supreme court's remand order directs this court to consider all

claims "not barred by Minn. Stat. § 148.103 (2016)." Respondents' argument is correct to the extent that it addresses conduct that is subject to immunity under section 148.103. But the breach-of-contract claim is not barred by section 148.103, because it involves conduct that is not associated with reports to the board.

Second, respondents argue that "MDI has no cause of action arising out of reports to insurance company attorneys." Respondents assert that, by the time the insurance companies filed the federal lawsuit in October 2013, MDI had failed to meet state licensing requirements mandating that all MRI centers be accredited, and, therefore, the publicity from the federal lawsuit could not have harmed MDI. Respondents describe this as "undisputed evidence that, as a matter of law, MDI suffered no damages" from the disclosure to the insurance companies. But MDI has not had the opportunity to fully develop its claim of damages resulting from disclosure to the insurance companies, which occurred before the federal lawsuit was filed.

Third, respondents argue that the *Leiendecker II* decision held that the anti-SLAPP statute was unconstitutional as applied to Leiendeckers' malicious-prosecution claim, but that the decision did not determine if the statute was facially unconstitutional. Respondents rely on language in the opinion that the issue before the supreme court was "the constitutionality of Minn. Stat. § 554.02 as applied to Leiendeckers' malicious prosecution claim," and its decision that "clauses 2 and 3 of section 554.02, subdivision 2, are constitutional as applied to claims at law alleging torts." 895 N.W.2d at 633, 637-38.

A party may challenge the constitutionality of a statute by asserting that it is either "facially unconstitutional," *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn.

2013) ("[I]n a facial challenge to constitutionality, the challenger bears the heavy burden of proving that the legislation is unconstitutional in all its applications"), or "unconstitutional as applied to a given set of facts," *Medill v. State*, 477 N.W.2d 703, 708 (Minn. 1991) ("A statute may be constitutional and valid as applied to one set of facts and invalid in its application to another."). In a facial challenge, "once a constitutional application is identified, it is inappropriate to speculate regarding other hypothetical circumstances that might arise." *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 694 (Minn. 2009). That is, if a statute can have a constitutional application, it is not facially unconstitutional.

As noted, the *Leiendecker II* decision is based on Minn. Const. art. 1, § 4, which requires a trial by jury in "all cases at law without regard to the amount in controversy." The supreme court stated that "[t]he jury-trial right exists for any type of action for which a jury trial was provided when the Minnesota Constitution was adopted in 1857." *Leiendecker II*, 895 N.W.2d at 634 (quotation omitted). "The jury-trial right does not extend to equitable claims." *Id.* Because the supreme court held that section 554.02 is unconstitutional when it deprives a party of a jury-trial right in actions at law, it also follows that this section is not unconstitutional when applied to equitable claims, which enjoy no jury-trial right. Therefore, the statute has a constitutional application, and it is not facially unconstitutional as to MDI's equitable claims. *See Minn. Voters Alliance*, 766 N.W.2d at 694.

But section 554.02 is unconstitutional as applied to actions at law, which are a guaranteed jury-trial right, and this applies to the various tort and contract claims asserted

by MDI. Respondents attempt to finesse this principle by asserting that parties have a jury-trial right only when there are disputed facts at issue and there are no disputed facts in this case. But because of the procedural posture of this matter, it is unclear whether there are disputed facts. Section 554.02 is unconstitutional as applied because the district court must determine the facts of the case before trial based on whether the nonmoving party has produced clear and convincing evidence that the moving party is not immune from suit. Unlike summary judgment, the district court does not view the evidence in the light most favorable to the nonmoving party, and it must resolve disputed fact issues. *Leiendecker II*, 895 N.W.2d at 635-36. In addition, the nonmoving party is assigned a burden of proof higher than that required at trial. *Id.* This deprives the nonmoving party of the right to a jury trial.

We conclude that the reasoning of *Leiendecker II* applies with equal force to appellant's tort and non-tort actions at law. Although the statute may not be facially unconstitutional in all of its applications, its application to MDI's actions at law-both tort and non-tort-is unconstitutional. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, 126 S. Ct. 961, 967-68 (2006) (stating that "a statute may be invalid as applied to one state of facts and yet valid as to another" and "a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact" (quotations omitted)). We therefore reverse the district court's summary judgment based on respondents' anti-SLAPP motion as to appellant's tort and non-tort legal claims, and remand for further proceedings.

This opinion addresses the limited remand from the supreme court. In response to the remand order, we reverse the district court's anti-SLAPP order dismissing appellant's claims that raise actions at law, and remand for further proceedings. For the reasons stated in our earlier opinion, the district court correctly concluded that respondents are entitled to immunity for reports of potential misconduct made to the chiropractic board and correctly dismissed respondents' counterclaim under the consumer-fraud statute. *Mobile Diagnostic Imaging*, 889 N.W.2d at 35. The district court's decision as to those matters is affirmed.

Affirmed in part, reversed in part, and remanded.