

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

GRAVES V. SCOTTSBLUFF UROLOGY ASSOCS.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

ROBERT F. GRAVES, M.D., APPELLEE,
V.
SCOTTSBLUFF UROLOGY ASSOCIATES, P.C., AND
JOHN N. KABALIN, M.D., APPELLANTS.

Filed December 18, 2012. No. A-12-096.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge.
Affirmed.

Howard P. Olsen, Jr., Rick L. Ediger, and John F. Simmons, of Simmons Olsen Law
Firm, P.C., for appellants.

Tylor J. Petitt and Lindsay R. Snyder, of Smith, Snyder & Petitt, G.P., for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Scottsbluff Urology Associates, P.C. (SBU), and John N. Kabalin, M.D., appeal from a
judgment of the Scottsbluff County District Court in favor of Robert F. Graves, M.D., awarding
him monetary damages for the value of his stock in SBU and for unpaid incentive compensation.
Because the district court's findings are not clearly wrong, we affirm.

BACKGROUND

Graves moved to Scottsbluff, Nebraska, in 2000 and immediately began practicing with
SBU as a urologist. At that time, Dr. Kabalin and Richard Engelbart were the only partners in the
practice. In 2002, Graves became a partner for one-third of the practice. On January 2, 2002,
Graves signed an employment agreement and a buy-sell agreement. Graves purchased one-third
of SBU's stock for \$180,000. According to the 2002 buy-sell agreement, the corporate value

shown on the attached exhibit A-1 was \$540,000 as of January 2, 2002, and the equipment value shown on the exhibit on said date was \$120,000. Although the agreement provided that reevaluation of the equipment should take place at least once every 24 months, no additional equipment values were contained in the attachment to the 2002 buy-sell agreement. The agreement required the remaining doctors to purchase the shares of a departing doctor, either through death or termination. While the agreement provided that the corporate value on January 2, 2002, was \$540,000, it also contained a formula for determination of the price per share upon the death or termination of employment of a doctor.

In 2005, Engelbart decided to retire and sell his shares of stock. The three doctors entered into a new buy-sell agreement on December 27, 2005. The 2005 buy-sell agreement provides that all prior buy-sell agreements shall be superseded and further states that no other buy-sell agreement shall continue to apply and that all such agreements are abrogated. The 2005 agreement was nearly identical in terms to the 2002 buy-sell agreement; however, the 2005 agreement included a provision specifically valuing Engelbart's shares at \$141,896.40. Graves and Kabalin each were to pay to Engelbart half of that amount or \$70,948.20.

The 2005 buy-sell agreement, in language identical to the 2002 buy-sell agreement, provides that upon termination of employment of any of the doctors by reason other than death, "the remaining doctors shall equally purchase the shares of the terminating doctor and the terminating doctor agrees to sell said shares at a value determined in the same manner as in paragraph (2) above." Paragraph 2, in turn, provides that the remaining doctors agree to buy the shares for the "fair market value, as per Exhibit B-1 attached, of the corporate shares." Exhibit B-1 attached to the 2005 buy-sell agreement, titled "Corporate Value," lists the value on December 30, 2005, as \$120,000. Unlike the 2002 buy-sell agreement, there was not another attachment containing the agreed-upon value of the equipment.

Paragraph 2 of the 2005 buy-sell agreement goes on to provide a formula for determining the price per share in the event of the death or termination of employment of a doctor:

The price per share shall equal the sum of the current value of all assets on the books of the corporation determined as set out below divided by the number of outstanding shares:

(i) The value of all office equipment shall equal the most recent mutually agreed value of the office equipment set by a majority of the stock[holders] of the corporation. The reevaluation should take place at least once every twenty-four (24) months.

(ii) The accounts receivable of the corporation shall be valued by taking the book value of the accounts receivable and multiplying that sum by the collection percentage for the immediately preceding calendar year.

The 2002 employment agreement provides, in relevant part, that Graves is entitled to compensation consisting of a salary, incentive compensation, and certain fringe benefits. Exhibit C-1 attached to the agreement provides that the salary is payable in biweekly installments and that the incentive compensation is paid in at least quarterly bonuses in accordance with production, collection, and all extraordinary expenses attributable to Graves. The agreement further specified that it could be terminated at any time in writing by either party giving not less than 30 days' written notice to the other party. Further, the agreement automatically terminated

upon the happening of various events, including “imparting any confidential information in violation of this agreement.” Upon termination of the agreement for any of the specified events, Graves is entitled to receive only the compensation accrued but unpaid as of the date of termination. Finally, Graves agreed that he would not disclose or furnish to anyone, without prior written consent, the names or addresses of any of SBU’s patients or disclose any information received during the course of his employment with regard to the personal, financial, or other affairs of SBU. Graves agreed to keep all such information confidential.

In 2008, Graves began looking for employment opportunities outside of SBU. Around September 2008, Graves started conversations about employment prospects with Regional West Physicians Clinic (RWPC). In October 2008, Graves met with the financial officer at RWPC. In order to determine an appropriate compensation, RWPC wanted to know approximately how much work Graves was doing at SBU. Current procedural terminology (CPT) codes are assigned to various procedures performed by doctors by the American Medical Association. Graves provided RWPC with the CPT codes of the procedures that he performed at SBU. The information included Graves’ name, a dollar amount for each CPT code, and the number of each CPT code Graves performed. No other patient or confidential information of SBU was provided to RWPC. In order to determine compensation, RWPC assigned each CPT code its own relative value unit. In early December 2008, Graves signed an employment agreement with RWPC effective January 1, 2009.

On December 1, 2008, Graves gave Kabalin a letter with 30 days’ notice of Graves’ resignation. In the letter, Graves requested that Kabalin either buy Graves’ shares or liquidate SBU and divide its assets and liabilities. Graves continued to practice with SBU through December 2008.

PROCEDURAL HISTORY

On March 5, 2009, Graves filed a complaint against SBU and Kabalin in Scotts Bluff County District Court in which Graves sought, among other things, specific performance of the 2005 buy-sell agreement relative to the purchase of his stock and unpaid compensation owed to him. In their responsive pleading, Kabalin and SBU (hereinafter Appellants), among other things, affirmatively alleged that Graves’ actions in disclosing confidential information constituted a material breach of the 2002 employment agreement and that because the 2002 employment agreement, the 2002 buy-sell agreement, and the 2005 buy-sell agreement are intertwined, Graves’ material breach of the employment agreement excused Appellants’ performance under the others.

Trial was held on October 12, 2011, and the evidence received is generally set forth above. On December 17, the district court entered a detailed written order. The district court found that Graves provided RWPC with confidential information in violation of the 2002 employment agreement. However, it determined that the breach was not material and that SBU owed Graves the value of his stock and the incentive compensation earned through December 31. The district court calculated these values based upon the evidence and awarded Graves a judgment in the amount of \$158,806.64 for the value of his stock and \$46,223.97 for his incentive compensation.

On December 30, 2011, Appellants filed a motion to alter or amend the judgment or, in the alternative, a motion for new trial. On January 11, 2012, the district court entered an order denying the motion.

ASSIGNMENTS OF ERROR

Appellants argue, consolidated and restated, that the district court erred in (1) finding that Graves' breach of contract was not material and did not excuse the other parties from performance, (2) determining the value of Graves' stock, and (3) awarding Graves' incentive compensation.

STANDARD OF REVIEW

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. We do not reweigh the evidence but consider the judgment in a light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party. And that party is entitled to every reasonable inference deducible from the evidence. *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

ANALYSIS

Initially, we note that Graves' brief argues that he did not breach the 2002 employment agreement. However, a cross-appeal is not noted on the cover of his brief, nor does it contain an assignment of error section. Appellate courts of this state have repeatedly held that a cross-appeal must be properly designated under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008) if affirmative relief is to be obtained. *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012). Errors argued but not assigned will not be considered on appeal. *Id.* We accordingly decline to consider Graves' argument that his actions should not be considered a breach of the contract.

Material Breach.

Appellants first argue that the district court erred in not finding that Graves' breach of the 2002 employment agreement was a material breach. Appellants claim that because Graves' breach of the employment agreement was material and because the employment agreement and buy-sell agreements were intertwined, Graves' material breach excused Appellants' performance under the agreements such that they are not required to pay Graves for the value of his stock or any remaining incentive compensation.

The district court found that around October 1, 2008, Graves provided RWPC with confidential information of SBU which was a violation of the 2002 employment agreement. However, the district court found that the breach was not material because the information provided to RWPC was to aid in determining an appropriate level of compensation for Graves, not to entice patients away from SBU. Further, the district court found that the breach did not defeat the essential purpose of the contract or make it impossible for SBU to carry on the purpose of the contract; therefore, SBU is not excused from performance under either the 2002 employment agreement or the 2005 buy-sell agreement.

A material breach will excuse the nonbreaching party from its performance. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). Whether or not a

breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in performance of contracts similar to the one involved in the specific case. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000).

We turn to Williston on Contracts, an authoritative treatise on the matter, for an explanation of what constitutes a material breach of contract at common law. The treatise provides as follows in this regard:

The courts have come up with numerous ways of speaking about “material” breaches of contract. Thus, it has been said that a “material breach” is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must “go to the root” or “essence” of the agreement between the parties, or be “one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.” A breach is “material” if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, the breach substantially defeats the contract’s purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract. Other courts have defined a breach of contract as “material” if the promisee receives something substantially less or different from that for which he or she bargained.

23 Samuel Williston, A Treatise on the Law of Contracts § 63:3 at 438-39 (Richard A. Lord ed., 4th ed. 2002).

Appellants argue that the primary purpose of the contract and the benefit of which it was deprived was a loyal employee; therefore, the imparting of confidential information should be considered a material breach. We note that while the employment agreement required that Graves “devote substantially his entire time, skill, and energy to the practice of medicine on behalf of [SBU],” there is no evidence in the record that Graves failed to do so through the date of his departure from the practice.

The 2002 employment agreement stated that Graves would not disclose, without consent, “the names or addresses of any of the patients of the Employer or disclose any information received by him during the course of his employment with regard to the personal, financial, or other affairs of the Employer or its other employees.” There is no evidence that Graves disclosed any patient information in violation of the employment agreement. While the district court found that Graves’ actions in disclosing the CPT codes to RWPC violated this provision, it cannot be said that Graves failed to substantially perform on the contract. Further, the evidence does not indicate that Graves’ breach defeated the essential purpose of the contract or make it impossible for SBU to carry on the purpose of the contract. See *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975) (forfeiture of contract may be declared only where breach is so material and substantial as to defeat objects of parties in making contract). To the contrary, Graves and Kabalin continued to work together for SBU through December 2008, and there was nothing in the 2002 employment agreement preventing Graves from seeking alternate employment or from competing with SBU. There is no evidence that the information provided by Graves would give

RWPC a competitive advantage. The district court's determination that Graves' breach was not material is not clearly wrong. Accordingly, Appellants' claim that they are excused from performing under the agreements by virtue of Graves' material breach is without merit.

Value of Stock.

Appellants next argue that the district court incorrectly determined the price to be paid for Graves' stock. The district court calculated the value of Graves' stock by following the formula for the price per share found in the 2005 buy-sell agreement. The court used the sum of \$120,000 for the office equipment, which was the most recent agreed value of office equipment found in exhibit B-1 to the 2002 buy-sell agreement. The parties agreed that the percentage of accounts receivable collected was 48 percent and that the 2008 accounts receivable value was \$411,694.34. Using these figures, the court calculated the value of Graves' stock to be \$158,806.64 ($\$411,694.34 \times 0.48 = \$197,613.28 + \$120,000 = \$317,613.28 \div 2 = \$158,806.64$). The district court noted that while exhibit B-1 to the 2005 buy-sell agreement provides that the "corporate value" as of December 31, 2005, is \$120,000, the agreement did not provide that this value should carry forward.

Appellants assert that the district court erred in its determination of the value of Graves' stock, because the "corporate value" was agreed to be \$120,000 in the 2005 buy-sell agreement, which should entitle Graves to only half of that value, or \$60,000. Since the 2005 buy-sell agreement also provides a formula for determining the price per share of stock, Appellants argue that the clauses are irreconcilably repugnant and that this court should follow the first provision which sets the corporate value at \$120,000.

A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract. *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010). Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses. *Id.* A party may not pick and choose among the clauses of a contract, accepting only those that advantage it. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

We disagree that the provisions in the 2005 buy-sell agreement are mutually repugnant. Paragraph 3 of the 2005 buy-sell agreement states that the value of the shares would be determined in the same manner as paragraph 2. The allegedly repugnant clauses contained in paragraph 2 can be reasonably and consistently construed. While paragraph 2 does contain reference to buying the shares of a terminated doctor for the fair market value contained in exhibit B-1, that exhibit shows that the "corporate value" as of December 31, 2005, was \$120,000. The formula, in contrast, is a determination of the price per share at the time of the event--either the death or termination of employment of a doctor. If the value set in exhibit B-1 was to carry forward in the future, there would be no need for the formula in the agreement. We find no error in the construction of the agreement given by the district court or in its determination of the price to be paid to Graves for his shares in SBU. This assignment of error is without merit.

Incentive Pay.

Finally, Appellants assert that the district court erred in awarding Graves incentive compensation. Specifically, Appellants argue that because the employment agreement was

automatically terminated in October 2008 when Graves provided the confidential information to RWPC, Graves was not entitled to the incentive pay from that time through December 31, 2008.

The 2002 employment agreement states that it “shall automatically terminate upon the happening of . . . [i]mparting any confidential information in violation of this agreement. Upon termination of this agreement[,] . . . the Employee shall be entitled to receive only the compensation accrued but unpaid as of the date of termination.” The incentive compensation pay provides quarterly bonuses based upon production, collection, and expenses attributable to the employee.

SBU argues that the plain meaning of “automatically terminate” would mean upon the happening of the stipulated condition, which would be when Graves provided RWPC with the confidential information in October 2008. The district court noted that although Graves’ actions constituted a violation of the 2002 employment agreement and that such actions “can trigger” automatic termination, Graves in fact worked for SBU through December 2008. Because the employment relationship was not terminated in October, the district court used December 31, 2008, as the date of termination. In overruling SBU’s motion for a new trial, the court expanded on its finding, noting that Graves’ right to further employment was terminated under the contract, but not his right to receive accrued but unpaid compensation.

Viewing the evidence in the light most favorable to Graves and resolving evidentiary conflicts in his favor as we must, we cannot say that the district court’s finding is clearly wrong. The 2002 employment agreement defines compensation to include both salary and incentive compensation. It is clear, and SBU does not dispute, that Graves is entitled to his salary that was earned but not yet paid as of December 31, 2008. The employment agreement treats the incentive compensation in the same way--Graves is entitled to the incentive compensation that he earned through the time of his termination of employment. The district court was not clearly wrong in finding that Graves was entitled to the incentive compensation which had been earned but not yet paid through December 31, 2008, and the evidence supports the amount of such compensation ordered to be paid.

CONCLUSION

The district court did not err in finding that Graves’ breach was not material, in its valuation of Graves’ stock, and in awarding Graves incentive compensation. The judgment entered in favor of Graves is affirmed in all respects.

AFFIRMED.