

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: March 25, 2015

4 **NO. 33,475**

5 **KIDSKARE, P.C.,**

6 Plaintiff-Appellee,

7 v.

8 **TYLER MANN,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

11 **Sandra A. Price, District Judge**

12 Jane B. Yohalem

13 Santa Fe, NM

14 for Appellee

15 Law Offices of Michael E. Mozes, P.C.

16 Michael E. Mozes

17 Albuquerque, NM

18 for Appellant

1 **OPINION**

2 **WECHSLER, Judge.**

3 {1} This case is an appeal by a dentist, Dr. Tyler Mann, who was found by the
4 district court to have violated the covenant not to compete in his employment contract
5 with his former employer, KidsKare, P.C. (KidsKare). On appeal, Dr. Mann raises
6 four claims of error: (1) KidsKare lacked standing to enforce the covenant not to
7 compete; (2) the covenant not to compete was unenforceable as written and was not
8 amenable to the modification made by the district court; (3) KidsKare waived its right
9 to enforce the covenant; and (4) prior breach of the covenant by KidsKare rendered
10 the covenant unenforceable. We hold that, contrary to the argument of Dr. Mann, the
11 covenant not to compete was amenable to modification by the district court because
12 the agreement explicitly provided for amendment of any unenforceable provision and
13 enforcement to the full extent deemed reasonable and enforceable by the reviewing
14 court. Nor are we persuaded by Dr. Mann’s other arguments. We therefore affirm the
15 district court. Also, we award attorney fees to KidsKare for this appeal and remand
16 to the district court for proceedings consistent with this holding.

17 **BACKGROUND**

18 {2} Dr. Mann was hired by KidsKare in May 2006. At that time, KidsKare was a
19 chain of dental service providers with several offices in New Mexico. As part of the

1 employment agreement between the parties, Dr. Mann agreed that, after termination
2 of his association with KidsKare, (1) he was not to provide the type of dentistry that
3 he performed for KidsKare within one hundred miles of any KidsKare office for one
4 year, and (2) his practice could not consist of more than ten percent Medicaid or child
5 patient services if that practice was within one hundred miles of a KidsKare office or
6 within one hundred miles of an area that provided a substantial number of patients to
7 a KidsKare office.¹

8 {3} In January 2010, Dr. Mann submitted his notice of resignation to KidsKare.
9 Four days after his final day at KidsKare, on April 12, 2010, Dr. Mann opened an
10 office three miles from the KidsKare office where he had practiced. On May 10,

11 ¹ The text of the “Covenant Not to Compete” found at Section 4.1 of the
12 employment agreement, provided, in pertinent part:

13 Associate agrees that for a twelve (12) month period following the
14 date that Associate’s employment terminates for any reason, including,
15 without limitation, termination by Employer without cause or
16 resignation by Associate . . . , Employee shall not provide any
17 professional dental services of any of the types of dentistry Employee
18 provided while employed by Employer within a radius of one hundred
19 (100) miles of any of Employer’s offices; and, for a period of five (5)
20 years following the date that Associate’s employment terminates,
21 children and/or Medicaid patient dental services shall not exceed ten
22 percent (10%) of the total patients in their future practice of dentistry
23 within one hundred (100) miles of any area that has KIDSKARE P.C.
24 offices and/or within one hundred (100) miles of an area that provides
25 substantial patients to KIDSKARE P.C. for dental services.

1 2010, KidsKare filed an action to enforce the covenant not to compete. In its
2 complaint, it asserted that Dr. Mann violated the provision that precluded him from
3 practicing the same type of dentistry within one hundred miles of a KidsKare office
4 and within one year of resignation.

5 {4} The district court bifurcated the trial. The court first concluded that clause one
6 of the covenant not to compete was reasonable as to the twelve month time period but
7 that the one hundred mile restriction from any KidsKare office was overbroad and,
8 therefore, unenforceable as written. As its remedy, the district court reformed the
9 distance provision of clause one by reducing the radius to thirty miles, finding that
10 the covenant was thus enforceable.

11 {5} After a trial on the merits, the district court found that Dr. Mann breached the
12 covenant not to compete by operating an office approximately three miles from the
13 KidsKare office within one year of leaving his employment and providing services
14 from that office similar to those he provided at KidsKare. The district court entered
15 a total judgment in the amount of \$88,639.40 in favor of KidsKare. It awarded
16 damages in the amount of \$44,449.40, a figure based on the amount billed by Dr.
17 Mann for services rendered within one year of leaving KidsKare to patients who had
18 been patients of KidsKare, excluding patients who were referred to Dr. Mann by

1 dentists, whether employed by KidsKare or not. It also awarded attorney fees in the
2 amount of \$44,140, and post-judgment interest at the rate of 8.75%.

3 **STANDING**

4 {6} Dr. Mann argued unpersuasively to the district court for summary judgment
5 that KidsKare lacked standing to enforce the covenant not to compete. He now argues
6 that the district court committed error. We review a summary judgment ruling de
7 novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d
8 582.

9 {7} Dr. Mann relies upon 42 U.S.C. § 1396a(a)(23) (2012), a section of the
10 Medicaid Act that provides strict freedom of choice for Medicaid patients to choose
11 treatment from any participating provider. *See Planned Parenthood of Ind., Inc. v.*
12 *Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 974 (7th Cir. 2012) (“Section
13 1396a(a)(23) mandates that . . . Medicaid patients have the right to receive care from
14 the qualified provider of their choice.”). Under the pertinent part of this section, a
15 state plan for medical assistance must:

16 [P]rovide that . . . any individual eligible for medical assistance
17 (including drugs) may obtain such assistance from any institution,
18 agency, community pharmacy, or person, qualified to perform the
19 service or services required (including an organization which provides
20 such services, or arranges for their availability, on a prepayment basis),
21 who undertakes to provide him such services[.]

1 Section 1396a(a)(23). Dr. Mann is correct that, under this section, health care
2 providers do not have the right to enforce the freedom of choice provision intended
3 to protect Medicaid recipients. *See RX Pharmacies Plus, Inc. v. Weil*, 883 F. Supp.
4 549, 554 (D. Colo. 1995) (stating that Section 1396a(a)(23) does not confer any
5 enforceable rights on Medicaid providers). Thus, we agree with Dr. Mann that
6 KidsKare is unable to sue under Section 1396a(a)(23).

7 {8} However, KidsKare has not attempted to enforce Section 1396a(a)(23), and we
8 do not see why it would attempt to do so under the facts of this case. Perhaps a party
9 in Dr. Mann's position might seek to prevent the enforcement of a covenant not to
10 compete, claiming that such a covenant violated Section 1396a(a)(23). But, as noted
11 by both KidsKare and Dr. Mann, the only intended beneficiaries of the freedom of
12 choice conferred by Section 1396a(a)(23) are Medicaid recipients. Thus, Dr. Mann,
13 like KidsKare, lacks standing to enforce Section 1396a(a)(23) as neither party is a
14 Medicaid recipient. Simply stated, Section 1396a(a)(23) is not applicable to this case.

15 **ENFORCEABILITY OF COVENANT NOT TO COMPETE**

16 {9} Dr. Mann also contends that the district court committed error when it modified
17 the covenant not to compete and found it thus enforceable. We review the findings
18 of fact of the district court under a deferential, substantial evidence standard and

1 review the application of the law to the facts de novo. *Ponder v. State Farm Mut.*
2 *Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960.

3 {10} Covenants not to compete that restrict employment present competing
4 principles: the freedom to contract and the freedom to work. Furthermore, the public
5 has an interest not only “in protecting the freedom of persons to contract and in
6 enforcing contractual rights and obligations[,]” but also in “seeing that competition
7 is not unreasonably limited or restricted[.]” *Lovelace Clinic v. Murphy*, 1966-NMSC-
8 165, ¶ 23, 76 N.M. 645, 417 P.2d 450. Our Supreme Court has held that a covenant
9 not to compete is “enforceable, if the restrictions thus imposed . . . are reasonable.”
10 *Id.* ¶ 18. “Whether there is a reasonable restraint depends on the facts of a particular
11 case[.]” *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, ¶ 4, 104 N.M.
12 514, 724 P.2d 223. Covenants not to compete with reasonable restraints will be
13 enforced when “they are not against public policy, and any detriment to the public
14 interest in the possible loss of the services of the covenantor is more than offset by
15 the public benefit arising out of the preservation of the freedom of contract.”
16 *Lovelace*, 1966-NMSC-165, ¶ 23 (internal quotation marks and citation omitted).

17 {11} Dr. Mann argues that the covenant was not amenable to modification under
18 New Mexico law. According to Dr. Mann, New Mexico case law does not provide
19 for reformation of terms of a covenant not to compete beyond, when possible, striking

1 an independent clause found to be unreasonable. He also argues that, not only could
2 the district court not alter the overly-broad distance provision in the first clause of the
3 covenant, but, further, that because the second clause of the covenant was also overly
4 broad and, therefore, unreasonable, the entire covenant not to compete should be
5 “voided.” Because we conclude that an alternative basis to alter the covenant not to
6 compete allows for disposition of this case, we do not reach Defendant’s argument
7 regarding New Mexico case law.

8 {12} As noted by the district court, the employment agreement between the parties
9 specifically provided for the amendment of any provision found by a court to be
10 “overbroad or otherwise unenforceable[.]” It further provided for the enforceability
11 of the agreement against Dr. Mann “to the maximum extent deemed reasonable and
12 enforceable by such court.”² The employment agreement additionally provided that
13 all provisions not found to be “invalid, illegal or unenforceable, in whole or in part”

14 ² In full, Section 5.2 of the employment agreement reads:

15 Employer and Associate further agree that if any provision of this
16 agreement is held in a final judgment or determination of any court to be
17 overbroad or otherwise unenforceable in any respect, such provision
18 shall be- [sic] deemed to be amended, and shall be binding upon
19 Employee to the maximum extent deemed reasonable and enforceable
20 by such court.

1 were to remain intact and enforceable.³ These terms make clear that, as part of their
2 bargain, Dr. Mann and KidsKare agreed that the covenant not to compete would not
3 fail if provisions within it were found to be unreasonable. Instead, they specifically
4 agreed to the type of reformation performed by the district court. Reformation of
5 unreasonable clauses was an aspect of the bargain of the parties and consistent with
6 their mutual intent as expressed by the employment agreement. *See Lovelace*, 1966-
7 NMSC-165, ¶ 20 (“The purpose of the agreement was to create legally-enforceable
8 rights and duties between the parties.”)

9 {13} We note that Dr. Mann is a highly trained medical professional. Like the doctor
10 in *Lovelace*, Dr. Mann accepted the benefits of the association with his employer
11 knowing the corresponding burdens if and when his employment terminated. *See id.*
12 ¶ 24 (“He knew that if and when he terminated his association there would likely be
13 a burden upon him He chose to accept the burdens as well as the benefits of his
14 contract.”). Nothing in the record suggests that Dr. Mann did not enter into the
15 employment agreement with KidsKare freely and with full knowledge of the post-

16 ³ In full, Section 5.3 reads:

17 Severability. In the event that any provision of this Agreement is
18 held invalid, illegal or unenforceable, in whole or in part, the remaining
19 provisions of this Agreement shall not be effected [sic] and shall
20 continue to be valid and enforceable. (Emphasis omitted).

1 employment restrictions. We do not perceive any lack of bargaining power on the part
2 of Dr. Mann, nor has he argued that lack of bargaining power or sophistication should
3 affect the result in this case. In fact, Dr. Mann has not argued any grounds on which
4 Section 5.2 of the employment agreement, which explicitly provides for reformation
5 of the agreement, should not be enforced.

6 {14} Thus, the covenant not to compete was amenable to reformation under the
7 terms of the employment agreement. We therefore turn to the reasonableness of the
8 terms of the covenant as applied by the district court, restrictions of one year and
9 thirty miles. As to the reasonableness of the one-year restriction, evidence was
10 presented that adult patients of KidsKare visit once per year, and Dr. Mann conceded
11 that a restriction of one or two years is frequently found to be reasonable. The district
12 court could thus conclude that the one-year restriction was reasonable. *See Ponder*,
13 2000-NMSC-033, ¶ 7 (“Substantial evidence is such relevant evidence that a
14 reasonable mind would find adequate to support a conclusion.” (internal quotation
15 marks and citation omitted)). The one-year restriction is further supported in
16 applicable case law. *See Lovelace*, 1966-NMSC-165, ¶¶ 24, 26, 29 (holding that a
17 three-year restriction on a doctor was reasonable and enforceable). The thirty-mile
18 restriction was also supported by the substantial evidence that approximately 90% of

1 the patients of the Farmington office of KidsKare came from within a thirty-mile
2 radius.

3 {15} Dr. Mann does not argue that the one-year time or thirty-mile restrictions are
4 unreasonable or unsupported. Instead, Dr. Mann argues that the district court erred
5 in concluding that: (1) the covenant not to compete was related to a legitimate
6 business interest, and (2) enforcement of the covenant not to compete did not violate
7 the public interest.

8 {16} Neither argument is persuasive. In *Lovelace*, a medical professional left
9 employment with a clinic and, as a result, violated a covenant not to compete. 1966-
10 NMSC-165. Our Supreme Court noted that an employer has a legitimate business
11 interest in protecting the goodwill of its patients. *Id.* ¶ 22. Like the clinic in *Lovelace*,
12 KidsKare had a legitimate interest in protecting its business from competition by Dr.
13 Mann, who became known to KidsKare patients through his employment. Dr. Mann
14 focuses his argument on the harm to the public from enforcement of the covenant not
15 to compete, arguing that enforcement would deprive underserved Medicaid dental
16 patients of an available practitioner. However, evidence was presented that a
17 Medicaid patient could get an appointment at KidsKare in Farmington within one
18 business day of making a request. The district court’s finding that Medicaid patients
19 who seek dental care are not underserved due to an insufficient number of providers

1 is therefore supported by substantial evidence in the record. *See Ponder*, 2000-
2 NMSC-033, ¶ 7 (“Substantial evidence is such relevant evidence that a reasonable
3 mind would find adequate to support a conclusion.” (internal quotation marks and
4 citation omitted)). Because enforcement of the covenant not to compete would not
5 cause the harm to the public asserted by Dr. Mann, we agree with the district court
6 that the reformed covenant does not violate public policy. As reformed by the district
7 court, the covenant not to compete was reasonable and enforceable.

8 **WAIVER BY ESTOPPEL**

9 {17} Dr. Mann argues that the district court erred in concluding that KidsKare did
10 not waive its right to enforce the covenant not to compete. He contends that referrals
11 to him from KidsKare dentists after he left employment constituted waiver by
12 estoppel on the part of KidsKare. KidsKare contends that waiver by estoppel is
13 inapplicable because it filed suit against Dr. Mann to enforce the covenant not to
14 compete approximately thirty days after Dr. Mann opened his competing office.

15 {18} “[W]aiver by estoppel is present where a party’s actions reasonably lead the
16 other party to believe waiver has occurred and that other party is prejudiced by the
17 belief.” *Atherton v. Gopin*, 2012-NMCA-023, ¶ 13, 272 P.3d 700. The district court
18 found that Dr. Mann could not have reasonably believed that KidsKare intended to
19 waive its right to enforce the agreement. Substantial evidence in the record supports

1 this finding. A number of the fourteen documented referrals on which Dr. Mann relies
2 came from a dentist at the KidsKare office during a time period when the only dentist
3 who could make those referrals was Dr. Connolly, a good friend and housemate of Dr.
4 Mann. Also, KidsKare filed suit against Dr. Mann approximately thirty days after Dr.
5 Mann left his position at KidsKare. That complaint specifically asserted that Dr.
6 Mann violated the first clause of the covenant not to compete and sought injunctive
7 relief, damages, and attorney fees and costs pursuant to that violation. Both the source
8 of at least some of the referrals relied upon by Dr. Mann and the lawsuit filed by
9 KidsKare support the finding by the district court that Dr. Mann could not have
10 reasonably believed that KidsKare intended to waive its rights under the covenant not
11 to compete. Because waiver by estoppel required such a belief, Dr. Mann's argument
12 fails.

13 **BREACH OF CONTRACT**

14 {19} Dr. Mann argues that the failure by KidsKare to provide adequate staff and
15 supplies, and the referral of patients by KidsKare to Dr. Mann, constituted material
16 breaches of the contractual employment agreement that excused Dr. Mann from
17 further performance, including adherence to the covenant not to compete.

18 {20} A material breach of a contract excuses the non-breaching party from further
19 performance under the contract. *Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-

1 155, ¶ 14, 126 N.M. 69, 966 P.2d 777. This Court has described a material breach as
2 the “failure to do something that is so fundamental to the contract that the failure to
3 perform that obligation defeats an essential purpose of the contract.” *Id.* ¶ 17 (internal
4 quotation marks and citation omitted). “[T]he materiality of a breach is a specific
5 question of fact.” *Id.* ¶ 16.

6 {21} The employment agreement between KidsKare and Dr. Mann required
7 KidsKare to furnish Dr. Mann with adequate equipment, supplies, and staff, as
8 determined to be necessary and appropriate by KidsKare. The district court found that
9 KidsKare and Dr. Mann sometimes disagreed as to the appropriate levels of
10 equipment, staff, and supplies, but that the employment agreement left those
11 determinations to KidsKare. The district court also found that the substantial salary
12 and production bonuses KidsKare paid to Dr. Mann was evidence that KidsKare had
13 fulfilled its obligation to materially support Dr. Mann’s practice.

14 {22} Evidence in the record supports the district court’s findings. Dr. Mann received
15 a production bonus for 2009 of \$110,000, equal to 55% of his base salary. His
16 projected bonus for 2010, the year he left KidsKare, was similarly large. Testimony
17 was presented that KidsKare spent more on supplies for Dr. Mann than any other
18 dentist. A KidsKare dentist testified that her practice was not limited by lack of

1 equipment or supplies. Testimony was also presented that the KidsKare office was
2 adequately staffed.

3 {23} With regard to Dr. Mann's argument that referrals from KidsKare constituted
4 a material breach of the employment agreement, Dr. Mann does not cite any provision
5 in the contract that forbids referrals to him. This argument is more properly presented
6 as an argument in support of waiver by KidsKare, as Dr. Mann did, and which we
7 addressed above.

8 {24} The evidence supports the district court's conclusion that KidsKare did not
9 materially breach the employment agreement and that Dr. Mann was not excused
10 from the obligations of the covenant not to compete on that basis.

11 **ATTORNEY FEES FOR APPEAL**

12 {25} KidsKare requests attorney fees for this appeal, noting that the employment
13 agreement between the parties provides for reasonable attorney fees and costs for any
14 action to enforce its rights. We agree that this provision entitles KidsKare to attorney
15 fees for this appeal. *See Famiglietta*, 1998-NMCA-155, ¶ 27 (awarding attorney fees
16 for an appeal where a contract called for attorney fees upon default by either party).

1 **CONCLUSION**

2 {26} We affirm the judgment of the district court. We award attorney fees for this
3 appeal and remand to the district court for proceedings consistent with this holding,
4 including a determination of appropriate attorney fees.

5 {27} **IT IS SO ORDERED.**

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7

JAMES J. WECHSLER, Judge

8 **WE CONCUR:**

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MICHAEL E. VIGIL, Chief Judge

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12

RODERICK T. KENNEDY, Judge