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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-21-51

DARRELL JAMES BROWN, M.D. APPELLANT V. CROSSETT HEALTH FOUNDATION D/B/A ASHLEY COUNTY MEDICAL CENTER APPELLEE	Opinion Delivered September 28, 2022 APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [NO. 02CV-20-33] HONORABLE ROBERT BYNUM GIBSON, JR., JUDGE REVERSED AND REMANDED

N. MARK KLAPPENBACH, Judge

This appeal concerns the validity of a covenant not to compete in a physician's employment contract with a hospital. Appellant Darrell James Brown, M.D., filed a complaint seeking a declaratory judgment that the clause was invalid and void as against public policy. Appellee Crossett Health Foundation d/b/a Ashley County Medical Center (ACMC) responded, in part, that there was no actual controversy between the parties because Dr. Brown had subsequently secured employment that did not violate the covenant. The circuit court entered summary judgment in ACMC's favor, finding that there was no actual controversy, and dismissed Brown's complaint. This appeal followed. We reverse and remand.

Dr. Brown was hired as an obstetrician/gynecologist by ACMC in November 2016 to work for three years, February 1, 2017, to January 31, 2020. The parties signed an eighteen-page employment contract, which contained the following clause:

> **Covenant Not to Compete**. During the term of this Agreement and for a period of three (3) years following the termination of this Agreement, for any reason, Physician agrees to not practice medicine or otherwise engage in any business offering the services in competition with those offered by Hospital, including, but not limited to, laboratory tests, radiology tests, clinical or inpatient services, in Ashley County, Arkansas or any county or parish immediately adjacent to Ashley County, Arkansas.

On January 30, 2020, ACMC's CEO, Philip Gilmore, informed Dr. Brown by a hand-delivered letter that the hospital was not going to renew or extend its employment contract with him.

Dr. Brown immediately began to seek other employment and contacted a hospital in Drew County, whose CEO contacted Mr. Gilmore to ask about Dr. Brown's work. Mr. Gilmore informed the CEO that Dr. Brown was bound by a non-compete agreement and that ACMC would not release Dr. Brown from that restriction. Dr. Brown did not hear back from the Drew County hospital. On February 4, 2020, Mr. Gilmore sent a certified letter to Dr. Brown at his Hamburg residence "to remind you of the Covenant Not to Compete" included in his employment contract with ACMC.[1]

[1]According to the terms of the covenant not to compete, Dr. Brown is prohibited from practicing medicine in Ashley, Bradley, Chicot, Drew, and Union Counties in Arkansas, as well as Morehouse Parish and West Carroll Parish in Louisiana. The three-year restriction runs from February 1, 2020, until January 31, 2023.

On February 18, 2020, Dr. Brown filed a complaint in Ashley County Circuit Court seeking a declaratory judgment that the covenant not to compete was null and void as against public policy. In March 2020, ACMC filed a general denial to the complaint, requested that Dr. Brown's complaint be dismissed, and requested that the court enter an order declaring the covenant not to compete valid and enforceable.

While the litigation was pending, Dr. Brown acquired a job at a hospital in Virginia. Dr. Brown and his wife sold their Hamburg, Arkansas, home in June 2020 and moved to Virginia. Dr. Brown agreed to an employment contract that would commence in July 2020 and expire in June 2022.

In September 2020, Dr. Brown moved for summary judgment. In his motion and supportive documentation, Dr. Brown explained that he was recruited by Mr. Gilmore in 2016 to take the job at ACMC; that he fully expected his contract to be renewed and was shocked to be summarily terminated; that he did not solicit any ACMC patients or take any hospital documents; that he was already board certified and received no special training, trade secrets, or confidential business information from ACMC; and that he and his wife purchased an expensive home in Ashley County in reliance on Gilmore's repeated assurances that ACMC wanted him to work for the long term. Dr. Brown pointed out that ACMC does not have any clinics or facilities outside Ashley County and that 99 percent of the patients he treated at ACMC came from Ashley County, so there was no reasonable basis to prevent him from working in any county or parish adjacent to Ashley County. This, he said, simply prevented him from making a living at a reasonable driving distance from his

home. Thus, the covenant's geographic extent was overbroad. The three-year prohibition was unreasonably long, he said, because it only served to prevent ordinary competition, and it unreasonably restricted the public's right of access to obstetricians and gynecologists of their choosing. Dr. Brown averred that he had not heard back from the Drew County hospital after Mr. Gilmore advised that hospital about the covenant not to compete. Dr. Brown swore in his affidavit that he and his wife did not want to leave their nice home in Ashley County and move away, but he needed a job, and the need for work forced them to sell their home and move to Virginia. He argued that non-compete provisions are not favored under Arkansas law and that this one should be declared invalid and void. He added that whether a contract is invalid as against public policy is a question of law for the courts, not a fact-finder, and that this litigation was the proper means for him to get relief from the shackles of these unfair restrictions.

ACMC responded that it should be granted summary judgment, not Dr. Brown, because Dr. Brown's claim was not ripe, is moot, and sought an improper advisory opinion from the circuit court. ACMC asserted that because Dr. Brown had since taken a job out of state and was presently working, there was no controversy in existence between ACMC and Dr. Brown. Moreover, although ACMC believed the covenant not to compete to be reasonable and valid, there remained questions of fact on the validity of the covenant not to compete itself, preventing summary judgment to be entered in Dr. Brown's favor at this point.

In December 2020, the circuit court granted ACMC's motion for summary judgment, denied Dr. Brown's motion for summary judgment, and dismissed Dr. Brown's complaint. The circuit court reasoned that there was "not now, nor was there ever an actual controversy" between the parties. The circuit court explained that Dr. Brown's being offered a job or setting up a medical practice within the time and space boundaries of the covenant not to compete would have created an actual controversy, but absent that, there was nothing to litigate. The circuit court did not decide whether the covenant not to compete was valid. This appeal followed.

A party seeking a declaratory judgment must still demonstrate a justiciable controversy. A case is nonjusticiable when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Monsanto Co. v. Ark. State Plant Bd.*, 2021 Ark. 103, 622 S.W.3d 166. In *Nelson v. Arkansas Rural Med. Prac. Loan & Scholarship Bd.*, 2011 Ark. 491, 385 S.W.3d 762, our supreme court considered a case filed pursuant to our declaratory-judgment statute and explained that the statute was applicable only where there is a present actual controversy, all interested persons are made parties, and only where justiciable issues are presented. A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events; the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote. *Id.*

Issues of law such as justiciability are reviewed de novo on appeal. *Palade v. Bd. of Trs. of the Univ. of Ark. Sys.*, 2022 Ark. 119, 645 S.W.3d 1. We hold that the circuit court erred.

There is an existing geographically broad, three-year covenant not to compete. Dr. Brown tried to gain employment in Drew County, one of the prohibited counties, shortly after his contract was not renewed with ACMC, and ACMC's CEO directly thwarted Dr. Brown's effort to gain employment in Drew County. Brown seeks to be relieved from those restrictions, which will not expire until January 31, 2023. This presents an actual controversy between the parties.

ACMC also argued that this matter was moot for the same reasons. A case is moot when a judgment on the matter would have no practical effect on an existing legal controversy. *Mahadevan v. Bd. of Trs. of the Univ. of Ark. Sys.*, 2021 Ark. 208, 633 S.W.3d 756. Dr. Brown's affidavit made clear that he desired to remain in his Arkansas residence and work within a reasonable driving distance of his home. That he accepted employment elsewhere to support himself and his wife does not nullify the fact that Dr. Brown will still be subject to this covenant not to compete until it expires on January 31, 2023, so this matter is not moot.[2]

The circuit court did not address the enforceability of the covenant not to compete, and we will not address the merits of enforceability for the first time at the appellate level. If there is no ruling by the circuit court on an issue, there is nothing for this court to review and determine. *Peck v. Peck*, 2019 Ark. App. 190, 575 S.W.3d 137. The validity of such a

[2]The evidence in this record indicates that Dr. Brown's employment contract in Virginia expired on June 30, 2022.

covenant depends on the facts and circumstances of each case, *Mercy Health Sys. of Nw. Ark., Inc. v. Bicak*, 2011 Ark. App. 341, 383 S.W.3d 869, and there are a multitude of factors to consider.[3] We reverse and remand to the circuit court for further proceedings.

Reversed and remanded.

VIRDEN and WHITEAKER, JJ., agree.

Gibson & Keith, PLLC, by: *C.C. Gibson III*, for appellant.

Friday, Eldredge & Clark, LLP, by: *Bruce B. Tidwell* and *Joshua C. Ashley*, for appellee.

[3]Covenants not to compete are not looked upon with favor by the law. *Burleigh v. Ctr. Point Contractors, Inc.*, 2015 Ark. App. 615,474 S.W.3d 887. A party challenging the validity of a covenant not to compete must show that it is unreasonable and contrary to public policy. *Id.* For a noncompete agreement to be valid, these three requirements must be met: (1) the covenantee must have a valid interest to protect; (2) the geographical restriction must not be overly broad; and (3) a reasonable time limit must be imposed. *Id.* However, an employer may not shield itself from ordinary competition. *Id.* The restraint imposed upon one party must not be greater than is reasonably necessary for the protection of the other and not so great as to injure a public interest. *Id.* Noncompete agreements in employment contracts are subject to stricter scrutiny than those connected with a sale of business. *Id.* Where a noncompete agreement grows out of an employment relationship, appellate courts have found an interest sufficient to warrant enforcement of the agreement only in those cases where the employer provided special training, or made available trade secrets, confidential business information, or customer lists, and then only if it is found that the employee was able to use the information so obtained to gain an unfair competitive advantage. *Id.*