[Cite as *Gen. Medicine, P.C. v. Manolache,* 2011-Ohio-340.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94861

GENERAL MEDICINE, P.C.

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

PETRICA MANOLACHE, M.D.

DEFENDANT-APPELLEE/
CROSS-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-586654

BEFORE: Celebrezze, P.J., Jones, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 27, 2011

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, General Medicine, P.C. ("General Medicine"), appeals from a jury verdict finding that appellee, Dr. Petrica Manolache, breached a noncompetition covenant between the parties, but caused no damages in doing so. After a thorough review of the record and law, we affirm.

{¶ 2} General Medicine is a company engaged in the business of providing medical services to nursing home facilities. At the completion of Dr. Manolache's medical school residency in 1999, he found employment with General Medicine providing primary physician services to patients in various nursing homes in and around Cleveland, Ohio. As a condition of employment, Dr. Manolache agreed to certain terms, including a two-year noncompetition covenant where he agreed not to compete with General Medicine within a 20-mile radius from any facility he practiced at while in its employ. In 2001, the employment contract was renegotiated to amend the noncompetition covenant to only a one-year duration.

{¶ 3} Dr. Manolache provided medical services on behalf of General Medicine at University Manor Health and Rehabilitation Center ("University Manor"), Hillside Plaza ("Hillside"), Cedarwood Plaza ("Cedarwood"), Grand Oaks, and Grand Pavilion.[1]

{¶ 4} Pursuant to the employment agreement, in November 2005, Dr. Manolache sent notice to General Medicine's owner, Dr. Thomas Prose, informing him that he did not wish to renew his employment contract when it expired in the middle of 2006. General Medicine began the process of recruiting a replacement. However, a dispute arose regarding Dr.

[1] Hillside and Cedarwood were managed by the same company, Legacy Health Services ("Legacy"); and Grand Oaks and Grand Pavilion were controlled by Embassy Healthcare ("Embassy").

Manolache's performance and, as a result, he was terminated on March 13, 2006.

{¶ 5} Dr. Manolache obtained malpractice insurance and returned to treating patients at the Hillside facility approximately one month following his termination, and he had returned to Cedarwood, University Manor, and Grand Oaks by the end of 2006. General Medicine discontinued providing services at the five facilities soon after Dr. Manolache reentered them.

{¶ 6} On March 14, 2006, General Medicine filed a declaratory action seeking review of the enforceability of the noncompetition clause and injunctive relief. On September 28, 2006, the trial court ruled that the provision was per se unenforceable because it involved a physician and violated R.C. 3721.13(A)(7) regarding patients' rights to choose their physicians.

{¶ 7} In a previous appeal, *Gen. Med. P.C. v. Manolache*, Cuyahoga App. No. 88809, 2007-Ohio-4169 ("*Manolache I*"), this court determined that R.C. 3721.13 did not per se prohibit noncompete agreements in physician employment contracts. This court directed the trial court to apply the factors set forth in *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 325 N.E.2d 544, to determine whether and to what extent the provision in question was enforceable.

{¶ 8} During pretrials, the trial court partially granted General Medicine's motion for summary judgment and ruled that the noncompetition provision was enforceable, but limited its scope to the five facilities at which Dr. Manolache had practiced while in General Medicine's employ. The court also allowed Dr. Manolache to present evidence that he saw only those patients at the facilities who requested his services pursuant to their rights under R.C. 3721.13. Trial then commenced to determine whether Dr. Manolache breached the agreement and, if breached, what amount of damages should be awarded.

{¶ 9} At trial, Dr. Manolache presented evidence that no damages resulted because General Medicine did not have any contracts with the facilities, and it lost the business of those facilities based on its own actions. Prior to Dr. Manolache's return to the facilities, General Medicine provided a replacement physician whose performance was unsatisfactory. The replacement was asked not to return to several facilities, and another replacement was not provided.

{¶ 10} Dr. Gregory Hall, medical director of University Manor, testified that as a result of the replacement physician's performance, the relationship with General Medicine was terminated before Dr. Manolache returned to University Manor. He further testified that General Medicine had no

contract with University Manor for physician services, and none was produced by General Medicine.

{¶ 11} Darla Handler, the chief operating officer of Embassy, testified that Embassy terminated its relationship with General Medicine as a result of the performance of Dr. Manolache's replacement.

{¶ 12} Bruce Daskal, the chief executive officer of Legacy, stated that General Medicine did not replace Dr. Manolache, and even if they did attempt to provide a replacement, Legacy would not have accepted because of the strained relationship with General Medicine and Legacy's decision to partner with doctors in the community to see their residents. Steven Daskal, administrator of the Hillside facility, testified that General Medicine never provided a replacement for Dr. Manolache.

{¶ 13} As a result of this testimony, the jury determined that Dr. Manolache breached the noncompetition agreement, but that no damages resulted.

Law and Analysis

{¶ 14} General Medicine appeals from this determination raising three assignments of error.

R.C. 3721.13

{¶ 15} First, General Medicine argues that "[t]he trial court erred in holding that a patient's limited right to choose a physician, as set forth in

[R.C.] 3721.13, supports an affirmative defense to General Medicine's breach-of-contract claim."

{¶ 16} Addressing similar covenants, the Tenth District noted that "[r]estrictive covenants not to compete are disfavored by law. *Ohio Urology, Inc. v. Poll* (1991), 72 Ohio App.3d 446, 452, 594 N.E.2d 1027, 1031. This disfavor is especially acute regarding restrictive covenants concerning professional mobility of physicians and access to medical care and facilities, which affect the public interest to a much greater degree. Id. at 452-453, 594 N.E.2d at 1031-1032. * * * However, such restrictive covenants are not *per se* unenforceable and if reasonable may be enforced by injunctive relief. Id. at 454, 594 N.E.2d at 1032-1033." *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (1997), 124 Ohio App.3d 308, 315, 706 N.E.2d 336.

{¶ 17} In a case involving veterinary medicine, the Ohio Supreme Court held that "[a] covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, *and is not injurious to the public*." (Emphasis added.) *Raimonde* at paragraph two of the syllabus.

{¶ 18} The trial court applied the factors set forth in *Raimonde* to this case and determined that a noncompetition covenant could be injurious to the residents of the facilities in question and an abridgment of their statutory

right to choose their own physician as set forth in R.C. 3721.13(A)(7).[2] The trial court allowed Dr. Manolache to argue and present evidence that he treated only those patients who had requested his services pursuant to their rights under this statute.

{¶ 19} General Medicine argues that this right is not plenary and may be abridged by its own clear language. However, the language of the statute contemplates a facility's right to ensure the credentials of physicians providing services to its residents. It does not speak to abridging these rights for the economic purposes of third parties. For support, General Medicine cites *Gen. Med., P.C. v. Morning View Care Ctr.*, Tuscarawas App. No. 2003AP12-0088, 2004-Ohio-4669. In that case, the Fifth District analyzed the statutory provision in question and held that "[t]he plain language of the statute clearly contemplates a facility's ability to place limitations upon a patient's right of choice." Id. at ¶35. This is not a case where a facility is attempting to limit a patient's choice as contemplated in the statute. Here, a third party is trying to limit that choice through

[2] This statute provides, in part, "[t]he right, upon request, to be assigned, within the capacity of the home to make the assignment, to the staff physician of the resident's choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home."

contractual provisions for which neither the facility nor the patients are a party.

{¶ 20} General Medicine also argues that this court implicitly overruled Dr. Manolache's argument that R.C. 3721.13 had any application in this case. It then alleges that the trial court ignored the law of the case as directed by this court.[3] That is not the holding in *Manolache I*. We remanded the case so the trial court could properly apply the test developed in *Raimonde*, which includes an analysis of the extent the covenant is injurious to the public. *Manolache I* at ¶17. This covenant abridges a statutory right, which is an important factor in the lower court's analysis and one we specifically directed it to consider.

{¶ 21} In the end, even if done in error, these arguments do not amount to reversible error in light of the jury's determination that Dr. Manolache breached the noncompetition covenant. The trial court allowed him to present evidence that the covenant was not breached because he returned to the facilities to see those patients that had specifically requested his services. Even if this was done in error, the jury determined that, in spite of the evidence offered by Dr. Manolache, he breached the covenant. General Medicine argues consistent

[3] The law of the case doctrine is "[t]he doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal." Black's Law Dictionary, (9 Ed.2009). See, also, *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410 ("[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.").

with the holdings in *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 1999-Ohio-309, 709 N.E.2d 162, which is based on the holding in *Ricks v. Jackson* (1959), 169 Ohio St. 254, 159 N.E.2d 225, that "[i]t is error to charge a jury with respect to the issue of assumption of risk where there is no evidence to support that issue." Id. at paragraph three of the syllabus. However, the court went on to note that "there may be instances where a charge such as that given on assumption of risk in the instant case can be regarded as not prejudicial." Id. at 257. That is the case here.

Directed Verdict

{¶ 22} General Medicine next argues that "[t]he trial court erred in denying [its] motion for a directed verdict as to causation."

{¶ 23} Civ.R. 50(A) sets forth the grounds upon which a motion for directed verdict may be granted. A motion is to be granted when, construing the evidence most strongly in favor of the non-moving party, the trial court finds that reasonable minds could come to only one conclusion and that conclusion is adverse to the non-moving party. Civ.R. 50(A)(4); *Crawford v. Halkovics* (1982), 1 Ohio St.3d 184, 438 N.E.2d 890; *The Limited Stores, Inc. v. Pan Am. World Airways, Inc.*, 65 Ohio St.3d 66, 1992-Ohio-116, 600 N.E.2d 1027.

{¶ 24} A directed verdict is appropriate where the party opposing it has failed to adduce any evidence on the essential elements of the claim. *Cooper v. Grace Baptist Church* (1992), 81 Ohio App.3d 728, 734, 612 N.E.2d 357. The issue to be determined involves a test of the legal sufficiency of the evidence to

allow the case to proceed to the jury, and it constitutes a question of law, not one of fact. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695, 586 N.E.2d 141; *Vosgerichian v. Mancini Shah & Assoc.* (Feb. 29, 1996), Cuyahoga App. Nos. 68931 and 68943.

{¶ 25} Since a directed verdict presents a question of law, an appellate court conducts a de novo review of the lower court's judgment. *Orbit Electronics, Inc. v. Helm Instrument Co., Inc.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶30.

{¶ 26} General Medicine argues, based on its prior experience, including its physicians servicing several of the facilities in question prior to Dr. Manolache, that without Dr. Manolache's return, it would have been able to continue servicing these facilities. However, Dr. Manolache offered testimony demonstrating that the facilities chose to terminate their relationships with General Medicine as a result of the poor performance of Dr. Manolache's replacement or strategic changes within the facilities.

{¶ 27} The testimony of those in charge of the facilities in question, as discussed above, puts causation in dispute and makes a directed verdict on the issue inappropriate. Construing the evidence most strongly in favor of Dr. Manolache, reasonable minds could reach varying conclusions. Therefore, the trial court did not err in denying General Medicine's motion for a directed verdict regarding causation.

Manifest Weight

{¶ 28} Finally, General Medicine, argues that "[t]he jury's finding that Dr. Manolache's breach did not cause damages was against the manifest weight of the evidence."

{¶ 29} It is well established that when some competent, credible evidence exists to support the judgment rendered by the trial court, an appellate court may not overturn that decision unless it is against the manifest weight of the evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. The knowledge a trier of fact gains through observing the witnesses and the parties in any proceeding (i.e., observing their demeanor, gestures, and voice inflections and using these observations in weighing the credibility of the proffered testimony) cannot be conveyed to a reviewing court by a printed record. *In re Satterwhite*, Cuyahoga App. No. 77071, 2001-Ohio-4137, citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. In this regard, the reviewing court in such proceedings should be guided by the presumption that the trier of fact's findings were indeed correct. *Seasons Coal Co.*, supra. As the Ohio Supreme Court has stated, "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178.

{¶ 30} General Medicine bases its arguments for this assignment of error on those raised above addressing the directed verdict issue. Similarly,

the people tasked with staffing decisions at the five facilities all testified that their respective relationships with General Medicine ended as a result of the poor performance of Dr. Manolache's replacement or reasons independent of Dr. Manolache's return to those facilities. Accordingly, the jury's verdict is not against the manifest weight of the evidence.

Dr. Manolache's Cross-Appeal

{¶ 31} Dr. Manolache raises two issues in his cross-appeal, but requests that this court only address them should we find merit in any of General Medicine's assignments of error.[4] While unusual, such a conditional request is not without precedent and is allowed by App.R. 3(C). See *Daniels v. Cooper* (Aug. 30, 1984), Mahoning App. No. 82CA134 ("Cross-appellants have styled their cross-appeal as a conditional appeal. They only seek consideration of the utility service responsibility if this court chose to remand the case on appellant's assignments of errors. Because the lower court has done an exemplary job in attaining equity between the parties, we affirm the trial court's order in its entirety. By cross-appellant's own consent, therefore, we need not address his assignments of error."). Having overruled General Medicine's assigned errors, we need not address Dr. Manolache's cross-appeal.

[4] These errors state: "The trial court erred in finding that General Medicine had standing[,]" and "[t]he trial court erred in granting a partial directed verdict on breach of contract claim."

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR