



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. CARUSO, M.D.,)
P.A. T/A SEASIDE)
GASTROENTEROLOGY)
CONSULTANTS,)

Plaintiff Below)
Appellant,)

v.)

HEATHER BARTON, M.D.)
Defendant Below)
Appellee.)

C.A. No. 350, 2024

Court Below: Superior Court of the
State of Delaware

C.A. No. N21C-10-248 EMD

PLAINTIFF BELOW-APPELLANT'S
SECOND AMENDED OPENING BRIEF

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NATURE OF THE PROCEEDINGS

The issues of this matter are quite straightforward. This matter directly relates to a core tenant of Delaware law and policy, namely the right of parties to have their contract enforced according to the parties' agreed upon terms.

Here, Defendant, Heather Barton, M.D. ("Defendant") entered into a valid and enforceable Employment Agreement (the "Agreement") with Plaintiff, Richard F. Caruso, M.D., P.A., trading as Seaside Gastroenterology Consultants ("Plaintiff" or "Appellant"). Ultimately, Defendant knowingly breached the terms of the Agreement.¹ As Defendant consequently refused to pay the agreed upon amount for damages due to her breach, which was stipulated in the terms of the Parties' Agreement, Plaintiff filed this action against Defendant on October 28, 2021 ("Compl.") asserting a claim for breach of contract.² Thereafter, Plaintiff filed a Motion for Summary Judgment on March 25, 2024.³ Defendant filed a Cross-Motion for Summary Judgment March 25, 2024.⁴ Oral argument on the Parties' Motions for Summary Judgment was held on July 12, 2024, wherein counsel presented their respective arguments with regard to the enforceability of the liquidated damages

¹ Appendix at A68, A74.

² Appendix at A59-63.

³ Appendix at A101-111.

⁴ Appendix at A112-120.

provision in the Parties' Agreement.⁵ On July 25, 2024, the Superior Court granted Defendant's Cross-Motion and denied Plaintiff's Motion.⁶

Incongruous with Delaware precedent, the Superior Court refused to enforce the plain language of the Agreement. Rather than analyzing the validity of the liquidated damages clause of the Parties' Agreement and considering the Parties' intentions and situational context at the time of contracting, the Superior Court baselessly ruled that the liquidated damages clause was unenforceable as a penalty without applying relevant Delaware law.⁷ The Superior Court's conclusion was unsupported by established Delaware law and policy, as well as the factual record. Therefore, the Superior Court's decision should be reversed, with summary judgment entered for Plaintiff.

This is Plaintiff Below-Appellant's Second Amended Opening Brief on appeal from the Superior Court's decision on Plaintiff's dispositive Motion for Summary Judgment.

⁵ Appendix at A140-166.

⁶ Appendix at A187.

⁷ Appendix at A167-184.

SUMMARY OF THE ARGUMENT

Plaintiff Below-Appellant appeals the Superior Court's denial of its summary judgment motion, along with its award of summary judgment to Defendant Below-Appellee, for the reasons stated herein.

1. The Superior Court erred as a matter of law when it failed to grant Plaintiff's Motion for Summary Judgment because the Court misapplied prevailing legal standards of Delaware in its ruling on Plaintiff's claims.

2. The Superior Court erred as a matter of law when it failed to properly apply the reasonableness analysis to the liquidated damages provision of the Parties' Agreement, producing a result inconsistent with conclusions reached by Delaware courts considering analogous conditions.

3. The Superior Court erred as a matter of law when it declared that the liquidated damages provision in the Parties' Agreement was a penalty and therefore unenforceable.

4. In light of these errors, the Court should vacate the judgment of the Superior Court and enter judgment in favor of Plaintiff based on the absence of an issue of material fact and correct application of pertinent legal standards.

STATEMENT OF THE FACTS

Plaintiff filed a civil cause of action against Defendant on October 28, 2021 (“Compl.”), asserting breach of contract stemming from an employment agreement between the Parties.⁸ As such, the action for breach of contract was brought in relation to a physician employment agreement between the Parties for enforcement of the liquidated damages provision.⁹

By way of background, on November 6, 2017, Defendant entered into a valid and enforceable Employment Agreement with Plaintiff.¹⁰ Plaintiff and Defendant extended the terms and conditions of the November 2017 Agreement on September 14, 2020,¹¹ and again on December 22, 2020.¹² The Parties agreed the terms and conditions of the November 2017 Agreement would be extended until February 28, 2021.¹³

Pursuant to Provision 10 of the Agreement, Defendant agreed to pay Plaintiff One Hundred Thousand Dollars (\$100,000.00) if she engaged in the practice of gastroenterology at any location within ten (10) miles of Plaintiff’s office during the term of the Agreement and for two years following the separation of her employment

⁸ Appendix at A59-63.

⁹ *Id.*

¹⁰ Appendix at A16-30.

¹¹ Appendix at A32.

¹² Appendix at A33.

¹³ *Id.*

at Plaintiff.¹⁴ Provision 10(c) of the Agreement contains the liquidated damages provision at issue and states as follows:

The parties acknowledge and agree that any breach of the foregoing Covenants will cause irreparable damage to Employer, and that the usual amount of damages to which the Employer should be entitled would be difficult to ascertain. Employee therefore agrees that upon the occurrence of a breach of one or more of the foregoing Covenants, she will pay to the Employer as liquidated damages and not as a penalty, the sum of One Hundred thousand (\$100,000.00) dollars.¹⁵

In January of 2020, while Defendant was employed with Plaintiff she began having discussions with Beebe Healthcare in Lewes, Delaware, regarding a gastroenterologist position at Beebe.¹⁶ As Defendant was aware, Beebe is located within ten (10) miles of Plaintiff's office.¹⁷ During those discussions, Defendant acknowledged she would have to pay Plaintiff, \$100,000.00 dollars if she went to work for Beebe.¹⁸ On February 28, 2020, Defendant emailed Beebe stating:

“Thank you for the follow up. I am still thinking about making a change. I reviewed my contract with Seaside and I would have to pay a non-compete of 100k which is weighing heavily in my decision making process. I spoke to Brendan Wiggins again and I think Beebe would be a great opportunity for me.”¹⁹

¹⁴ Appendix at A23-24.

¹⁵ *Id.*

¹⁶ Appendix at A34-35, A80.

¹⁷ Appendix at A67.

¹⁸ Appendix at A37.

¹⁹ *Id.*

Prior to Defendant's abrupt and unexpected departure, it is undisputed the parties were engaged in discussions about Defendant buying into both the endoscopy center as well as the practice.²⁰ The Parties had even exchanged a term sheet.²¹ As Defendant admitted in her deposition, she continued to have discussions with Beebe while still employed with Plaintiff.²² In fact, Defendant admitted that as of November 29, 2020, she confirmed with Beebe that she was very interested in making the transition to their organization, while still leading Plaintiff to believe she was interested in a partnership agreement.²³

With full knowledge of her agreement and obligation to pay Plaintiff \$100,000.00 if she engaged in the practice of gastroenterology within ten (10) miles of Plaintiff's office, Defendant accepted a position with Beebe on February 16, 2021.²⁴ Thereafter, Defendant provided her notice of resignation to Plaintiff on February 16, 2021.²⁵ Defendant began employment with Beebe practicing gastroenterology in June of 2021, and failed to pay Plaintiff the agreed upon amount for engaging in the practice of gastroenterology within ten (10) miles of Plaintiff's office.²⁶

²⁰ Appendix at A74-76.

²¹ Appendix at A79.

²² Appendix at 79-81.

²³ *Id.*

²⁴ Appendix at A67, A57-58.

²⁵ Appendix at A57-58.

²⁶ Appendix at A68, A74.

Defendant admits she failed to pay the agreed upon amount for damages due to Plaintiff as a result of her breach.²⁷ When questioned during her deposition as to why she failed to pay the agreed amount of money if she worked within the designated area, Defendant responded she did not have any other option because she could not secure an agreeable partnership agreement with Plaintiff.²⁸ However, upon further questioning Defendant admitted her Agreement did not entitle her to a partnership agreement.²⁹

In the wake of Defendant's resignation on February 16, 2021, and notification that she would be working with a competitor, Plaintiff was faced with the dilemma of being forced to either bear the unquantifiable expenses of hiring, relocating, and training a new gastroenterologist for his practice or closing his practice and beginning to work for another practice. In May of 2021, several months after receiving notice from Defendant that she would be leaving the practice, Plaintiff executed a bill of sale with AmSurg on May 11, 2021, and an employment agreement with EHG GI DE, P.C. to commence on July 19, 2021. However, Plaintiff continued to operate under Richard Caruso, MD, P.A. T/A Seaside Gastroenterology Consultants, until July 19, 2021.³⁰

²⁷ *Id.*

²⁸ Appendix at A83-84.

²⁹ *Id.*

³⁰ Appendix at A124.

In addition to the aforestated, Appellant incorporates the Statement of Facts sections from Plaintiff's Motion for Summary Judgment³¹ and Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment.³²

³¹ Appendix at A101-A111.

³² Appendix at A121-A131.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

A. Questions Presented

Appellant presents the following questions to the Court pursuant to Delaware Supreme Court Rule 8.

1. Did the Superior Court err as a matter of law in denying Plaintiff's Motion for Summary Judgment?³³

2. Did the Superior Court erroneously apply Delaware law upon mischaracterization of the operative facts, and therefore improperly rule the liquidated damages provision in the Parties' Agreement to be unenforceable?³⁴

3. Did the Superior Court err as a matter of law in failing to apply precedential Delaware law to assess whether the liquidated damages provision in Parties' Agreement is enforceable?³⁵

B. Scope of Review

The Delaware Supreme Court examines *de novo* questions of law decided by a lower court and thus exercises plenary review.³⁶ This Court reviews *de novo* the

³³ Appendix at A101-A111, A112-A120, A162-A164, A170-A180, A185, A187.

³⁴ Appendix at A101-A111, A112-A120, A162-A164, A170-A180, A185, A187.

³⁵ Appendix at A101-A111, A112-A120, A162-A164, A170-A180, A185, A187.

³⁶ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (citing *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927 (Del. 1982)).

“trial court’s formulation and application of legal principles.”³⁷ On appeal of a grant or denial of a motion for summary judgment, the Delaware Supreme Court reviews the lower court’s decision *de novo*, applying the same standard as the trial court.³⁸ In such review, the Supreme Court considers “*de novo* the factual record before the trial court and examine[s] anew the legal conclusions to determine whether error occurred in applying pertinent legal standards.”³⁹ The Delaware Supreme Court’s review extends to both “the facts and the law in order to determine whether or not the undisputed facts entitled the movant to judgment as a matter of law.”⁴⁰

Accordingly, the Delaware Supreme Court will review whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there [was] no genuine issue as to any material fact and the moving party [was] entitled to judgment as a matter of law.”⁴¹ A dispute about a material fact is genuine when “the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.”⁴² Where there are some disputed facts, summary judgment is still warranted if the undisputed facts and the

³⁷ *Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080,1085 (Del. 2008) (citing *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999)).

³⁸ *GMG Ins. Agency v. Edelstein*, 2024 WL 4440459, at *4 (Del. 2024).

³⁹ *Brzoska v. Olson*, 668 A.2d 1355, 1360 (Del. 1995).

⁴⁰ *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

⁴¹ *Kuratle Contracting, Inc. v. Linden Green Condominium Assoc.*, 2013 WL 6140000, at *9 (Del. Super. 2013) (quoting Super. Ct. Civ. R. 56(c)).

⁴² *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986)).

non-movant's version of the disputed facts entitles the movant to judgment as a matter of law.⁴³ Thus, the issue is “whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law.”⁴⁴

C. Merits of the Argument

Plaintiff contends that summary judgment should have been granted in his favor based upon the factual record with correct application of operative legal standards by the trial court.

An analysis of the validity and enforceability of a liquidated damages provision in a physician’s agreement should begin with the operative Delaware statutory text and case law. Instead, the Superior Court ignored the relevant Delaware law and applied misaligned law related to the enforceability of limited partnership agreements and incomparable employment agreements.⁴⁵ In its analysis of the validity and enforceability of liquidated damages provision in the Parties’ Agreement, the Superior Court should have applied the two-pronged test from *Lee Builders* to determine whether the liquidated damages were reasonable.⁴⁶ However, the Superior Court failed to conduct this analysis, arbitrarily deeming the liquidated

⁴³ *Merrill*, 606 A.2d at 99-100.

⁴⁴ *Id.* (quoting Super. Ct. Civ. R. 56(c)).

⁴⁵ Appendix at A174-179.

⁴⁶ *Lee Builders v. Wells*, 103 A.2d 918, 919 (Del.Ch. 1954).

damages provision an unenforceable penalty.⁴⁷ Moreover, the Superior Court articulated no basis for its deviation from established Delaware law. Therefore, the Superior Court's ruling should be reversed.

1. The Superior Court erred in its denial of Plaintiff's Motion for Summary Judgment when it failed to apply prevailing Delaware law related to the validity of liquidated damages in physician employment agreements.

It is well-settled that in order to sustain an action for breach of contract Plaintiff must show a valid contract with Defendant, a breach of an obligation by Defendant which was imposed by the contract, and that damages resulted from the breach.⁴⁸ In Delaware, as a general principle, unambiguous contracts are enforced as written.⁴⁹ Accordingly, Delaware law strongly protects parties' contractual rights, supporting that "[p]arties have a right to enter into good and bad contracts[;] the law enforces both."⁵⁰

Here, the facts of the matter are undisputed. The Parties agree that they entered into a valid and enforceable contract through their mutual attestation of the Agreement on November 6, 2017, and subsequent extensions of the Agreement on

⁴⁷ Appendix at A174-179.

⁴⁸ *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *4 (Del. Ch. Jan. 28, 2020) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

⁴⁹ *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *7 (Del. Super. Ct. June 8, 2017).

⁵⁰ *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

September 14, 2020, and December 22, 2020.⁵¹ In the terms of the Agreement, in exchange for the promises, representations, and compensation made to Defendant she agreed, *inter alia*, not to compete in any way, either directly or indirectly, and further agreed not to “consult with or have any interest in any business, . . . corporation or other entity, whether as an employee . . . or otherwise, which engages in the practice of Gastroenterology” at any location within ten (10) miles of Plaintiff’s office, during the term of her agreement and for two years subsequent.⁵²

By way of both her initial Agreement and two subsequent extensions, Defendant agreed and represented that any breach of the covenants contained in the Agreement would cause irreparable damage to Plaintiff.⁵³ As the Parties mutually agreed at the time of contracting that the amount of the damages would be difficult to ascertain, Defendant agreed to pay Plaintiff as liquidated damages \$100,000.00.⁵⁴ Additionally, Defendant further agreed this amount was not a penalty.⁵⁵ Thereafter, Defendant undeniably breached the terms of the Agreement by accepting employment with Beebe and engaging in the practice of Gastroenterology within ten (10) miles of Plaintiff’s office within two years of the Agreement and failing to pay

⁵¹ Appendix at A16-30, A32-33.

⁵² Appendix at A23-24.

⁵³ Appendix at A23-24, A32-33.

⁵⁴ Appendix at A23-24.

⁵⁵ *Id.*

Plaintiff the agreed upon sum of damages.⁵⁶ Defendant has acknowledged her obligation to pay Plaintiff \$100,000.00 if she accepted employment with Beebe, which she was aware was within 10 miles of Plaintiff's office.⁵⁷

Although Delaware law prohibits covenants not to compete in employment agreements among physicians which would restrict the right of a physician "to practice medicine in a particular locale and/or for a defined period of time," it is further stipulated that the enforcement of liquidated damages provisions which require payment of damages in an amount that is reasonably related to the injury in lieu of injunctive enforcement of a physician noncompetition covenant is expressly permitted.⁵⁸ Accordingly, in physician employment agreements, such provisions requiring payment of damages reasonably related to the injury may include "damages related to competition."⁵⁹

Delaware courts apply a two-prong analysis to determine the validity of liquidated damages provisions. First, the calculation of damages must be uncertain or difficult to ascertain at the time of contracting.⁶⁰ Second, the amount stipulated must be a reasonable estimate of damages which could conceivably flow from the

⁵⁶ Appendix at 37, 68, 74.

⁵⁷ Appendix at A31.

⁵⁸ 6 *Del. C.* § 2707.

⁵⁹ *Id.*

⁶⁰ *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 651 (Del. 2006) (quoting *Lee Builders*, 103 A.2d 918 at 919).

breach.⁶¹

These principles should have guided the Superior Court's analysis of the undisputed facts and led to the Court's evaluation of the reasonableness of the liquidated damages. While the Superior Court found that Defendant engaged in some competition with Plaintiff, it seemingly concluded without any factual or legal analysis that the \$100,000.00 liquidated damages amount was not tethered to any damages. However, the Parties articulated a number of damages caused by Defendant's breach, including but not limited to the closure of Plaintiff's practice shortly after Defendant's departure. Accordingly, the Superior Court misapplied the facts and law in this instance by concluding the liquidated damages were a penalty.⁶²

2. The Superior Court erred in its denial of Plaintiff's Motion for Summary Judgment when it failed to properly analyze the enforceability of the liquidated damages provision in the Parties' Agreement.

The purpose of liquidated damages provisions is to determine in advance the measure of damages awardable to the non-breaching party.⁶³ Accordingly, liquidated damages provisions are designed to provide a way to render certain and definite damages that would otherwise be uncertain or not easily susceptible to

⁶¹ *Id.*

⁶² Appendix at A173-179.

⁶³ *Anderson v. McDonald*, 2006 WL 758460, at *1 (Del. C.P. Mar. 23, 2006).

proof.⁶⁴ The principle governing a liquidated damages clause is that it should be an agreed-upon sum between the parties to satisfy any loss or injury resulting from a breach of contract.⁶⁵

In Delaware, liquidated damages are presumptively valid and enforceable, unless the liquidated damages constitute a penalty.⁶⁶ Therefore, if the damages serve to punish, rather than to compensate the non-breaching party for the breach, the liquidated damages will be construed as a penalty.⁶⁷ The determination of whether the liquidated damages provision is unenforceable as a penalty involves a review of the intent of the parties to the contract at the time of contracting.⁶⁸

Pursuant to Delaware law, the two-pronged *Lee Builders* test is applied to determine whether a liquidated damages clause is valid and enforceable or if it is unenforceable as it functions as a penalty.⁶⁹ As such, for a liquidated damages clause to be valid and enforceable: (1) the damages which the parties might reasonably anticipate must be difficult to ascertain at the time of the contracting because of their indefiniteness or uncertainty, and (2) the amount stipulated must either be a

⁶⁴ *Id.* (see also *S.H. Deliveries, Inc. v. TriState Courier & Carriage, Inc.*, 1997 WL 817883, at *2 (Del. Super. Ct. May 21, 1997)).

⁶⁵ *Christiana Med. Grp., P.A. v. Ford*, 2008 WL 162829 at *3 (Del. Super. Ct. Jan. 16, 2008) (see also *Kold, LLC v. Croman*, 2014 WL 7008431, at *4 (Del. Super. Ct. Nov. 25, 2014)).

⁶⁶ *Kold*, 2014 WL 7008431, at *4.

⁶⁷ *S.H. Deliveries, Inc.*, 1997 WL 817883, at *2.

⁶⁸ *Delaware Bay*, 900 A.2d at 650.

⁶⁹ *Lee Builders*, 103 A.2d at 919.

reasonable estimate of damages which would probably be caused by the breach or must be reasonably proportionate to the damages which have been reasonably caused by the breach.⁷⁰

The Superior Court ruled that the liquidated damages provision in the Parties' Agreement was unenforceable as a penalty; however, it failed to apply the two-pronged test in its determination. Instead, the Superior Court misapplied and deviated from prevailing Delaware law. The Superior Court relied upon three cases in its ruling: *Cantor Fitzgerald, L.P. v. Ainslie*⁷¹; *Faw, Casson & Co., L.L.P. v. Halpen*⁷²; and *Lyons Insurance Agency, Inc. v. Wark*.⁷³

The Superior Court's reliance upon *Cantor Fitzgerald* is an erroneous application of law as that case primarily concerns the enforceability of a "forfeiture for competition" provision within a limited partnership agreement.⁷⁴ Moreover, the Superior Court failed to recognize that *Faw* and *Lyons* are distinguishable from this case as those matters specifically pertain to employment agreements with an insurance agent and an accountant. In employment agreements for insurance agents and accountants, injunctions are an available remedy for violations of non-compete

⁷⁰*Delaware Bay*, 900 A.2d at 651 (quoting *Lee Builders*, 103 A.2d at 919) (see also *Kold*, 2014 WL 7008431 at *6).

⁷¹ *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024).

⁷² *Faw, Casson & Co., L.L.P. v. Halpen*, 2001 WL 985104 (Del. Super. Ct. Aug. 7, 2001)

⁷³ *Lyons*, 2020 WL 429114 (Del. Ch. Jan. 28, 2020).

⁷⁴ *Cantor Fitzgerald*, 312 A.3d 674.

agreements.⁷⁵ However, the present matter specifically relates to a physician employment agreement. As aforesaid, injunctive relief is generally void in regard to non-compete provisions in physician employment agreements as Delaware law expressly prohibits non-compete covenants in physician employment agreements which would restrict the right of a physician “to practice medicine in a particular locale and/or for a defined period of time.”⁷⁶ Despite this, the Superior Court erroneously concluded that Plaintiff “could not have enforced the \$100,000 against [Defendant], but they have been able to enforcement injunction against her”, thereby failing to apply the law to the facts in this case and erring as a matter of law.⁷⁷ Therefore, in addition to failing to properly apply the two-pronged test promulgated by Delaware law to determine the validity of the Parties’ liquidated damages provision, the Superior Court erroneously applied case law which is not appurtenant to the circumstances of the present matter due to the available remedies for breach of a non-compete provision in an physician employment agreement.

In applying first prong of the test from *Lee Builders*, the analysis of the validity of the liquidated damages provision in the Parties’ Agreement begins with whether damages which would result from a breach by Defendant were indefinite or

⁷⁵ *Burriss Foods, Inc. v. Razzano*, 1984 WL 8230 at *2 (Del. Ch. 1984) (see also *Hub Grp., Inc. v. Knoll*, 2024 WL 3453863 (Del. Ch. 2024)).

⁷⁶ 6 *Del. C.* § 2707.

⁷⁷ Appendix at A178.

uncertain at the time of contracting.⁷⁸ Here, the Parties acknowledged in the Agreement and subsequent extensions that “the usual amount of damages to which the Employer should be entitled would be difficult to ascertain.”⁷⁹ Damages related to the Defendant’s future breach of the Agreement were not easily ascertainable at the time which the parties entered the contract. A multitude of factors, including the unquantifiable costs of Plaintiff training Defendant in the specialized field of gastroenterology and incorporating her into Seaside’s practice and community, contribute to the measure of harm which would be caused by her breach, which the Parties agreed was incapable of accurate calculation at the time they entered into the Agreement. As a result of this uncertain appraisal, the parties agreed to liquidated damages in the sum of \$100,000.00.⁸⁰

The second prong of the *Lee Builders* test asks whether the amount of liquidated damages contracted for is reasonable.⁸¹ In order “to fail the second prong of *Lee Builders*, the amount at issue must be unconscionable or not rationally related to *any measure of damages* a party might conceivably sustain.”⁸² The Delaware Supreme Court has previously addressed issues regarding contested liquidated

⁷⁸ *Lee Builders*, 103 A.2d at 919.

⁷⁹ Appendix at A24, A32-33.

⁸⁰ Appendix at A24.

⁸¹ *Lee Builders*, 103 A.2d at 919.

⁸² *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43, 48 (Del. 1997)(emphasis added) (citing *Lee Builders*, 103 A.2d 918 at 919.

damages provisions related to physician contracts, the most analogous case with the present matter being in *Delaware Bay Surgical Services, P.C. v. Swier*.⁸³

In *Delaware Bay*, the parties entered into an employment agreement which provided for a payment of \$25,000.00 by whichever party terminated the contract early.⁸⁴ The Delaware Supreme Court held there was sufficient evidence that calculation of the liquidated damages *at the time of contract* for a breach one year later was uncertain or incapable of accurate calculation.⁸⁵ The Court further held that the amount of liquidated damages in the parties' agreement was "a reasonable forecast, rationally related and not unconscionable" in consideration of the conceivable expenses which could be incurred by the employer due to any future breach by the employee at the time of contracting.⁸⁶

In the Parties' Agreement, Provision 10 clearly specifies the obligation for Defendant's payment of liquidated damages arises as a result of the irreparable harm Plaintiff will sustain due to Defendant's breach rather than as a penalty of such breach.⁸⁷ As such, it is undisputed the Parties agreed Plaintiff would suffer damages because of Defendant's breach.⁸⁸ Pursuant to Delaware law, the Parties' Agreement

⁸³ *Delaware Bay*, 900 A.2d at 649.

⁸⁴ *Id.*

⁸⁵ *Id.* at 651 (emphasis added).

⁸⁶ *Id.*

⁸⁷ Appendix at A23-24.

⁸⁸ *Id.*

is presumptively valid and enforceable as the amount of liquidated damages was rationally related to conceivable damages Plaintiff might sustain as a result of any future breach by Defendant at the time of contracting and is not unconscionable. During the course of Defendant's employment with Plaintiff, Plaintiff devoted considerable resources to supporting Defendant and growing her practice. In part, Defendant was provided an incentive bonus of \$10,000.00 and relocation reimbursement of \$10,000.00.⁸⁹ Plaintiff further provided Defendant with support of unquantifiable value, including training and mentoring in the specialized field of gastroenterology, providing her access to his well-established patient portfolio, and assisting in incorporating her into Seaside's practice and community.

Plaintiff has shown that the liquidated damages in the Parties' Agreement was rationally related to possible damages Plaintiff may incur stemming from any future breach by Defendant at the time of contracting; however, a plaintiff is not required to prove the actual amount of damages he or she sustained as a result of a defendant's breach in order to support an award of liquidated damages. In *Dow Chemical*, the court ruled that it would not require affirmative proof of the amount of actual damages in its review of the reasonableness of an amount of damages to uphold a liquidated damages provision.⁹⁰ The court explained that "[a]lthough a close

⁸⁹ Appendix at A20.

⁹⁰ *Dow Chemical Canada Inc. v. HRD Corp.*, 909 F.Supp.2d 350, 358 (D. Del. 2012).

relationship with actually incurred damages is clearly relevant to the question of whether the stipulated amount is ‘rationally related to any measurable damages conceived’ or ‘unconscionable,’ this Court would be straying from Delaware binding precedent to impose such a requirement as a necessity.”⁹¹

Moreover, considerable Delaware law supports enforcement of liquidated damages provisions in physician employment agreements. By way of example, in *Christiana Med. Grp., P.A. v. Ford*, the employment agreement between the parties contained a provision which explicitly required Dr. Ford to pay Christiana \$100,000.00 in liquidated damages if Dr. Ford provided more than twenty percent of his medical services on an inpatient basis, directly or indirectly, to another hospital affiliated with the Wilmington Hospital or Christiana Care Health System.⁹² The Court found that summary judgement was appropriate where Christiana and Ford explicitly acknowledged in their signed Agreement that Christiana would sustain damages if Ford were to become employed with another hospital.⁹³

In *Ryan v. Orris*, the employment agreement between the parties provided that Orris was required to pay Ryan liquidated damages if he left Ryan’s gastroenterology practice before a period of two years of employment and practiced

⁹¹ *Id.*

⁹² *Christiana*, 2008 WL 162829, at *1.

⁹³ *Id.* at *3.

in the area.⁹⁴ The court held that the liquidated damages clause was valid and enforceable in consideration of the harm to Ryan’s practice and losses that would flow from Orris’s withdrawal from the business, the cost invested in training Orris and introducing him to the area, as well as the costs to retrain his substitute.⁹⁵

Similarly, in *Palekar v. Batra*, the parties agreed to a \$200,000.00 liquidated damages provision for breach of contract.⁹⁶ The defendant argued the damages provision was invalid as the \$200,000.00 was not a valid estimate of the damages injuring the practice because of the breach.⁹⁷ However, the Court found this argument without merit and held that the plaintiff does not have to show the corresponding number of damages that actually occurred.⁹⁸

Additionally, in accordance with Delaware law, a party is not required to actually suffer damages in order to be able to recover liquidated damages pursuant to an agreement.⁹⁹ As liquidated damages are inherently designed to determine in advance a reasonable sum for damages which are uncertain or unquantifiable at the

⁹⁴ *Ryan v. Orris*, 463 N.Y.S.2d 883, 884 (N.Y. App. Div. 1983).

⁹⁵ *Id.* at 885.

⁹⁶ *Bhaskar S. Palekar, M.D., P.A. v. Batra*, 2010 WL 2501517, at *6 (Del. Super. Ct. May 18, 2010).

⁹⁷ *Id.*

⁹⁸ *Id.* at *8. (see also *Unbound Partners Ltd. P'ship v. Invoy Holdings Inc.*, 251 A.3d 1016, 1032–33 (Del. Super. Ct. 2021) (the Court will not strike that number merely because the cost “has become financially inconvenient for a counterparty to honor”).

⁹⁹ *Pierce Associates, Inc. v. Nemours Found.*, 865 F.2d 530 (3d Cir. 1988) (citing *Piccotti's Restaurant v. Gracie's, Inc.*, 1988 WL 15338, at *2 (Del. Super. Ct. 1988)).

time of contracting, such damages “can serve as a substitute for going through the effort of attempting to quantify actual damages.”¹⁰⁰ The point of negotiating a liquidated damages provision is that the parties are uncertain of the amount of damages which may flow from a future breach and therefore so long as they are reasonable they will be upheld.¹⁰¹

Although Plaintiff actually suffered actual damages as a result of Defendant’s breach in the present matter, he merely needs to show that the damages were a reasonable reflection of conceivable damages that could result from Defendant’s breach at the time of contracting. Accordingly, the liquidated damages provision in which the Parties agreed was meant to substitute for going through costly and long-protracted litigation to quantify actual damages. As such, Plaintiff is entitled to recovery of the agreed upon liquidated damages in the amount of \$100,000.00 regardless of proven actual damages.

Based on the evidence cited above, the record is void of any legal or evidentiary support that the Parties liquidated damages provision is unenforceable. Accordingly, it is clear that the Superior Court disregarded the evidence and law related to the validity of the liquidated damages in the Parties’ agreement and instead

¹⁰⁰ *Palekar*, 2010 WL 2501517, at *7.

¹⁰¹ *Delaware Bay*, 900 A.2d at 651 (quoting *Lee Builders*, 103 A.2d at 919) (see also *Kold*, 2014 WL 7008431, at *6).

rendered an improper verdict. Respectfully, if the Superior Court properly applied the law to the facts of this case, judgment should have been rendered in favor of Plaintiff's Motion for Summary Judgment.

CONCLUSION

For the reasons stated herein and in Plaintiff, Below-Appellant's pleadings in support of similar arguments throughout this litigation, Appellant respectfully requests this Court to dismiss the lower Court's ruling and grant Appellant's Motion for Summary Judgment. In the alternative, Plaintiff requests this Honorable Court to reverse and remand this matter for a new trial.

Respectfully submitted,

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