

THE SUPREME COURT OF ARKANSAS HOLDS THAT PARTIAL
SUMMARY JUDGMENT IS APPROPRIATE WHERE MOVANTS
HAVE ESTABLISHED THAT THERE ARE NO GENUINE ISSUES OF
MATERIAL FACT AND THAT THEY ARE ENTITLED TO
JUDGMENT AS A MATTER OF LAW, ALL WHILE SUPPORTING
THEIR CLAIMS WITH ADMISSIBLE EVIDENCE

In *Mercy Health System of Northwest Arkansas v. Bicak*,¹ the Arkansas Supreme Court held that a circuit court's entry of partial summary judgment in favor of a doctor for breach of a covenant not to compete and tortious interference was appropriate because the hospital was unable to offer admissible evidence to support its claims.²

"In 1998, appellant Mercy Health System of Northwest Arkansas, Inc. hired appellee, Ajdahan Bicak, M.D., to work as a family practitioner in its facilities in Rogers, Arkansas."³ As part of the employment agreement, the parties entered into a covenant not to compete.⁴ Late in 2007, Bicak notified Mercy of his intention to terminate their contract by the end of the year.⁵ Two months later, Bicak notified Mercy that he was planning "to open a medical practice in Bentonville in early 2008."⁶ After notifying Mercy, Bicak immediately began advertising the opening of his new office in the local newspapers.⁷ Mercy then filed suit against Bicak, asking for injunctive relief, damages for breach of contract, for using confidential information, for breaching patient record confidentiality, for failing to cooperate in the windup of his remaining work with Mercy, for disclosing Mercy's business and patient information to unauthorized parties, for removing or retaining Mercy's confidential information, and for tortious interference.⁸

Although Bicak denied breaching the contract, he also pled that "any breach was excused by Mercy's prior breach" of imposing him with an unfair obligation to provide care for unassigned patients.⁹ In Bicak's motion for summary judgment, he argued the following: (1) that Mercy could not show that it had either made confidential information available to him or that Bicak used Mercy's confidential information to gain an advantage; (2)

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1. 2011 Ark. App. 341, ___ S.W.3d ___.
 2. *See id.* at 11-13, ___ S.W.3d at ___.
 3. *Id.* at 1, ___ S.W.3d at ___.
 4. *Id.* at 1-2, ___ S.W.3d at ___.
 5. *Id.* at 2, ___ S.W.3d at ___.
 6. *Id.*, ___ S.W.3d at ___.
 7. *Bicak*, 2011 Ark. App. 341, at 2, ___ S.W.3d at ___.
 8. *Id.* at 2-3, ___ S.W.3d at ___.
 9. *Id.* at 3, ___ S.W.3d at ___.

that the geographic restriction violated public policy; (3) that the Mercy's was seeking to enforce the agreement for the sole purpose of establishing a precedent; and (4) that the covenant not to compete was an unreasonable restraint on trade, against public policy, and a restriction on his ability to earn a living.¹⁰ Bicak admitted that two former Mercy employees came to work for him, but only after Mercy let them know "that their jobs were in jeopardy."¹¹ Furthermore, Bicak stated that he did not tortuously interfere, and he noted the following: (1) that Mercy's patients were not obligated to use its doctors or hospitals; (2) that Mercy had not revealed any evidence that his actions were improper or aimed at interfering with Mercy's existing contracts; (3) that Mercy should have no expectation of future business because patients were not bound to continue to seek treatment there.¹² He was opening his practice merely to earn a living.¹³

Both parties filed various exhibits along with their motions, including excerpts from depositions, affidavits, and business records.¹⁴ Bicak stated that Mercy had not provided affidavits from two employees who alleged that Bicak had taken actions that violated patient confidentiality.¹⁵

On June 22, 2010, the circuit court entered a partial summary judgment for Dr. Bicak.¹⁶ After laying out its findings, the court granted Bicak's motion for summary judgment on Mercy's breach of covenant not to compete claim, for using Mercy's patient and business information for his benefit, and for tortious interference.¹⁷ The court denied Bicak's motion for Mercy's breach of patient record confidentiality claim of a "removal of patient records from Mercy's facilities[,] and failure to cooperate in winding up his practice."¹⁸ It is upon this order that Mercy appealed.¹⁹

The only issue on appeal was whether "summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered."²⁰ A statement based on inadmissible hearsay "will not be accepted as the basis

10. *Id.*, ___ S.W.3d at ___.

11. *Id.*, ___ S.W.3d at ___.

12. *Id.* at 3–4, ___ S.W.3d at ___.

13. *Bicak*, 2011 Ark. App. 341, at 3–4, ___ S.W.3d at ___.

14. *Id.* at 4, ___ S.W.3d at ___.

15. *Id.*, ___ S.W.3d at ___.

16. *Id.* at 5, ___ S.W.3d at ___.

17. *Id.* at 6, ___ S.W.3d at ___.

18. *Id.*, ___ S.W.3d at ___.

19. *Bicak*, 2011 Ark. App. 341, at 6, ___ S.W.3d at ___.

20. *Id.*, ___ S.W.3d at ___ (citing *Bisbee v. Decatur State Bank*, 2010 Ark. App. 459, at 5, ___ S.W.3d ___, ___).

for finding a genuine issue of material fact to deny entry of summary judgment.”²¹

The Arkansas Supreme Court disagreed with Mercy’s arguments that there were genuine issues of material facts as to whether it had an interest to protect, whether Bicak used Mercy’s confidential information to gain an advantage, and whether the time and place restrictions were reasonable.²²

A covenant not to compete is enforceable if the covenantee has a valid interest to protect, the geographic restrictions are not overly broad, and the time limit imposed is reasonable.²³ The law generally treats these covenants unfavorably, because they contravene the public policy of “unduly restrict[ing] the public’s right of access to the physicians of their choice.”²⁴

Courts have found interests sufficient to warrant enforcement of covenants growing out of employment or other associational relationships “only in those cases where the covenantee provides special training or made available trade secrets, confidential business information, or customer lists, and then only if it is found that the associate was able to use the information so obtained to gain an unfair competitive advantage.”²⁵ If a restriction “negatively affects a person’s potential employment and ability to earn a living,” courts are less likely to uphold that restriction.²⁶ Geographic restrictions are reasonable if the restriction does not exceed the trade area of the former employer.²⁷

On the covenant not to complete claim, the court concluded that the circuit court appropriately granted partial summary judgment to Dr. Bicak for three reasons.²⁸ First, the hospital did not counter evidence showing that its interest was insufficient to warrant enforcement.²⁹ Second, the covenant was merely designed to eliminate competition.³⁰ Third, it “unreasonably

21. *Bicak*, 2011 Ark. App. 341, at 7, ___ S.W.3d at ___ (citing *Cowan v. Ellison Enters, Inc.*, 93 Ark. App. 135, 142, 217 S.W.3d 175, 179 (2005); *Holt Bonding Co. v. First Fed. Bank of Ark.*, 82 Ark. App. 8, 13, 110 S.W.3d 298, 302 (2003)).

22. *Bicak*, 2011 Ark. App. 341, at 7, ___ S.W.3d at ___.

23. *Id.* at 8, ___ S.W.3d at ___ (citing *Duffy v. Alberty*, 19 Ark. App. 137, 139, 718 S.W.2d 111, 112 (1986)).

24. *Bicak*, 2011 Ark. App. 341, at 7-8, ___ S.W.3d at ___ (citing *Duffy*, 19 Ark. App. at 141, 718 S.W.2d at 114).

25. *Bicak*, 2011 Ark. App. 341, at 8, ___ S.W.3d at ___ (citing *Duffy*, 19 Ark. App. at 139-40, 718 S.W.2d at 112-13).

26. *Bicak*, 2011 Ark. App. 341, at 9, ___ S.W.3d at ___ (citing *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 255, 987 S.W.2d 722, 727 (1999)).

27. *Bicak*, 2011 Ark. App. 341, at 9, ___ S.W.3d at ___ (citing *Jaraki v. Cardiology Assocs. of NE. Ark., P.A.*, 75 Ark. App. 198, 207, 55 S.W.3d 799, 804 (2001)).

28. *Id.* at 11, ___ S.W.3d at ___.

29. *Id.*, ___ S.W.3d at ___.

30. *Id.*, ___ S.W.3d at ___.

interfere[d] with the public’s right of access to the physicians of their choice and Dr. Bicak’s ability to earn a living.”³¹

The court also found the hospital’s second argument to be without merit, because its allegations that genuine issues of material fact remained with regard to whether Bicak breached his agreement “by using its business information for his own benefit,” could not be supported with evidence.³² The evidence which was provided by Bicak directly contravened the hospital’s assertion.³³ Also, although the hospital did attempt to proffer its own evidence, it was in the form of inadmissible hearsay.³⁴

Finally, the court also affirmed the circuit court on the hospital’s last point which was that an issue of genuine material fact remained with regard to its claims that Bicak “tortiously interfered with its valid business expectancy.”³⁵ If a business expectancy is subject to a contingency, a claim for tortious interference cannot be made. In this case, the court agreed with Bicak that the hospital’s patients were under no obligation to return in the future, therefore, that expectancy was only possible at best.³⁶ To find that Bicak tortiously interfered with the hospital’s business expectancy, the court would have to find that his conduct also had an improper motive.³⁷ The court concluded that the hospital was unable to provide any evidence of improper motive; Bicak “was simply attempting to earn a living and satisfy his obligation not to abandon his patients.”³⁸

* *David Jung*

31. *Id.*, ___ S.W.3d at ___.

32. *See id.* at 11, ___ S.W.3d at ___.

33. *Bicak*, 2011 Ark. App. 341, at 11, ___ S.W.3d at ___.

34. *Id.*, ___ S.W.3d at ___.

35. *Id.*, ___ S.W.3d at ___.

36. *Id.* at 12–13, ___ S.W.3d at ___.

37. *Id.* (citing *Baptist Health v. Murphy*, 2010 Ark. 358, at 15, ___ S.W.3d ___, ___).

38. *Bicak*, 2011 Ark. App. 341, at 12–13, ___ S.W.3d at ___.