NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 2394

WEATHERALL RADIATION ONCOLOGY, A LOUISIANA MEDICAL CORPORATION

VERSUS

DAVID CALETRI, M.D.

Judgment Rendered: June 8, 2012.

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On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne,
State of Louisiana
Trial Court No. 138,488

The Honorable Randall L. Bethancourt, Judge Presiding

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* * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C.J.

In this dispute arising out of an alleged breach of contract, the Defendant/Appellant, David Caletri, M.D., appeals the judgment of the district court granted in favor of the Plaintiff/Appellee, Weatherall Radiation Oncology, A Louisiana Medical Corporation (WRO). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Caletri was hired in 1994 to perform radiation oncology services for a medical corporation owned by Thomas Weatherall, M.D. In the years following, Caletri continued to work for medical corporations owned by Weatherall. On August 1, 2001, Caletri signed an employment agreement with and was made a partner in WRO.[1] Pursuant to the agreement, Caletri agreed to "devote his full professional time and effort to the performance of radiation oncology in the Houma area for [WRO.]" The term of the agreement was for one year and renewed automatically for successive one-year periods unless terminated. The initial one-year term commenced July 1, 2001, and absent advanced written notice of termination sixty days prior to the end of the term, would automatically renew for an additional year. On January 2, 2003, Caletri terminated his agreement with WRO without giving the required sixty-day notice. He continued to treat and bill patients that were previously billed by WRO. From January 2003 until June 2003, Caletri was self-employed. In June 2003, Caletri and another radiation oncologist formed Radiation Oncology of the South, LLC (ROS).

WRO filed suit against Caletri seeking damages for breach of contract. After a trial on the merits, the district court found that Caletri breached his employment agreement with WRO by failing to provide radiation oncology

[1] WRO was founded by Weatherall and provided radiation oncology services at facilities in Terrebonne, Lafourche, Jefferson, Orleans, and St. Tammany Parishes.

services to its patients for the period of January 2, 2003, until July 30, 2003. The district court also found that Caletri violated the non-competition clause in the agreement and awarded WRO damages in the amount of $520,000.00.

Caletri now appeals.

DISCUSSION

The contract at issue is the employment agreement Caletri entered into with WRO. Contracts have the effect of law between the parties and may only be dissolved through the consent of the parties or on grounds provided by law. La. Civ. Code art. 1983. Parties are obliged to perform contractual obligations in good faith. *Id.* Contracts are interpreted according to the common intent of the parties. La. Civ. Code art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. Civ. Code art. 2046. Whether a contract is ambiguous is a question of law and subject to the *de novo* standard of review on appeal. *Guest House of Slidell v. Hills*, 10-1949 (La. App. 1 Cir. 8/17/11), 76 So. 3d 497, 499. Where factual findings are pertinent to the interpretation of a contract, those factual findings are not to be disturbed absent manifest error. *Guest House*, 76 So. 3d at 499.

Termination for Cause

Caletri argues that he was authorized to terminate the employment agreement for cause. According to Caletri, because he terminated for cause, the non-competition clause in the agreement is unenforceable. The section of the agreement concerning termination provides:

> This agreement shall terminate at the expiration of the term of this agreement upon proper notice unless otherwise terminated for cause. By way of example, and not by limitation, cause for termination is any one of the following:

a. Loss or suspension of the license to practice medicine or the right to dispense narcotics in the State of Louisiana.

b. Conduct deemed unprofessional or unethical by members of the medical staff of any hospital in which such Physician has privileges as evidenced by any formal or informal act of censure taken by such medical staff.

c. Loss or any limitation of hospital privileges at hospitals where Physician has privileges.

d. Personal bankruptcy or financial misconduct of Physician with respect to the cancer center.

e. Filing of formal criminal charges other than those for minor traffic offenses against any Physician.

f. Any act or activity on the part of any Physician which may cause harm to the image of the cancer center, [WRO], or hospital at which such Physician has privileges.

g. Incompetence.

A majority of the examples listed provide authority to terminate for actions of the "Physician." Caletri and WRO were the only two parties to the agreement. WRO is not a "Physician;" therefore, reference to "Physician" in the agreement can only be to Caletri. Moreover, Caletri's own testimony contradicted his assertion that cause for termination existed. He argued that WRO's physicians provided inadequate on-call coverage when he was out of town and that constituted cause for him to terminate his employment with WRO, but he testified that he never complained about the coverage and was unable to give an example of a time when a patient suffered due to the alleged inadequate coverage. Therefore, the district court was correct in its conclusion that Caletri did not terminate the employment agreement for cause.

Non-Competition Clause

Caletri challenges the factual findings made by the district court in enforcing the non-competition clause in the employment agreement with WRO. The non-competition clause provides:

> **Caletri**, his successors, assigns, or professional corporations, will not during this term, nor for a period of two (2) years from the date of termination of this agreement, for any reason whatsoever, for cause or no cause, directly or indirectly, practice radiation oncology, or own, manage, operate, join, control, be employed by, or participate in the ownership, management, operation, or control of, or be connected in any manner with, any person or entity that competes with [WRO] in the provision of professional radiation oncology services in any Louisiana Parishes where [WRO] provides said services, specifically including the Parishes of Terrebonne, Lafourche, Jefferson, Orleans, and St. Tammany.

Non-competition agreements are governed by Louisiana Revised Statutes Section 23:921. The applicable version of Section 921 provided, in pertinent part:

> A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.

Subsection C of Section 921 is particularly relevant and provides:

> Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.

In addressing the contentions of Caletri, we are conscious of the fact that Section 921C is an exception to Louisiana's public policy against non-competition agreements, and as such, it must be strictly construed. *Garcia v. Banfield Pet Hospital, Inc.*, 09-0466 (La. App. 1 Cir. 1/21/10), 35 So. 3d 261, 264, *writ denied*,

10-0393 (La. 4/30/10), 34 So. 3d 299. If the action sought to be enjoined pursuant to the non-competition agreement does not fall within the statutory exception of Section 921C, or the agreement does not conform to the statutory requirements, then the party seeking enforcement cannot prove it is entitled to the relief sought. *Vartech Systems, Inc. v. Hayden*, 05-2499 (La. App. 1 Cir. 12/20/06), 951 So. 2d 247, 255-56.

Caletri first argues that the clause is unenforceable because he was an employee of ROS. At the time Caletri signed the agreement, Section 921C had been interpreted by the Louisiana Supreme Court as restricting an employee from engaging in or carrying on *his own competing business*, but still allowing an employee to become employed by a competitor of his former employer. *See SWAT 24 Shreveport Bossier, Inc. v. Bond*, 00-1695 (La. 6/29/01), 808 So. 2d 294, 306. Caletri argues that because he was employed by ROS, an oncology service separate and apart from WRO, and not "carrying on or engaging in" his own competing business, the non-competition clause could not be enforced.[2] Although Caletri contends that he was an "employee" of ROS, he testified that his 2003 income tax returns confirmed he was not an employee, but an independent contractor for ROS. He also admitted that he was the only person referenced on documents filed with the Secretary of State regarding ROS's formation. Based on this evidence, the district court's determination that Caletri continued to work for himself in direct competition with WRO was not manifestly erroneous.

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[2] *SWAT 24*'s narrow interpretation of "carrying on and engaging in a business similar to that of the employer" in Section 921C was legislatively overruled. By 2003 La. Acts, No. 428, § 1, effective August 15, 2003, the legislature broadened the scope of non-competition agreements by amending Section 921 to allow enforcement of such agreements regardless of whether the former employee is an owner or equity interest holder of a competing business. *See Green Clinic, LLC v. Finley*, 45,141 (La. App. 2 Cir. 1/27/10), 30 So. 3d 1094, 1098.

Next, Caletri contends that the non-competition clause is unenforceable because WRO did not "carry on a like business" in the parishes of Terrebonne and Lafourche from January 2003 through January 2005. Daniel Vincent, the department manager for Terrebonne General Medical Center, testified that he worked with WRO doctors on a regular basis and confirmed that Caletri was the primary radiation oncologist from 2000 through 2003. In his opinion, the market for radiation oncology in Terrebonne Parish only supported one radiation oncologist.

Weatherall testified at trial that he did not try to find an oncologist to practice in Terrebonne Parish because Caletri assumed the practice in that parish, and it would have been almost impossible to reverse that. Caletri continued seeing WRO's patients after terminating employment with WRO, leaving a relatively small market for radiation oncology services in Terrebonne Parish. However, Weatherall testified that he did continue to receive some patients from Terrebonne Parish, just not at Terrebonne General Medical Center. In its written reasons, the district court stated that Caletri's assertion that WRO had no Lafourche Parish practice was unsupported by the evidence and pointed out that it would have been impractical for WRO to send another oncologist to Terrebonne Parish as long as Caletri remained there. We do not find the district court's determinations to be manifestly erroneous.

Damages

Caletri argues that WRO did not suffer any damage as a result of his termination. An obligor is liable for damages caused by his failure to perform a conventional obligation, and damages are measured by the loss sustained by the obligee and the profit of which he has been deprived. La. Civ. Code arts. 1994 and

1995; *Frankel v. Exxon Mobil Corp.*, 04-1236 (La. App. 1 Cir. 8/10/05), 923 So. 2d 55, 64. The party bringing suit has the burden of proving any damages suffered by him as a result of a breach of contract. *L&A Contracting Company, Inc. v. Ram Industrial Coatings, Inc.*, 99-0354 (La. App. 1 Cir. 6/23/00), 762 So. 2d 1223, 1235, *writ denied*, 00-2232 (La. 11/13/00), 775 So. 2d 438. When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages. La. Civ. Code art. 1999; *L&A Contracting Company, Inc.*, 762 So. 2d at 1235. Thus, absent an abuse of discretion, an appellate court will not disturb a district court's assessment of damages. *L&A Contracting Company, Inc.*, 762 So. 2d at 1235.

Both Caletri and WRO offered the expert testimony of certified public accountants on the issue of damages. WRO's expert, Stephen Romig, testified that but for Caletri's terminating employment with WRO, net profits in the amount of $660,003.00 would have been generated. Romig testified that the calculations in the report prepared by Caletri's expert, Michael Bergeron, were flawed because they were based on an erroneous assumption that the employment agreement required WRO to distribute all of its net profits to its employees. The district court found the testimony of Romig to be more credible and reliable than that of Bergeron. Credibility determinations, including the evaluation of and resolution of conflicts in expert testimony, are factual issues to be resolved by the trier of fact and should not be disturbed on appeal in the absence of manifest error. *Lasyone v. Kansas City Southern Railroad*, 00-2628 (La. 4/3/01), 786 So. 2d 682, 693. We do

not find the district court's decision to credit the testimony of Romig over that of Bergeron to be manifestly erroneous.[3]

Contrary to Caletri's assertion, WRO produced evidence of the loss it sustained as a result of Caletri's termination. Caletri's decision to continue treating WRO's patients and to engage in competition with WRO after his termination negatively impacted WRO. Considering the language of the agreement and the district court's reliance on WRO's expert, we conclude that the district court did not abuse its discretion in the amount of damages awarded.

Caletri also argues that WRO should be barred from seeking damages because it failed to seek injunctive relief and to send a physician to Terrebonne Parish to compete with Caletri. However, based on the evidence and testimony, we find the district court's determination that WRO did not fail to mitigate its damages was not manifestly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court in favor of Weatherall Radiation Oncology, A Louisiana Medical Corporation is affirmed. All costs of this appeal are assessed against Defendant/Appellant, David Caletri, M.D.

AFFIRMED.

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[3] Although the district court credited Romig's testimony over Bergeron's, it found that Romig incorrectly included the six-month period from Caletri's resignation in January 2003 to July 2003 in his calculation of total loss. The district court found that WRO's recoverable damages were confined to the twenty-four-month period immediately following Caletri's resignation in January 2003 and awarded WRO damages in the amount of $520,000.00.