Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-180

AUGUST TERM, 2005

Craig Johnston	}	APPEALED FROM:
	}	
	}	
v.	}	Lamoille Superior Court
	}	
Sheryl Wilkins	}	
	}	DOCKET NO. 66-3-01 Lecv

Trial Judge: Howard E. VanBenthuysen

In the above-entitled cause, the Clerk will enter:

This is the third time that this case, which involves an acrimonious and longstanding dispute between sibling veterinarians, is before us. We affirm.

In our first decision, we concluded that the doctrine of res judicata prevented the superior court from reforming the parties= anti-competition agreement, which resulted from a settlement of a previous lawsuit concerning the breakup of the parties= veterinary practice. See Johnston v. Wilkins, 2003 VT 56, & 8, 175 Vt. 567 (mem.). Based on our determination that defendant Sheryl Wilkins had violated the parties= agreement by working for another veterinarian who was located within a twenty-mile radius of plaintiff Craig Johnston=s practice, we remanded the matter for an award of attorney=s fees. Id. & 13. We explicitly declined to consider her cross-appeal argument that the superior court had erred by construing the parties= agreement to preclude her from working outside the twenty-mile radius but accepting customers who lived within that area. See id. & 12. We were unaware at the time that Wilkins had moved to a new practice just outside the twenty-mile radius.

On remand, the superior court denied Wilkins=s motion for relief from judgment under Vermont Rule of Civil Procedure 60(b), and awarded Johnston $42,236 in attorney=s fees. Wilkins then filed a motion to stay the superior court=s injunction preventing her from accepting customers who lived within the twenty-mile radius, even if she practiced outside of that radius. When the superior court determined that it was precluded from granting the relief she sought, Wilkins appealed. On July 7, 2004, we remanded the matter for the superior court to consider on its merits Wilkins=s motion for a stay. In doing so, we emphasized that although the superior court could not reform the parties= agreement unless Rule 60(b) criteria were satisfied, it could interpret the agreement in response to a motion to enforce or for contempt to determine whether Wilkins should be allowed to accept customers from within the twenty-mile radius as long as she practiced outside that area. On remand once again, following an evidentiary hearing, the superior court ruled that the covenant should be interpreted to allow Wilkins to see patients who live within the twenty-mile radius as long as she practices outside that area and does not either solicit customers from within the area, visit them in the area, or accept Johnston=s current patients.

Johnston appeals, first arguing that the superior court erred by mistakenly deducting his expert witness fees from his attorney=s fee award. Wilkins responds that there was no mistake. In its decision, the court initially stated that Johnston was requesting $63,494 in attorney=s fees, not including an additional $14,529 for expert witness fees. Later in the decision, the court found $63,494 to be a reasonable lodestar figureCthe number of hours reasonably expended on the case multiplied by a reasonable hourly rateCbut deducted $6729 for non-attorney work and $14,529 for expert witness fees. Johnston does not challenge the deduction of the non-attorney work, but claims that the court made a clerical error by deducting the expert witness fees. We disagree. After arriving at the lodestar figure, the court noted

that, in pursuing this lawsuit against Wilkins, Johnston had been successful to the extent that the court had reaffirmed a protected twenty-mile radius for his practice; on the other hand, he had failed to obtain an attachment on Wilkins=s property or a temporary injunction against Wilkins, had lost his claims against Wilkins=s employer, and had failed to demonstrate any monetary or actual damage to his practice resulting from Wilkins=s activities. The court stated that reducing the lodestar figure by the amount of his expert costs coincidentally corresponded to its view of a reasonable attorney=s fee award. Plainly, there was no clerical error. Because Johnston has failed to challenge the reasonableness of the court=s reduction of the lodestar figure, we affirm the attorney=s fee award. See L=Esperance v. Benware, 2003 VT 43, && 21-22, 175 Vt. 292, 300-01 (because trial court must award attorney=s fees based on specific facts of each case, it has wide discretion in making that determination; court may adjust lodestar figure depending on various factors, including results obtained in litigation).

We also uphold the superior court=s refusal to award Johnston additional attorney=s fees based on his vague claim that he was entitled to at least an additional $6500. In addition to noting the pendency of an appeal, the court stated that Johnston=s request failed to itemize the hours claimed or to tender a witness certificate. In his one-paragraph argument, Johnston argues only that his request satisfied V.R.C.P. 54(d)(2)(B) (request for attorney=s fees must provide fair estimate of amount sought). That may be true, but Johnston has failed to demonstrate that the court abused its discretion by not granting additional fees based on his vague claim.

Next, Johnston argues that the superior court should have awarded him his expert witness fees and found Wilkins in contempt for violating the parties= agreement. Regarding Johnston=s request for an award of expert witness fees, the court ruled that, under Ianelli v. Standish, 156 Vt. 386, 390 (1991), Johnston was entitled to such fees only as provided under 32 V.S.A. ' 1551. Johnston does not address the court=s reasoning, but rather argues that because Wilkins initially denied that she worked within a twenty-mile radius of his practice, he was entitled to expert witness fees under V.R.C.P. 36(a) and 37(c). We need not address this argument, which is raised for the first time on appeal. See Pion v. Bean, 2003 VT 79, & 45, 176 Vt. 1.

As for Johnston=s claim that the superior court should have sanctioned Wilkins for violating the court=s order that she not serve clients living within the twenty-mile radius, we conclude, given all of the circumstances of this case, that the court acted well within its discretion in refusing to do so. The record supports the court=s conclusion that Wilkins made a good faith effort to comply with the parties= agreement and the various court orders. Further, Johnston has never demonstrated that he suffered any damages as the result of Wilkins=s activities. Nor do we find any abuse of discretion regarding the court=s refusal to sanction Wilkins=s attorney for filing a motion under Rule 60(b) following remand from this Court=s first decision.

Johnston=s principal brief also contains a one-paragraph argument that the superior court erred by allowing Wilkins=s expert to testify on questions of law, namely on whether the parties= agreement was ambiguous and on how it should be interpreted. Ironically, Johnston successfully argued for admission of similar testimony by his own expert in earlier proceedings in this case. We find no abuse of discretion in admitting the testimony. See USGen New England, Inc. v. Town of Rockingham, 2004 VT 90, & 21, 177 Vt. 193 (A[A]dmissibility decisions under V.R.E. 702 are reviewed only for abuse of discretion.@). Wilkins=s expert offered testimony regarding the custom and usage among veterinarians with respect to covenants not to compete. This testimony was helpful for the court to determine whether the instant covenant was ambiguous and what restrictions were intended by the parties. See Lambourne v. Manchester Country Props. Inc., 135 Vt. 178, 180 (1977) (expert testimony of custom and usage regarding procedures in real estate firms was properly admitted where agreement did not clearly express parties= intent); Stemkowski v. C.I.R., 690 F.2d 40, 45 n.5 (2d Cir. 1982) (expert testimony on hockey industry=s custom and usage was admissible to determine parties= intent regarding players= contract). The court determined that the parties= spare agreement created an ambiguity with respect to whether Wilkins could see patients who lived within the protected area as long as she practiced outside that area. See Isbrandtsen v. North Branch Corp., 150 Vt. 575, 577-79 (1988) (in determining whether agreement is ambiguous, court may consider circumstances surrounding making of agreement, as well as object, nature and subject matter of writing). The court acted within its discretion in allowing expert testimony to get a better understanding of the custom and usage with respect to these types of contracts.

Finally, Johnston argues that the superior court erred by modifying the parties= agreement to allow Wilkins to accept clients who lived within the twenty-mile radius, as long as she practiced outside that area and did not advertise or actively seek customers from within the area. We discern no basis for overturning the court=s decision. First, the matter appears to be moot. The five-year agreement expired by its own terms on August 11, 2005, and Johnston has

never demonstrated that his practice was harmed in any way by Wilkins=s activities. Second, neither the doctrines of res judicata nor collateral estoppel precluded Wilkins from litigating whether she could accept clients who lived within the twenty-mile radius, as long as she practiced outside that area. Indeed, as we explained in our July 7, 2004 order, we explicitly reserved judgment in our initial decision on this issue, Johnston, 2003 VT 56, & 12, and the superior court, in response to a motion to enforce or for contempt, was free to interpret the meaning of the parties= agreement. Third, Johnston=s brief contention that the superior court erred in interpreting the agreement is not persuasive. The three cases he relies on are easily distinguishable. Two of them concerned defendantsCactually or potentiallyCactively seeking out and engaging in work within the protected area. See Vt. Elec. Supply Co., Inc. v. Andrus, 132 Vt. 195, 197-89 (1974); Cockerill v. Wilson, 281 N.E.2d 648, 651 (Ill. 1972). The other case involved what, in effect, was a violation of the covenant of good faith and fair dealing. See Johnson v. Stumbo, 126 S.W.2d 165, 173-75 (Ky. 1938). Here, in contrast, the superior court explicitly found that Wilkins acted in good faith.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice