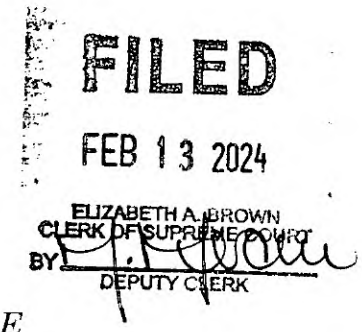
IN THE SUPREME COURT OF THE STATE OF NEVADA

MIA AESTHETICS CLINIC LV, PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY,
Appellant,
vs.
CHARLESTON CHUA, M.D., AN INDIVIDUAL,
Respondent.

No. 85288



ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a preliminary injunction and denying a permanent injunction. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Facts and procedural history

Before his employment with appellant Mia Aesthetics, respondent Dr. Charleston Chua earned his medical degree and then completed his general surgery residency. Thereafter, Dr. Chua completed a three-year fellowship at the University of California, Davis, where he specialized in plastic surgery. Dr. Chua then entered into a professional services agreement with Mia Aesthetics to work as a plastic surgeon in Mia Aesthetics' Las Vegas office. The agreement contained a post-employment noncompete clause providing that

> During the Term of this Agreement and for a period of two (2) years thereafter, Physician shall not, and shall cause each Physician Representative to no[t], with or without cause, directly or indirectly, as principal, agent, or employee, alone or with another person, firm, corporation, or other entity, establish, work, invest, manage, provide services or advice to,

> or participate in any way or work in a facility or practice or other enterprise providing services of the type provided by the Practice, or any other type of surgical services, even if such services are not provided by the Practice, within a fifty (50) mile radius of the Clinics and within a fifty (50) mile radius of any future clinic location owned by, operated by, or affiliated with the Practice (the "Restricted Area").

After a year of employment with Mia Aesthetics, Dr. Chua resigned. Before his resignation, Dr. Chua sought employment with a non-party plastic surgery company and Mia Aesthetics initiated this action to enforce the noncompete clause.

Dr. Chua filed an answer and counterclaim in which he sought declaratory relief regarding the noncompete clause. Dr. Chua contemporaneously sought a preliminary injunction to restrain Mia Aesthetics from enforcing the noncompete clause, arguing it was "patently overbroad, unreasonable, and thus, unenforceable." To support his motion, Dr. Chua attached a sworn declaration wherein he indicated he was excited to move back to Las Vegas after his fellowship to be around his family and friends, he intended to open his own practice in Las Vegas after leaving Mia Aesthetics, and 80 percent of his patients at Mia Aesthetics were from out of town. He also attached a map depicting a 50-mile radius around Mia Aesthetics' Las Vegas office.

Mia Aesthetics filed a countermotion for a permanent injunction to enforce the noncompete clause, contending it was reasonable. It argued the 50-mile radius would not cause undue hardship because Dr. Chua could practice in California or in other areas in Nevada. The district court granted Dr. Chua's motion and found the noncompete clause was overbroad. Relying on NRS 613.195(6), the district court blue-penciled the

noncompete clause to restrain Dr. Chua only from providing procedures offered by Mia Aesthetics within a five-mile radius of Mia Aesthetics' Las Vegas clinic for a period of one year. The district court also ordered Dr. Chua to provide a $1,000 bond under NRCP 65(c).

On appeal, Mia Aesthetics argues that the district court erred in determining the noncompete clause was overbroad and unenforceable, granting the injunction and blue-penciling the noncompetition agreement, deciding the motions without holding an evidentiary hearing, and only ordering a security bond of $1,000.

DISCUSSION

Standard of review

"A preliminary injunction is proper where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages will not suffice." *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 350-51, 351 P.3d 720, 722 (2015); *see* NRS 33.010. We will not disturb a district court's decision granting a preliminary injunction unless it "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Duong v. Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.*, 136 Nev. 740, 742, 478 P.3d 380, 382 (2020) (quoting *Excellence Cmty. Mgmt.*, 131 Nev. at 351, 351 P.3d at 722 (internal quotation marks omitted)). However, we review the reasonableness of a noncompete clause de novo. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 481-82, 376 P.3d 151, 155 (2016), *superseded by statute on other grounds as recognized in Tough Turtle Turf, LLC v. Scott*, 139 Nev., Adv. Op. 47, 537 P.3d 883, 887 (2023); *see also Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996).

The district court properly determined the noncompete clause was unreasonable

Mia Aesthetics argues the district court failed to apply NRS 613.195 to the noncompete clause and instead made its decision based on a feeling. It further argues the noncompete was reasonable because it was necessary and proportional to protect it from any harm Dr. Chua might inflict from use of its reputation, goodwill, and confidential information and that it caused no undue hardship as Dr. Chua could work anywhere else in Nevada or in California. A noncompete clause is not enforceable if it is not supported by valuable consideration,[1] imposes a greater restraint than is required for the protection of the employer, or imposes undue hardship on the employee. NRS 613.195(1). "NRS 613.195(6) provides that a district 'court shall revise . . . to the extent necessary' a covenant that unreasonably limits time, geographical area, or scope of activity; imposes a greater restraint than is necessary to protect the employer; or imposes undue hardship on the employee." *Tough Turtle Turf*, 139 Nev., Adv. Op. 47, 537 P.3d at 887. In determining the reasonableness of a post-employment noncompete agreement, this court considers "(1) the duration of the restriction, (2) the geographical scope of the restriction, and (3) the hardship that will be faced by the restricted party." *Shores v. Glob. Experience*

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[1]While Dr. Chua argues the noncompete clause is not supported by valuable consideration, Dr. Chua's employment with Mia Aesthetics, his base salary and bonuses, and the limited specialized training provided by Mia Aesthetics constitute sufficient consideration to support the noncompete clause contained in the professional services agreement. *Cf. Camco, Inc. v. Baker*, 113 Nev. 512, 517-18, 936 P.2d 829, 832 (1997) (holding "continued employment in an at-will employment context should be deemed sufficient consideration to uphold a post-hire non-competition covenant").

Specialists, Inc., 134 Nev. 503, 506, 422 P.3d 1238, 1241 (2018). "Time and territory are important factors to consider when evaluating the reasonableness of a noncompete agreement." *Golden Rd.*, 132 Nev. at 482, 376 P.3d at 155. Restrictions that are reasonably necessary to protect the business and goodwill of the employer are reasonable, but restraints of trade that are "greater than is required for the protection of the person for whose benefit the restraint is imposed," are unreasonable. *Shores*, 134 Nev. at 506, 422 P.3d at 1241 (quoting *Hansen v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967)). "A noncompete agreement that reaches beyond the geographical areas in which an entity has protectable business interests, by definition, is not 'reasonably necessary to protect the business and goodwill of the employer.'" *Id.* at 506, 422 P.3d at 1242 (quoting *Jones*, 112 Nev. at 296, 913 P.2d at 1275).

We perceive no error in the district court's conclusion that the noncompete clause was unreasonable because it imposed a greater restriction than necessary to protect Mia Aesthetics' interests and imposed undue hardship on Dr. Chua. Not only did it restrict Dr. Chua from providing the services offered by Mia Aesthetics, but it also restricted him from providing "any other type of surgical services, even if such services are not provided by" Mia Aesthetics. Such a restriction goes beyond protecting Mia Aesthetics' business interests.

Turning next to the geographical area covered by the noncompete clause, we conclude that the district court properly found that the noncompete was overbroad. The 50-mile radius defined in the agreement would preclude Dr. Chua from practicing in Las Vegas, Henderson, North Las Vegas, Paradise, Sunrise Manor, State Line, Indian Springs, and Pahrump. Mia Aesthetics demonstrated it had a protectable

business interest in some portion of Las Vegas, given the millions of dollars it spent to establish its practice there. Yet it failed to present evidence establishing that this interest spanned throughout the entire area covered in the 50-mile radius. Rather, Dr. Chua presented evidence that the majority of his clients at Mia Aesthetics were not from the Las Vegas area and therefore would not be included in the 50-mile radius. He further attested he intended to treat primarily local Las Vegas residents, in part due to the difficulties associated with treating out-of-town patients. Dr. Chua presented evidence that he moved to the Las Vegas area to be closer to his friends and family because he was a Las Vegas native. The radius of the noncompete in conjunction with the two-year duration would realistically prevent Dr. Chua from practicing in his resident city for two years. Thus, under the terms of the noncompete, he would be unable to earn a living practicing plastic surgery or general surgery without moving out of the Las Vegas area to practice. This evidence all supports the conclusion that the noncompete agreement was more restrictive than necessary to protect Mia Aesthetics' business interests and imposed an undue hardship on Dr. Chua. Accordingly, the district court properly determined that the noncompete clause is unreasonable and unenforceable under NRS 613.195(1).

The district court did not abuse its discretion in blue-penciling the noncompete clause

Mia Aesthetics argues the district court abused its discretion in failing to make factual findings regarding the reasonableness of the blue-pencil revisions and instead relying on Dr. Chua's representations. When a noncompetition covenant is unreasonable, the court "shall revise the covenant to the extent necessary and enforce the covenant as revised." NRS 613.195(6); *see Tough Turtle Turf,* 139 Nev., Adv. Op. 47, 537 P.3d at 887.

Here, the modifications made by the district court transformed the otherwise unenforceable covenant into one that was not a greater restraint than necessary for Mia Aesthetics' protection and removed the undue hardship imposed on Dr. Chua. The district court modified the terms of the noncompete clause to cover surgeries offered by Mia Aesthetics within a 5-mile radius for a period of one year. First, the modification reasonably narrowed the restrictions to surgeries actually offered and performed by Mia Aesthetics. Second, the modification of the radius to five miles is reasonable in light of the metropolitan area in which Mia Aesthetics' office is located and the representations that Mia Aesthetics performs all of its procedures in house, removing hospital and staffing conflicts from the business interest of Mia Aesthetics. Additionally, the evidence in the record shows that most of its patients are from out of state, rather than the Las Vegas area. Finally, the reduction of the time frame to one year proportionally protects Mia Aesthetics' interests while permitting Dr. Chua to practice in the Las Vegas area. The two-year restriction is unreasonable in light of Dr. Chua entering employment with Mia Aesthetics already having the majority of his skills pertaining to general and plastic surgery and the relatively short term of employment. *See, e.g., Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 224-25 (1979) (concluding a two-year duration for a noncompete was reasonable but nonetheless concluding the noncompete was unreasonable because the doctor, an orthopedic surgeon, operated in Elko where such services were limited); *cf. Hansen*, 83 Nev. at 193, 426 P.2d at 794 (imposing a one-year duration on a noncompete which was originally silent on duration for a podiatrist in the Reno area). Therefore, the district court did not abuse its discretion when blue-penciling the noncompete clause here.

The district court did not abuse its discretion in granting the preliminary injunction

Mia Aesthetics argues the district court abused its discretion by failing to provide sufficient details as to why it was issuing the preliminary injunction and thereby precluding meaningful appellate review. As discussed above, Dr. Chua presented sufficient prima facie evidence to show that he was entitled to relief from enforcement of the overbroad noncompete clause, and therefore demonstrated a likelihood of success on the merits. Further, Dr. Chua demonstrated he would suffer irreparable harm if the court did not enjoin Mia Aesthetics from enforcing the noncompete, as he would not be able to work in his specialized field in his hometown near his friends and family. Additionally, the district court made sufficient findings to permit meaningful appellate review. While the district court indicated it felt the 50-mile radius of the noncompete clause was unreasonable during the hearing on the preliminary injunction, the district court's written order made sufficient findings of fact to support its blue-penciling of the clause's scope. In both its oral pronouncements and written order, the district court pointed to Dr. Chua's desire to work in the Las Vegas area due to his strong ties there, the unique practice approach of Mia Aesthetics which he did not intend to follow after leaving, the number of plastic surgeons in Nevada, and the lack of hospital and staffing privileges as a potential cause of competition in this case. These findings of fact indicate Dr. Chua was likely to succeed on his declaratory relief claim rooted in the noncompete being unreasonable and that he established irreparable injury.

Therefore, the district court did not abuse its discretion in granting the preliminary injunction in Dr. Chua's favor.[2] For these reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
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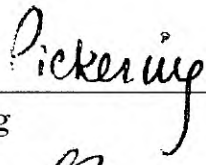
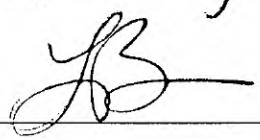


_____, J.
Pickering



_____, J.
Bell

cc: Hon. Timothy C. Williams, District Judge

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[2]We decline to consider Mia Aesthetics' argument that the district court should have held an evidentiary hearing before granting the preliminary injunction as it did not request an evidentiary hearing or raise this argument in district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Further, Mia Aesthetics failed to cogently present any argument regarding the amount of the security bond in its opening brief. Therefore, this argument is waived, and we decline to address it. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 671-72 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived." (citing *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n. 5, 138 P.3d 433, 444 n. 5 (2006) and NRAP 28(a)(8))); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument).

Eleissa C. Lavelle, Settlement Judge
Armstrong Teasdale, LLP/Las Vegas
Maier Gutierrez & Associates
Eighth District Court Clerk