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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

MEDICAL ASSOCIATES,)
Clinton, Iowa,)
A Partnership,)
Appellant,)

Filed September 9, 1977

v.)

ROBERT G. GERMAN, M.D.,)
Appellee.)

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2-58051

Appeal from Clinton District Court - C. H. Pelton, Judge.

Medical partnership appeals trial court's denial of injunctive relief in action to enforce noncompetition agreement. Appeal dismissed.

G. Wylie Pillers, III, of Pillers, Pillers and Pillers, of Clinton, for appellant.

Robert A. Van Vooren and Thomas J. Shields of Lane & Waterman, of Davenport, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Appellant, Medical Associates, a medical partnership, appeals from the trial court's denial of injunctive relief in an action to enforce a covenant of noncompetition against its former employee, Doctor Robert German.

The principal substantive issue presented by the appeal is whether the trial court erred in concluding that even though the time and area restrictions in the non-competition agreement are reasonable, it should not be enforced because to do so would work a hardship on the public out of proportion to any potential injury to Medical Associates. See generally on this question cases collected in Annotation, Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement, 62 A.L.R.3d 1014 sections 9, 14-16; *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (1962).

Because the period of the proscription against competition provided in the agreement between the parties has now expired we decline to decide the substantive issue presented. When faced with a similar situation in *Nitta v. Kuda*, 249 Iowa 853, 857, 89 N.W.2d 149, 151 (1958) the court observed:

"As the three-year restriction of the first contract ended on December 31, 1952, so the five-year period of the second agreement expired on December 31, 1954. There is no provision of either contract that prohibits the defendants, or either of them, from engaging in the business or employment. . . in the defined territory, or anywhere else, now. No matter how valid plaintiff's contracts may have been —a matter we do not decide — they do not pretend to restrict the defendants after December 31, 1954. Nothing we could possibly do would turn back the calendar of the years or restore any rights the plaintiff may once have had."

The court in *Nitta v. Kuda*, *supra*, accordingly dismissed the appeal as moot. Cases from other jurisdictions supporting such disposition include *Abalene Pest Control Service v. Hall*, 126 Vt. 1, 220 A.2d 717, 722 (1966) and *Hayes v. Altman*, 438 Pa. 451, 266 A.2d 269, 271-72 (1970).

In oral argument, appellant asked that this court, sitting as equity chancellors, extend the time of Doctor German's performance although the time provided in the written agreement has now expired. Our attention has not been directed to any authority authorizing such procedure in a case of this type. A similar request for equitable relief

was expressly rejected by the Pennsylvania court in *Hayes v. Altman*, supra. Without deciding whether it would ever be appropriate to grant such equitable relief, we believe it is particularly inappropriate where, as in the present case, the delay has been of such a duration that the doctor-patient relationships sought to be enjoined have likely become firmly established.

It was conceded by appellee in oral argument that the dismissal of the present appeal on the issue of injunctive relief will have no issue-preclusive effect upon Medical Associates' right to seek damages from Doctor German for such breach of contract, if any, as it might establish. Based upon this concession and upon our conclusion that Doctor German's successful defense in the trial court to the claim for injunctive relief was based upon equitable doctrines not applicable to a claim for money damages, we direct that our dismissal of the appeal is without prejudice to appellant's claim, if any, for damages.

Appeal dismissed.

ALLBEE, C.J., and SNELL, J., concur; OXBERGER, J., concurs specially;
DONIELSON, J., dissents.

OXBERGER, J. (specially concurring)

I would affirm this matter on its merits. I agree with the reasons cited by Donielson, J. as to why we should not invoke the mootness doctrine.

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DONIELSON, J. (dissenting)

I dissent. I recognize that the majority finds *Nitta v. Kuda*, 249 Iowa 853, 857, 89 N.W.2d 149 (1958), controlling in this case, but I do not believe that *Nitta* should be interpreted in such a manner as to rule this appeal moot. In my view, mootness is generally a drastic and doctrinally unsatisfactory disposition which should be used sparingly, and certainly not in a case such as this where the parties acted diligently, in good faith, and with reasonable dispatch.

In *Nitta*, the action was commenced on December 27, 1950, trial began June 27, 1951, the cause was submitted February 29, 1952, and was under consideration until January 27, 1954, when the judgment was entered. That decision was appealed on February 20, 1954, and was submitted to the supreme court on March 11, 1958. Consequently, there was almost an eight year delay from the initial filing to ultimate disposition.

In the instant matter, the plaintiff commenced the action on November 22, 1974. A temporary restraining order was requested ex parte and was denied on that same date. A long and arduous hearing regarding temporary injunction was held on November 29, 1974. The findings of fact, conclusions of law, and order were filed on January 17, 1975, and notice of appeal was entered on February 6, 1975. Appellant's brief was filed on December 1, 1975, (10 months), appellee's brief on May 7, 1976, and the matter was placed on the ready calendar on May 27, 1976, which constituted an 18 month lapse of time. As a result of a backlog of cases pending before the supreme court, this case was assigned to this court, where oral argument was held on June 14, 1977; an additional 12 month delay from the ready calendar date.

I do not believe that these parties should be precluded from having their day in appellate court where, as here, they faithfully and swiftly attempted to redress their grievance through the machinery of the judicial system.

A disposition on mootness grounds is a serious matter which should only be used with great restraint. I do not believe that *Nitta v. Kuda*, *supra*, requires such a result in this case. I would decide this case on its merits after considering the relevant law, including *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (1962); and *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368 (Iowa 1971).