

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 25, 2003 Session

MEDTRONIC, INC., ET AL. v. NuVASIVE, INC., ET AL.

**A Direct Appeal from the Circuit Court for Shelby County
No. CT-001579-01 The Honorable Robert L. Childers, Judge**

No. W2002-01642-COA-R3-CV - Filed August 20, 2003

This is an appeal from a Final Order enjoining Appellant from indemnifying its employees in their lawsuit against Appellees. Appellant's employees were previously employed by Appellee. Appellee and Appellant are competing corporations who, prior to this lawsuit, entered into a Settlement Agreement with a forum selection clause forbidding Appellant from suing Appellee outside Tennessee for an eighteen month period. In a lawsuit instigated in California by Appellees' former employees, Appellant agreed to fund the litigation and to indemnify those employees against any attorney fees incurred by the employees. Appellees' suit seeks to enjoin Appellants from further funding of the employees' action. The trial court granted the injunction and Appellants appeal. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J. and HOLLY M. KIRBY, J., joined.

Glen G. Reid, Jr., Memphis, For Appellants, Nuvasive, Inc., Rufus L. Bennett, Keith Valentine and Pat Miles

William Z. Pentelovitch and Mary R. Vasaly, Minneapolis, Minnesota; Sam B. Blair, Jr., Memphis, For Appellees, Medtronic, Inc. and Medtronic Sofamor Danek, Inc.

OPINION

Medtronic, Inc. ("Medtronic") is a Minnesota corporation with its principal place of business in Findley, Minnesota.¹ Medtronic Sofamor Danek, Inc. ("MSD," and together with Medtronic

¹ Medtronic is a leading medical technology company, focusing its expertise in the areas of cardiac rhythm management, cardiac surgery, coronary and peripheral vascular, neurological, spinal, and ear, nose and throat, and, after
(continued...)

“Plaintiffs,” or “Appellees”) is an Indiana corporation with its principal place of business in Memphis, Tennessee. MSD is a wholly owned subsidiary of Medtronic.² MSD is a leader in spinal and cranial surgical products and an innovator in technology associated with these surgeries. Because the products offered by MSD are sophisticated, sales of these products require the company’s representatives to develop networks of spine surgeon contacts and to nurture these relationships in order to influence the surgeon’s decision to choose MSD’s spine surgery products.³ In order to keep their sales representatives up to date, MSD must share with them confidential marketing and business information.⁴

NuVasive, Inc. (“NuVasive”) is a Delaware corporation with its principal place of business in San Diego, California. NuVasive is a direct competitor of MSD in the business of the design, marketing, and sale of medical devices used in connection with spinal surgery. Since the summer of 1999, NuVasive has been led by Alex Lukianov, a former senior executive of MSD. The Appellees allege that, since Lukianov took control of NuVasive, NuVasive has targeted MSD’s employees for hiring in an attempt to acquire confidential information.

The Bird Litigation and Resulting Settlement Agreement

During 1999, Edward Bird, Jr. (“Bird”) lived in Tennessee and worked for MSD as Vice President of Global Medical Education and Emerging Technologies. In late 1999, Lukianov hired Bird to be NuVasive’s Vice President of Sales and Marketing. MSD asserted that this hiring was in violation of Bird’s contractual and common law duties to MSD. Before notifying MSD that he was quitting, Bird joined NuVasive in suing MSD in California.⁵ MSD sued Bird in the Chancery Court of Tennessee to enforce its contractual covenants and protect its confidential information.

¹ (...continued)
the acquisition of MSD, in the areas of spinal surgery technology.

² MSD was previously known as Danek Medical, Inc. and Danek Group, Inc. before it adopted the name, Sofamor Danek Group, Inc., in 1993. In 1999, Sofamor Danek Group, Inc. became a wholly owned subsidiary of Medtronic, and changed its name to Medtronic Sofamor Danek.

³ In order to enable its sales representatives to develop these relationships, MSD provides those representatives with substantial entertainment and travel expense accounts. MSD also encourages sales representatives to provide business management programs targeting MSD’s customers, “think tank” seminars, educational retreats and “VIP” meetings, where key surgeons visit MSD for product and surgical education and training.

⁴ This information includes MSD’s contractual relationships with key customers (including types of products purchases and prices paid for those products). In addition, MSD also circulates a large amount of confidential financial information among its manager-level employees. This financial information reflects product sales, costs, inventory levels, sales trends and other market informations.

⁵ The California Suit was allegedly an attempt to (1) avoid the contractual choice of Tennessee law in Bird’s employment agreement with MSD, (2) to have Bird’s noncompete agreement declared unenforceable under California law, and (3) to preclude MSD from attempting to enforce Bird’s contract in Tennessee or anywhere else outside California.

Bird removed the Tennessee Suit to federal court. The federal court refused to transfer the lawsuit to California. (These lawsuits are referred to collectively as the “Bird Litigation”).

After intensive litigation, NuVasive and MSD ended the Bird Litigation by executing a Settlement Agreement (the “Settlement Agreement”) in February 2000. This agreement was executed by NuVasive’s CEO, Lukianov, by Medtronic’s counsel, Jean Forneris, and by MSD’s counsel, Karl Dahlquist. The Settlement Agreement reads, in relevant part, as follows:

This Settlement Agreement, Waiver and Release of Claims (“Settlement Agreement”) is made by and between MEDTRONIC, INC. and MEDTRONIC SOFAMOR DANEK, INC. (Collectively, “Medtronic”), and NUVASIVE, INC. (“NuVasive”). For purposes of this Agreement, the term “NuVasive” shall include NuVasive, Inc. and its stockholders, officers, directors, agents, representatives, attorneys, servants, employees, predecessor, successors, subsidiaries, parents, divisions, other corporate affiliates, assigns, and all persons or entities acting by, through, under, or in concert with any of them. For purposes of this Agreement, the term “Medtronic” shall include Medtronic, Inc. and its stockholders, officers, directors, agents, representatives, attorneys, servants, employees, predecessors, successors, subsidiaries, parents, divisions, other corporate affiliates, assigns, and all persons or entities acting by, through, under, or in concert with any of them.

* * *

6. The parties agree that for a period of eighteen (18) months, from February 7, 2000 through August 6, 2001, they shall litigate certain disputes in a chosen forum. This specified eighteen (18) month period shall hereinafter be referred to as the “Forum Selection Period”. The parties agree that the types of disputes that shall be litigated in the pre-selected forum pursuant to this paragraph shall be any disputes or actions involving or related to (1) any dispute concerning the enforceability of a current or former Medtronic employee’s non-compete agreement; (2) any contention that a current of former Medtronic employee’s employment with NuVasive violates such a non-compete agreement.... If any such disputes arise between or among the parties during the Forum Selection Period, the parties agree that any actions or proceedings relating to such disputes shall be brought and maintained exclusively in the Court in a county in which the Medtronic employee was last employed by Medtronic, so long as such actions or proceedings are initiated prior to the expiration of the Forum Selection Period. NuVasive agrees that this

provision of the Settlement Agreement is binding and enforceable, and hereby waives any right to seek to declare this provision void or unenforceable.

Rufus L. Bennett

At the time of this Settlement Agreement, Rufus L. Bennett (“Bennett”) was employed by MSD as a Senior Vice President of Sales and Marketing.⁶ Bennett executed an Employment Agreement (the “Bennett Agreement”) with MSD, which was effective January 1, 1994.⁷ The Bennett Agreement is governed by Tennessee law and provides, in pertinent part, as follows:

8. Confidentiality. Employer possesses and will continue to possess information which has been created, discovered, developed by or otherwise become known to Employer (including information discovered or made available by subsidiaries, affiliates or joint venturers of Employer or in which property rights have been assigned or otherwise conveyed to Employer), which information has commercial value to Employer, including but not limited to trade secrets, innovations, processes, computer codes, data, know-how, improvements, discoveries, developments, techniques, marketing plans, strategies, costs, customer and client lists, or any information the Employee has reason to know Employer would treat as confidential for any purpose, whether or not developed by the Employee (hereinafter referred to as “Confidential Information”). Unless previously authorized in writing or instructed in writing by the Employer, the Employee will not, at any time, disclose to others, or use, or allow anyone else to disclose or use any Confidential Information (except as may be necessary in the performance of the Employee’s employment with Employer), unless, until and then only to the extent that such Confidential Information has become ascertainable or obtained from public or published sources or was available to Employee on a non-confidential basis prior to any such disclosure or use, provided that the source of such material is or was not bound by an obligation of confidentiality to Employer.

9. Restrictive Covenants. ...The Employee acknowledges that because of his skills, the Employee’s position with Employer and the Confidential Information to which the Employee shall have access or

⁶ Bennett had been employed by MSD since 1991.

⁷ Bennett had originally executed an Employment Agreement with MSD’s predecessor, Danek Group, Inc. dated January 1, 1992. The January 1, 1994 Agreement contains substantially identical terms as the 1992 Agreement.

be provided on account of such employment with Employer, competition by the Employee with Employer could damage Employer in a manner which cannot adequately be compensated by damages or an action at law. In view of such circumstances, because of the Confidential Information obtained by, or disclosed to the Employee, and as a material inducement to Employer to enter into this Agreement and to compensate the Employee,...as well as provide him with additional benefits as provided herein and other good and valuable consideration, the Employee covenants and agrees that:

(a) Noncompetition. During the Employee's employment with Employer and for a period of one (1) year thereafter, the Employee shall not, directly or indirectly, in any geographic area in which Employer is engaged in Business, participate or assist any other person or entity in any manner or capacity in performing any services or work similar to the business conducted by Employer at the time of termination of the Employee's employment with Employer.

(b) Nonsolicitation of Customers. During the Employee's employment with Employer and for a period of one (1) year thereafter, the Employee shall not, directly or indirectly solicit, divert or accept any work or services which competes with Employer's Business from any customer of Employer or seek to cause any such customer to refrain from doing business with or patronizing Employer.

(c) Nonsolicitation of Employees. During the Employee's employment with Employer and for a period of one (1) year thereafter, the Employee shall not, directly or indirectly, solicit for employment or employ any employee of Employer.

On August 15, 2000, Bennett resigned from MSD to accept a position with NuVasive. MSD contends that this employment violates the Bennett Agreement.

Keith Valentine

Keith Valentine ("Valentine") began his career at MSD in 1992. His initial position was as International Marketing Manager. In 1994, he became Director of Sales and Marketing-Asia Pacific; and, in February 1997, he became Group Director of Sales and Marketing-Asia Pacific. In 1999, Valentine was promoted to Vice President of Marketing for MSD's Thoracolumbar Group. Valentine also entered into an Employment Agreement (the "Valentine Agreement"), which is also governed by Tennessee law and reads, in relevant part, as follows:

1. Unless previously authorized in writing or instructed in writing by Company, I will not, during or after my employment, disclose to any third party or use for the benefit of any third party or for my personal benefit any information, knowledge or data, which I may obtain during my employment with Company (including information discovered or made available by subsidiaries or joint ventures of Company), including but not limited to, information obtained to keep confidential, documents, drawings, blueprints, formulas, patterns, compilations, programs, devices, techniques, business or other methods, customer information, processes, machines, manufacturers, compositions of matter and figures, whether or not developed by me, unless and until, and then only to the extent, such information, knowledge or data has already become available to the public in a printed publication otherwise than by my act or omission.

Effective February 29, 2000, Valentine resigned from MSD. Valentine initially took the position of director of marketing for arthroscopy products for ORATEC Interventions, Inc. Although ORATEC is a direct competitor of MSD, MSD agreed to grant Valentine a limited release from his obligations under the Valentine Agreement. According to MSD, this release was applicable solely with respect to Valentine's position with ORATEC and did not release him from the covenant of nonsolicitation of MSD's employees. According to MSD, Valentine breached the condition upon which the limited release was granted by soliciting Pat Miles ("Miles," and together with NuVasive, and Messrs. Bennett and Valentine, "Defendants," or "Appellants"), an employee of MSD, to leave MSD and join ORATEC.

As a result of Valentine's breach, MSD notified Valentine that it would pursue any and all available action to protect MSD's interests. Valentine thereafter left ORATEC and became an employee of NuVasive.

Pat Miles

Miles joined MSD in 1997. He held senior product management and marketing positions before resigning from MSD effective April 24, 2000. Throughout his tenure at MSD, Miles was responsible for marketing MSD's MicroEndoscopic Discectomy System, and its successor the Metrx™ MicroEndoscopic Discectomy System ("Metrx™"). In relation to his employment with MSD, Miles also executed an Employment Agreement (the "Miles Agreement"). The Miles Agreement is governed by Tennessee law and reads, in pertinent part, as follows:

2. DEFINITIONS

(a) Medtronic means Medtronic, Inc. and all of its parent, subsidiary or affiliated corporations and the operating divisions of any of them.

(b) Confidential Information means any information or compilation of information that the Employee learns or develops during the course of his/her employment that derives independent economic value from not being generally known, or readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use. It includes but is not limited to trade secrets and may relate to such matters as research and development, manufacturing processes, management systems and techniques and sales and marketing plans and information.

* * *

(d) Medtronic Product means any product, product line or service (including any component thereof or research to develop information useful in connection with a product or service) that is being designed, developed, manufactured, marketed or sold by Medtronic or with respect to which Medtronic has acquired Confidential Information which it intends to use in the design, development, manufacture, marketing or sale of a product or service.

(e) Competitive Product means any product, product line or service (including any component thereof or research to develop information useful in connection with a product or service) that is being designed, developed, manufactured, marketed or sold by anyone other than Medtronic and is of the same general type, performs similar functions, or is used for the same purposes as a Medtronic Product on which the employee worked during the last two years of employment or about which he/she received or had knowledge of Confidential Information.

* * *

5. CONFIDENTIAL INFORMATION

Employee agrees not to directly or indirectly use or disclose Confidential Information for the benefit of anyone other than Medtronic, either during or after employment, for as long as the information retains the characteristics described in paragraph 2(b) above.

* * *

7. POST-EMPLOYMENT RESTRICTION

Employee agrees that for two (2) years after termination of employment he/she will not directly or indirectly render services (including services in research) to any person or entity in connection with the design, development, manufacture, marketing, or sale of a Competitive Product that is sold or intended for use or sale in any geographic area in which Medtronic actively markets a Medtronic Product or intends to actively market a Medtronic Product of the same general type or function. It is expressly understood that the employee is free to work for a competitor of Medtronic provided that such employment does not include any responsibilities for, or in connections with, a Competitive Product...for the two year period of the restriction.

If the Employee's only responsibilities for Medtronic during the last two years of employment have been in [the] field [of] sales or field sales management capacity, this provision shall only prohibit for one (1) year the rendition of services in connection with the sale of a Competitive Product to persons or entities located in any sales territory the Employee covered or supervised for Medtronic during the last year of employment.

As stated above, Miles was recruited by Valentine to leave MSD and join ORATEC. Miles subsequently left the employ of ORATEC to join NuVasive.

After NuVasive hired Bennett, Valentine, and Miles, Medtronic and MSD commenced this action against NuVasive on March 12, 2001 in the Circuit Court of Shelby County (the "Tennessee Suit"). In their Complaint, Medtronic and MSD alleged tortious interference by NuVasive with Bennett, Valentine, and Mile's respective employment agreements and sought temporary and permanent injunctions to enjoin continuing and further breaches by NuVasive. On April 20, 2001, Medtronic and MSD filed its First Amended Complaint for Injunctive and Other Relief, which added Bennett, Valentine, and Miles as Defendants and lists the following causes of action: (1) Declaratory relief against NuVasive, (2) Injunctive relief against NuVasive, (3) Breach of settlement agreement against all Defendants, (4) Breach of implied covenant of good faith and fair dealing against all Defendants, (5) Inducing breach of settlement agreement against Bennett, Valentine, and Miles, and (6) Breach of employment agreements against Bennett, Valentine, and Miles.

On April 13, 2001, Bennett, Valentine and Miles filed a Complaint for: 1) Declaratory Relief, 2) Unfair Competition, and 3) Injunctive Relief against Medtronic and MSD in the Superior Court of the State of California, San Diego County (the "California Suit"). The California Complaint seeks, *inter alia*, a declaration that the NuVasive employees' Tennessee employment contracts are unenforceable, an injunction against the Tennessee Suit, an injunction against MSD prohibiting it from commencing any other lawsuit outside California against Bennett, Valentine, Miles, or NuVasive, and damages for "unfair competition" based on MSD's filing the Tennessee Suit.

Medtronic and MSD moved the California court to dismiss or transfer the California Suit in favor of the first-filed Tennessee Suit, but the request was denied. On April 18, 2001, Bennett, Valentine, and Miles also filed Plaintiff's Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction, seeking to stop Medtronic and MSD from proceeding in the Tennessee Suit. The California Court denied this Motion.

According to the deposition testimony of NuVasive CEO, Lukianov, NuVasive agreed to pay the legal fees incurred by Bennett, Valentine, and Miles in conjunction with the California Suit, to wit:

Q [to Lukianov] ...Specifically, is NuVasive paying the legal fees for Mr. Miles, Mr. Bennett, and Mr. Valentine for—in connection with the lawsuit filed in San Diego?

A [by Lukianov]. Yes.

Q. Did NuVasive agree to pay those fees before the lawsuit was filed?

A. Yes.

Q. Did NuVasive participate in selecting the counsel to represent Mr. Miles, Mr. Bennett, and Mr. Valentine?

A. Yes.

Following the California court's denial of the Motion to stop the Tennessee Suit, Bennett, Valentine, and Miles removed the California Suit to federal court⁸ where they again sought to enjoin the Tennessee Suit. After the parties submitted briefs, the California district court heard the Motion. On June 1, 2001, the California court issued an order, enjoining MSD "from seeking to enforce the Plaintiff's non-compete agreements in any court except the federal district court in San Diego." *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 805 (9th Cir. 2002). In its opinion, the appeals court noted, correctly, that the effect of the District Court's "granting the motion is to halt the Tennessee proceedings." *Id.* at 805.

On June 8, 2001, NuVasive moved the Tennessee court to stay its action based on the California court's injunction. Although Medtronic and MSD had previously moved the Tennessee court to temporarily enjoin Bennett, Miles, and Valentine from their alleged ongoing breaches of their respective employment agreements, based on the California court's injunction, Medtronic and MSD modified their motion to request only enforcement of the employees' confidentiality

⁸ The action is now styled *Rufus L. ("Lew") Bennett, Keith Valentine, and Patrick Miles v. Medtronic, Inc. And Medtronic Sofamor Danek, Inc.*, Case No. 01 CV 00684 JM (JFS), United States District Court for the Southern District of California.

agreements. On June 22, 2001, the Tennessee trial court ruled on the motions. It declined to stay the action and issued an injunction prohibiting NuVasive from disclosing MSD's confidential information and from inducing current or former MSD employees from breaching their duty not to disclose MSD's confidential information.

On March 27, 2002, the United States Court of Appeals for the Ninth Circuit reversed the district court's order granting the injunction. *Bennett*, 285 F.3d at 807. This reversal left Medtronic and MSD free to proceed in the Tennessee Suit.

On or about August 20, 2001, NuVasive Answered the First Amended Complaint of Medtronic and MSD. On or about November 8, 2001, Valentine, Bennett, and Miles filed their respective answers to the Medtronic MSD Complaint. On November 30, 2001, MSD moved the Tennessee court for an order enjoining NuVasive from continuing to fund the California Suit. The Motion was based on the grounds that NuVasive's actions violated the Settlement Agreement executed by MSD and NuVasive in connection with the Bird Litigation.

On May 24, 2002, the trial court issued an injunction prohibiting NuVasive from continuing to finance the California Suit. The trial court's Memorandum Opinion reads, in pertinent part, as follows:

The Court has considered the Plaintiff's Motion For Temporary Injunction upon the briefs, affidavits and depositions submitted by the parties, upon statements of counsel, and from the entire record in this cause. The Court finds that the Motion for Temporary Injunction should be granted.

Facts

Following prior litigation, Medtronic, Inc. (Medtronic) and NuVasive, Inc. (NuVasive) executed a Settlement Agreement. The Settlement Agreement, which was freely entered into by both Medtronic and NuVasive, includes a Forum Selection Clause for a period of eighteen months following the execution of the Agreement (February 7, 2000 to August 6, 2001). The Clause states that during that time any suit concerning the non-compete agreement of a former Medtronic employee must be brought in the last county the Medtronic employee worked. The Agreement defines "Medtronic" and "NuVasive" as including the employees, attorneys, and all other persons or entities acting by, through, under, or in concert with any of them.

Bennett, Valentine and Miles are former employees of Medtronic who signed non-compete agreements while working for

Medtronic in Tennessee. These employees then began working for NuVasive in California, and Medtronic brought this suit against NuVasive for violation of the non-compete agreements. The former Medtronic employees, seeking relief from their non-compete agreements, then brought suit against Medtronic in April 2001, in California, a jurisdiction that does not recognize any non-compete agreement. NuVasive suggested to the employees that they retain counsel that had represented NuVasive in past suits against Medtronic and agreed to indemnify the employees for their attorneys' fees.

Medtronic requests this Court to enjoin NuVasive 1) from continuing to fund the California litigation, which is in violation of the Settlement Agreement, and; 2) from indemnifying NuVasive employees Bennett, Valentine, and Miles against any attorney's fees in any action in violation of the Settlement Agreement.

Findings of Fact and Conclusions of Law

First, the actions of Nuvasive have created a situation that defeats the essential purpose of the Settlement Agreement, which was bargained for and freely entered into by both parties. NuVasive bound its employees to the terms of the Agreement by expressly defining "NuVasive" as including employees. The NuVasive employees' California lawsuit against Medtronic is of the nature described in the Agreement covered by the eighteen-month Forum Selection Period. The suit was filed within the eighteen month period, but was not brought in Shelby County, Tennessee, which was the last county in which the employees worked, a violation of the Agreement. NuVasive suggested that its employees retain counsel to prosecute their lawsuit that NuVasive had retained in the past to either sue Medtronic or to defend suits brought by Medtronic. NuVasive then indemnified its employees for attorney's fees for these attorneys. By doing so NuVasive is able to use its employees' lawsuit to circumvent its Settlement Agreement with Medtronic and reap the benefits of employing Medtronic's former employees.

Second, if Medtronic's allegations are correct, the actions of NuVasive are contrary to the covenant of good faith and fair dealing that Tennessee implies into every contract. In *Riveredge Associates v. Metropolitan Life Insurance Co.*, 774 F. Supp. 897 (D.N.J., 1991), the Court stated that the covenant is breached by "conduct such as...asserting an interpretation contrary to one's own understanding." The Settlement Agreement was executed to assure that litigation

involving the non-compete agreements would take place in Tennessee. The terms of the Settlement Agreement appear to be clear and unambiguous. It also appears that NuVasive should have recognized that by involving itself in a lawsuit outside the jurisdiction chosen by the Forum Selection Clause, it would be in violation of the Agreement. To argue otherwise would be to assert an interpretation contrary to a reasonable person's understanding of the Forum Selection Period.

Third, NuVasive relies on California Labor Code § 2802 to suggest that it must indemnify its employees for legal expenses incurred as a result of a lawsuit brought by those employees against their former employer, Medtronic. However, the clear language of the statute states that “an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties...” NuVasive has presented no evidence that its employees had any work-related duty to file the lawsuit against Medtronic in California. NuVasive seems to argue that it has a duty to indemnify the employees for the employees' attorneys fees in prosecuting the California lawsuit because the employees would be discharged from NuVasive if the employees did not prevail in that lawsuit. Even if the employees did have a work-related duty to bring suit against Medtronic, the Labor Code still does not apply here, because the employees have yet to be discharged from NuVasive. Therefore, no legal fees can be in direct consequence of their discharge.

Fourth, if the Court denied this Motion for Temporary Injunction, Medtronic would suffer the irreparable harm of losing the “fruits of the Settlement Agreement” that was bargained for and freely entered into by both parties. Medtronic would lose the right to have disputes concerning non-compete agreements that arose during the Forum Selection Period litigated in Tennessee. The Court does not believe that Medtronic can receive adequate damages to compensate for NuVasive's breach of the Settlement Agreement.

For these reasons the Court will enjoin the Defendant, NuVasive: 1) from continuing to fund the California litigation, which is in violation of the Settlement Agreement, and; 2) from indemnifying NuVasive employees Bennett, Valentine, and Miles against any attorney's fees in any action in violation of the Settlement Agreement.

On June 21, 2002, the trial court entered an “Order on Memorandum Opinion Dated May 24, 2002, Granting Permanent Injunction Against NuVasive,” which provides in pertinent part:

Upon request of Defendants and meeting with counsel for the parties, the Court finds that the Memorandum Opinion should be amended to require Plaintiffs, Medtronic, Inc. and Medtronic Sofamor Danek, Inc., to post an injunction bond in the amount of \$5,000. Also upon the request of Defendants, the Court further amends its Memorandum Opinion and rules that the injunction granted is permanent and finds as to the specific claims for relief that are addressed by the Memorandum Opinion and this Order, there is no just reason for delay and that this Order should be entered as a Final Judgment as to the issue of Plaintiffs’ entitlement to injunctive relief pursuant to the Settlement Agreement between the parties, from which Defendant, NuVasive, Inc., shall have the right to appeal.

In granting Defendants’ requests, the Trial Court specifically retains jurisdiction of all remaining issues in this case, specifically including, but not limited to, all alleged breaches of the agreements between the parties.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. For the reasons set forth in the Memorandum Opinion dated May 24, 2002, which is incorporated herein by reference, Defendant NuVasive is permanently enjoined:

A. From continuing to fund the California litigation, which is in violation of the Settlement Agreement;

B. From indemnifying NuVasive employees Bennett, Valentine and Miles against any attorneys’ fees in any action in violation of the Settlement Agreement;

2. Medtronic shall post a \$5,000 injunction bond;

3. The Trial Court determines that there is no just reason for delay and directs the entry of this Permanent Injunction Order as a Final Judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure; and

4. The Trial Court specifically retains jurisdiction of all remaining issues in this case, specifically including, but not limited to, all alleged breaches of the agreements between the parties.

NuVasive, Bennett, Valentine and Miles appeal from this Order and raise one issue as stated in their brief: Whether the Trial Court erroneously enjoined NuVasive from indemnifying its Employees for legal fees incurred by the Employees in litigation between the Employees and Medtronic in California.

Review of findings of fact by the trial court is de novo on the record with a presumption of correctness “unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13 (d). The presumption of correctness applies only to findings of fact and not to conclusions of law. *See Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996). The standard of review respecting injunctive relief is whether the trial court erred in exercising its discretion in the issuance or nonissuance of the injunction. *See Thompson v. Menefee*, 6 Tenn. App. 118 (1927); *Durham v. Dormer Enter., Inc.*, No. 02A01-9105-CH-00090, 1992 WL 97075 (Tenn. Ct. App. May 12, 1992).⁹

Tenn. R. Civ. P. 65.04(2) governs the trial court’s determination of whether to grant an injunction and provides as follows:

A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant’s rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

The threshold issue requires a showing that the moving party’s rights are being or will be violated by the adverse party. In this case, the moving parties, Medtronic and MSD, derive their rights from the Settlement Agreement entered in the Bird Litigation.

The interpretation of a written contract is a matter of law, and thus, no presumption of correctness in its interpretation exists. *NSA DBA Benefit Plan, v. Connecticut Gen. Life Ins. Co.*, 968 S.W.2d 791 (Tenn.Ct.App.1997). The cardinal rule in the construction of contracts is to ascertain the intent of the parties. *West v. Laminite Plastics Mfg. Co.*, 674 S.W.2d 310 (Tenn.Ct.App.1984). If the contract is plain and unambiguous, the meaning thereof is a question of law, and it is the Court's function to interpret the contract as written according to its plain

⁹ *See also Bd. of Comm’rs of Roane County v. Parker*, 88 S.W.3d 916, 919 (Tenn. Ct. App. 2002), wherein the Court states the following in dicta: "The standard of review respecting the issuance of injunctive relief is whether the Chancellor erred in exercising his discretion to do so."

terms. *Petty v. Sloan*, 197 Tenn. 630, 277 S.W.2d 355 (Tenn.1955). The language used in a contract must be taken and understood in its plain, ordinary, and popular sense. *Bob Pearsall Motors, Inc. v. Regal-Chrysler Plymouth, Inc.*, 521 S.W.2d 578 (Tenn.1975). In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. *Ballard v. North American Life & Casualty Co.*, 667 S.W.2d 79 (Tenn.Ct.App.1983). If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Sutton v. First Nat. Bank of Crossville*, 620 S.W.2d 526 (Tenn.Ct.App.1981). Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made. *McKee v. Continental Ins. Co.*, 191 Tenn. 413, 234 S.W.2d 830 (Tenn.1950).

By its plain language, the Forum Selection Clause of the Settlement Agreement requires NuVasive to litigate disputes concerning the enforceability of a current or former Medtronic employee's non-compete agreement only in the state where the employee last worked for MSD. This requirement is valid from February 7, 2000 through August 6, 2001. NuVasive asserts that the Settlement Agreement is not triggered by the California Suit. Specifically, NuVasive contends that: (1) the Settlement Agreement did not specifically mention indemnification, (2) that it is required by California law to indemnify the employees, (3) it is not a party to the California Suit, and (4) the employees are not bound by the Settlement Agreement.

We first note our agreement with the trial court's interpretation of California Labor Code § 2802, on which NuVasive relies for the proposition that its indemnification of Valentine, Bennett and Miles is mandated under California law. The trial court is correct in holding that this particular litigation, which involves the employees' contest of their respective employment agreements with MSD, is not contemplated by the California Labor Code which requires employers to indemnify their employees in litigation arising as a "direct consequence of the discharge of his or her duties." *See* § 2802 California Labor Code. The California Suit simply does not meet this criterion. Consequently, NuVasive is not required to embroil itself in the employees' lawsuit in any way. Absent a legislative mandate to indemnify, NuVasive's agreement to do so violates the bargained-for exchange, which lies at the crux of the Settlement Agreement.

The clear language of the Settlement Agreement indicates that Medtronic and MSD agreed to dismiss their case against Bird and NuVasive in exchange for NuVasive agreeing to litigate other disputes, involving former Medtronic employees, in Tennessee, for the eighteen-month period. In short, Medtronic and MSD exchanged settlement for the privilege of not having to defend parallel litigation outside Tennessee. The California Suit clearly falls within the scope of the Settlement Agreement in that it was brought within the Forum Selection Period, it involved the employees' non-compete agreements with Medtronic and MSD, and it was brought in California, which is outside the selected forum.

It is true that the Settlement Agreement has no bearing on the decision of Valentine, Bennett and Miles to sue Medtronic and/or MSD in a California forum. Indeed, these employees

are only bound by the terms of their respective employment agreements, as set out *supra*. But while these employees are free to pursue their California litigation free of any constraints mandated by the Settlement Agreement, NuVasive is not. NuVasive is bound by the Settlement Agreement and, under its clear terms, is prohibited from engaging in the California litigation. As noted above, absent a legislative mandate to indemnify these employees, NuVasive must refrain from any direct or indirect involvement in litigation that violates the Settlement Agreement, i.e. litigation that involves the employees' non-compete agreements, begun within the eighteen month period, and brought outside the selected forum. Because the California Suit meets all three criteria, NuVasive would have been precluded from participating in this litigation directly, i.e. bringing the suit itself or being a party to it. For NuVasive to fund the employees' litigation, absent a legal obligation to do so, embroils them in a litigation in which they are prohibited from participating. In essence, NuVasive is doing indirectly through the employees what it is prohibited from doing directly under the terms of the Settlement Agreement. *See, e.g., Bellsouth BSE, Inc. v. Tennessee Regulatory Auth.*, 2003 WL 354466, *7 (Tenn. Ct. App.). It is well settled that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement, and there is an implied undertaking on the part of each party that nothing will be intentionally done which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Winfree v. Educators Credit Union*, 900 S.W.2d 285 (Tenn.App.1995). To allow NuVasive to fund the California Suit would violate this implied covenant of good faith and fair dealing by denying Medtronic and MSD the benefit of their bargain under the Settlement Agreement, i.e. Medtronic and MSD would have to defend, outside the selected forum, parallel litigation, in which NuVasive is involved.

Injunctions should only be granted if the moving party will suffer immediate and irreparable injury pending a final judgment, or the acts of the adverse party will tend to render final judgment ineffectual. Tenn. R. Civ. P. 65.04(2). As discussed above, the injury to Medtronic and MSD in allowing NuVasive to fund the California Suit would be to deny Medtronic and MSD the benefit of their bargain, i.e., to avoid parallel litigation outside of Tennessee. Injunction is the proper relief in this case in that injunction is the only way to secure the fruits of Medtronic and MSD's bargain.

For the foregoing reasons, we affirm the Order of the trial court, and this case is remanded to the trial court for such further proceedings as may be necessary. Costs of this appeal are assessed to the Appellant, NuVasive, and its surety.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.