

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

RITTENHOUSE DENTISTS, P C : AUGUST TERM, 2008
v. : No. 1956
IRA SHERES, DMD : (Commerce Program)
: Injunction Control No. 086212

**ORDER
AND MEMORANDUM OPINION
SUR PRELIMINARY INJUNCTION PETITION**

AND NOW, this 17th day of February 2008, upon consideration of the Petition for a Preliminary Injunction and the response in opposition, the Complaint in Equity and the Answer, the respective memoranda and trial briefs, all other matters of record and after hearings and in accord with the Memorandum Opinion filed contemporaneously with this Order, it is **ORDERED** that the Petition for a Preliminary Injunction is **Granted, in limited part, and otherwise Denied.**

The court finds that defendant, Ira Sheres, DMD (“Sheres”) may continue to treat patients in the office at 248 South 21st Street. Thus, the injunction in this respect is **Denied.**

The court **ORDERS** that Sheres **shall not** treat any patient who was not his client when he worked with John L. Richter, D.M.D., PhD., (“Richter”) (that is, the majority of them were gay and their records color-coded). Further, should Sheres disobey this Order severe sanctions may be imposed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

MEMORANDUM OPINION

Richter¹ asks this court to enforce a restrictive covenant requiring Sheres to cease treating dental patients at the office he recently opened and now maintains at 248 South 21st Street.

Richter urges that Sheres may not practice dentistry between 8th Street and the Schuylkill River and between South and Vine Streets based on the covenant.

The office of Sheres at issue is, according to Richter, four blocks from the Richter office. The court accepts as facts the “Stipulations” attached as Exhibit “B” to Richter’s Trial Memorandum and attached to this Memorandum Opinion as Appendix “1”.

It is important to note that Sheres treated primarily, if not exclusively, gay patients (color coded on the Rittenhouse Dentists, P.C. office records). These were different from the body of patients treated by Richter. (Color coded with a different color from the Sheres patients).

Richter and his counsel have cited the Superior Court decision of Wellspan Health, v. Bayliss 869 A.2d 990 (Supr. Ct. 2005), in support of the Injunction Petition. This court agrees that this decision correctly presents the controlling law and the court will apply here the rationale set forth in that opinion.

The essential law can be briefly stated. In determining whether to grant a preliminary injunction, a court may consider the averments of the pleadings and petition, affidavits of the parties or third parties, or any other proof. Pa.R.Civ.P. 1531. A preliminary injunction is “a most extraordinary form of relief which is to be granted only in the most compelling cases”. Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 501, 597 A.2d 141, 144 (1991). “The purpose of a preliminary injunction is to preserve the status quo as it exists **or previously existed**

¹ The nominal plaintiff is Rittenhouse Dentists, P.C.; however, the court will treat the plaintiff as Dr. Richter.

before the acts complained of, thereby preventing irreparable injury or gross injustice.”

Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 259, 602 A.2d 1277, 1286 (1992). A preliminary injunction should issue only where there is urgent necessity to avoid injury for which damages cannot compensate. Id.

The court may grant the injunction only if the moving party has **sufficiently established each** of the following five elements:

(1) that relief is necessary to prevent immediate and irreparable harm that damages cannot compensate;

(2) that greater injury will occur from refusing the injunction than by granting it;

(3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;

(4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and

(5) that the plaintiff’s right to relief is clear.

Cappiello v. Duca, 449 Pa.Super. 100, 105, 672 A.2d 1373, 1376 (1996). See also School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 (1995); New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 464, 392 A.2d 1383, 1385 (1978). “Additionally, the concern of the courts for the public welfare results in a close judicial scrutiny of restraints on physicians because of the value of their services to the community.” New Castle Orthopedic Associates, 392 A.2d at 1385. See also West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 298 (Pa.Super. 1999). These requisite elements “are cumulative, and if one element is lacking, relief may not be granted.” Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa.Comm. 1998).

This court finds that Richter has failed to sufficiently establish the requisite elements for injunctive relief. First, he has failed to establish immediate and irreparable harm that damages cannot compensate. Admittedly, a Pennsylvania court sitting in equity may enjoin a breach of contract - - including a breach of a restrictive covenant contained in an employment agreement - - where money damages are an inadequate remedy. John G. Bryant Co., v. Sling Testing & Repair, Inc., 471 Pa. 1, 369 A.2d 1164 (1977). Here, the covenant requires Sheres to refrain from practicing in the stated territory. If the covenant is enforceable, Sheres is in breach. But Sheres' breach of the covenant (if assumed), alone, does not entitle Richter to preliminary injunctive relief. See New Castle Orthopedic Associates, 392 A.2d at 1386; Herman v. Sixon, 393 Pa. 33, 37, 141 A.2d 576, 578 (1958); Rollins Protective Services Co. v. Shaffer, 383 Pa.Super. 598, 602, 557 A.2d 413, 415 (1989). Richter must show irreparable harm. He could do so by showing that Sheres has stolen patients, taken patient lists or other confidential information, or that Richter has lost patients or income or has otherwise suffered damage as a result of the alleged violation of the covenant.²

² New Castle Orthopedic Associates, 392 A.2d at 1386 (reversing issuance of preliminary injunction enforcing a restrictive covenant contained in the physician's employment agreement where the plaintiff failed to show that defendant had stolen patients, taken patient lists or that defendant had lost patients or income); Herman, 393 A.2d at 578 (reversing issuance of preliminary injunction enforcing a restrictive covenant contained in physician's employment contract where trial court refused to permit defendant to cross-examine plaintiff as to whether the plaintiff's income had decreased, whether plaintiff's practice had been damaged, or whether the defendant had used plaintiff's confidential information or solicited plaintiff's patients); West Penn Specialty MSO Inc., 737 A.2d at 295 (affirming issuance of preliminary injunction enforcing restrictive covenant contained in contract for the sale of defendant's medical practice to plaintiff, where defendant set up a competing practice treating 125 of her prior patients).

Sheres treated only gay patients. Richter treated a very different group of patients. Further, Richter was more experienced than Sheres and could perform difficult dental procedures which Sheres could not do. In sum, Sheres did not take and presently is not treating Richter's patients. (The medical records pertinent to those patients had a different color code than did Sheres' patients).

Thus, there is a lack of evidence that Sheres' present practice is causing financial injury to Richter or has damaged the good will that Richter has established during his years of practice.³

Two additional points should be noted. First, the Order that this court will issue contemporaneously will **enjoin Sheres from treating any patient that was originally treated by Dr. Richter**. In essence, this means Sheres can only treat those gay patients he treated while working with Dr. Richter (and were so color coded). Second, this court genuinely believes that Richter will not experience a loss of income because of Sheres' practice. If future events demonstrate that this court is wrong, Richter will have an adequate damages remedy, if he can show that he lost patients (other than those treated originally by Sheres).

Richter believed that Sheres was dragging the practice down. In the May 5, 2008 e-mail (Exhibit 2D-4 and attached hereto as Appendix II) Richter advises Ms. Martine (the bookkeeper) that Sheres fails to admit that "the practice is [about] \$300,000 in debt". It is not consistent for Richter to maintain Sheres was the major reason the practice lost revenue and, at the same time, argue that permitting Sheres to practice at the 21st Street Office will cause the Richter practice irreparable harm.

³ This court agrees that good will is generally an issue when the employee is engaged in a position involving customer contact.

Next, Richter has not established that greater injury would result by refusing the injunction than by granting it. Allowing Sheres to continue practicing will likely cause no significant immediate and irreparable injury to Richter. But, to prohibit Sheres from practicing for up to six months to a year and at a cost of \$330,000 (the cost of equipment for and to build out a new office) will cause Sheres to lose his primary source of income and would deny the gay community access to dental treatment being provided by Sheres. Further, there was testimony that could reasonably lead one to conclude that Richter's real complaint is that Sheres owes Richter (the Corporation) money. Putting Sheres out of business for an extended period of time would preclude Sheres from realizing enough revenue to pay Richter what he owes to Richter.⁴

This court submits that under the rationale set forth in Wellspan Health v. Bayliss, 869 A.2d 990 (Pa.Super.2005), it would be improvident to grant the injunction as demanded by plaintiff. When the litigants are healthcare professionals, the court must be aware of, and not ignore the public interest. In Wellspan, our Superior Court reiterated the need for a balancing test. The court stated:

If the threshold requirement of a protectable business interest is met, the next step in analysis of a non-competition covenant is to apply the balancing test defined by our Supreme Court in Hess. First, the court balances the employer's protectable business interest against the employee's interest in earning a living.

⁴ Parenthetically, the court is not convinced that the Agreement was in effect when Sheres left. Mutual assent to abandon a contract may be inferred from the attendant circumstances and the acts and declarations of the parties, even where the contract prohibits non-written modification. See Kirk v. Brentwood Manor Homes, Inc., 191 Pa.Super. 488, 492, 159 A.2d 48, 50-51 (1960); Murray on Contracts §143C (2001). The focus of the abandonment inquiry is the intent of the parties, which is a generally a question for the fact finder.

There was testimony that Richter had requested (or suggested, depending on one's view) Sheres leave the practice for months prior to Sheres actually leaving. Richter wanted Sheres **out of the practice** before Sheres actually left. This is clear from the May 5, 2008 e-mail (Exhibit "2D-4" - Appenidx II) in which Richter states, "I want him out ASAP ... my fear is that he ... will try to drag it out indefinitely."

What is clear is that these two **cannot** work together in any manner.

Then, the court balances the employer and employee interests with the interests of the public.

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Although the public interest is sometimes neglected in the balancing of employer and employee concerns, the interests of the public are of paramount importance in the context of non-competition covenants for physicians. Our Supreme Court has made clear that the courts will undertake a “close judicial scrutiny” of non-competition covenants involving physicians because of the value of their services to the public. In New Castle Orthopedic, evidence of long delays experienced by patients who attempted to obtain appointments for orthopedic services led the court to conclude that there was a shortage of orthopedic specialists in the geographic area. This was the major factor in the court’s decision to reverse the grant of a preliminary injunction against an orthopedic physician-surgeon.

In West Penn, this court concluded that the public interest analysis of non-competition covenants involving physicians requires a determination of the “quantitative sufficiency of physicians practicing in the restricted area” When patient demand in the geographical region in question exceeds the ability of appropriately trained physicians to provide expeditious treatment, then the public interest predominates over the right to enforce a non-competition covenant by injunction. The West Penn court cited the presence of numerous oncologists in the area and no evidence of a shortage of oncology services in affirming a grant of a preliminary injunction against an oncologist.

These cases show that public interest can be the determinative factor in the balancing test which determines enforceability of a non-competition covenant as applied to a health care provider. As our Supreme Court has stated, “paramount to the respective rights of the parties to the [physician non-competition] covenant must be its effect upon the consumer who is in need of the service.” The court must analyze whether enforcing the covenant would compromise patients’ ability to obtain adequate skilled care in the geographical area in which the health care provider is planning to work. In other words, the court must evaluate the likelihood that consumers could be adequately served by existing health care providers, including alternate health care providers that the employer has on staff or can readily hire to meet patient demand. The interests of the public are paramount. Whether the court respects those interests by granting or denying the injunction or by blue lining the restrictive covenant is dependent on the facts of the case and within the discretion of the court.

Wellspan, 869 A.2d at 999-1000.

CONCLUSION

In summary, the court denies the Injunction Petition as presented. Sheres may continue to maintain the office at 248 South 21st Street. However, the court grants a limited injunction which prohibits Sheres from treating any patient who, when Sheres left the practice, was designated as a patient of Richter.

The court notes that the case will continue on to determine whether damages are appropriate. To the extent the gravaman of the dispute is monetary, the court directs the parties to act reasonably with a view to reaching an amicable resolution of their differences.

The court will issue a contemporaneous Order consistent with this Memorandum Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.