

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

M. KELLY TILLERY, ESQUIRE	:	JUNE TERM 2005
	:	
	:	NO. 3085
v.	:	
	:	(Commerce Program)
	:	
LEONARD & SCIOLLA, LLP	:	Superior Court Docket
	:	No. 1761 EDA 2006

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**OPINION**

**Albert W. Sheppard, Jr., J.....October 12, 2006**

This Opinion is submitted relative to the appeal of plaintiff, M. Kelly Tillery, Esquire, (“Tillery”) from this court’s Order dated May 24, 2006, which denied Tillery’s Petition for a Preliminary Injunction. For the reasons discussed, this court respectfully submits that its decision should be affirmed.

**Background**

Tillery was a partner in the law firm of Leonard, Tillery & Sciolla, LLP from 1982 to April 2005. Complaint, ¶ 3. In April 2005, Tillery left Leonard, Tillery & Sciolla, LLP to practice law at another Philadelphia law firm. Complaint, ¶ 4. In June 2005, Tillery filed a Complaint and Petition for Preliminary Injunction alleging that his former firm Leonard & Sciolla, LLP<sup>1</sup> (“L & S”) refused to turn over to him certain

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<sup>1</sup> Leonard, Tillery & Sciolla, LLP became Leonard & Sciolla, LLP after Tillery’s departure.

e-mails and electronic files that were stored on the firm's computers. Complaint, ¶ 8. Two hearings were held on the Petition for Preliminary Injunction.<sup>2</sup> At the end of the hearings, the parties were to try to work out an agreement as to the exchange of the information. The matter was held in abeyance, with no formal ruling on Tillery's Petition for Preliminary Injunction, in the hopes that the parties would resolve their dispute.

Subsequently, L & S produced the information that Tillery sought in his Petition for Preliminary Injunction. In light of this production and on May 24, 2006 this court denied Tillery's Petition for Preliminary Injunction and ordered that the case be marked ended since "there remain[ed] no material dispute between the litigants."

Tillery filed a Motion for Reconsideration of the court's May 24, 2006 Order seeking to amend and clarify the Order to state that the Order did not preclude a later claim for damages. At oral argument on the Motion for Reconsideration, counsel for Tillery conceded that L & S had turned over all of the information that Tillery sought in his Petition for a Preliminary Injunction. (N.T. 5:5-6, 10:19-22, 6/16/06). But, Tillery claimed that the information was not turned over until approximately one year after it was initially requested. (Tillery's Memorandum of Law in Support of Motion for Reconsideration, at p. 2; N.T. 2:12-3:16, 6/16/06). Tillery expressed concern that this delay in turning over the electronic files may have harmed Tillery's clients and hence, may possibly subject Tillery to a claim for damages by his clients in the future. (N.T. 5:5-6:5, 6/16/06). Therefore, Tillery requested that the court, in denying his Petition for Preliminary Injunction, include language in its order stating that it was not a final judgment on the merits and did not bar any subsequent claim for damages.

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<sup>2</sup> The case was assigned and handled initially by the Honorable C. Darnell Jones. When Judge Jones became the President Judge, the undersigned took over the case.

The court denied Tillery's Motion for Reconsideration. This timely appeal followed.

### **Discussion**

Tillery's Petition for Preliminary Injunction was denied because it had become moot by the time of the formal ruling on the Petition. Indeed, Tillery, by his own admission, agreed that his Petition for Preliminary Injunction was moot since L & S produced the information that Tillery had sought. (Tillery's Memorandum of Law in Support of Motion for Reconsideration, at p. 2; N.T. 5:5-6, 10:19-22, 6/16/06).

However, Tillery argues that since there was no final adjudication on the merits, the final order should have been clarified to indicate that it did not preclude a later claim for damages. It is true that "a preliminary injunction cannot serve as a judgment on the merits since, by definition, it is a temporary remedy granted until that time when the parties' dispute can be completely resolved." Consolidation Coal Co. v. District 5, United Mine Workers, 336 Pa. Super. 354, 363, 485 A.2d 1118, 1122 (1984). Here, the denial of Petition for Preliminary Injunction did not serve as a judgment on the merits; however, it did effectively end the case because the entire controversy was resolved when L & S produced the electronic files.

Furthermore, Tillery conceded at oral argument that he had not, at that point, suffered any damages as a result of the delay in turning over the electronic files. (N.T. 3:17-19, 11:8:14, 18:21-24, 6/16/06). In fact, Tillery acknowledged that it is possible that such proceedings for damages may never be initiated. (N.T. 15:20-24, 6/16/06). In short, the issue will likely never ripen into an actual controversy. This court should not act where a real controversy does not exist. See, e.g., Excellent Laundry Co. v. Szekeres,

382 Pa. 23, 25, 114 A.2d 176, 177 (1955) (“[t]he function of a court is to redress existing wrongs...[t]he law is not concerned with matters that have become moot, and the rule is well and wisely established that a court will act only where a real controversy exists”); Silver v. Zoning Board of Adjustment, 381 Pa. 41, 46, 112 A.2d 84, 87 (1955) (“[a] court should not render advisory decisions on hypothetical facts”); Brown v. Liquor Control Board., 673 A.2d 21, 23 (Pa. Commw. 1996) (“[a]ny action...may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic”); In re Petition to Compel Cooperation with Child Abuse Investigation; Appeal of R.G & S.G., 2005 Pa. Super. 188, P7, 875 A.2d 365, 369 (2005) (“[i]t is impermissible for courts to render purely advisory opinions”). Thus, the case was properly marked ended.

### **Conclusion**

For these reasons, this court respectfully submits that its decision should be affirmed.

**BY THE COURT:**

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**ALBERT W. SHEPPARD, JR. J.**