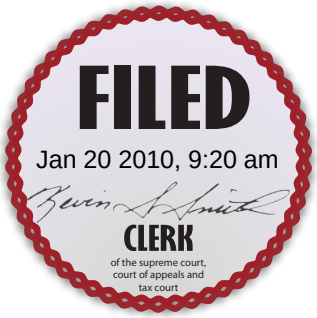

ATTORNEYS FOR APPELLANT:

LARRY L. BARNARD
TIMOTHY M. PAPE
Carson Boxberger LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

MICHAEL H. MICHMERHUIZEN
H. JOSEPH COHEN
Barrett & McNagney LLP
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SPINE, SPORTS, AND PAIN MEDICINE, P.C.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0906-CV-279
	)	
DANIEL H. NOLAN, M.D.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Nancy E. Boyer, Judge
Cause No. 02D01-0903-PL-71

January 20, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Spine, Sports, and Pain Medicine, P.C. (Spine) appeals the trial court's judgment denying its motion for a preliminary injunction against appellee-plaintiff Daniel H. Nolan, M.D. Specifically, Spine contends that the trial court erred in concluding that "[it] did not have a legitimate protectable interest in precluding Dr. Nolan from [practicing medicine] in Warsaw." Appellant's Br. p. 9. Moreover, Spine asserts that the trial court erroneously determined that the non-competition provision in the parties' Physician Employment Agreement (Agreement) was overly broad and that the trial court should have entered an injunction precluding Dr. Nolan from providing services to Spine's patients.

Notwithstanding Spine's arguments that it satisfied the requirements for the issuance of a preliminary injunction, we conclude that the express terms of the Agreement did not prohibit Dr. Nolan from opening a medical practice in Warsaw. Thus, we affirm the trial court's judgment.

FACTS

Dr. Nolan, a resident of Fort Wayne, is an anesthesiologist licensed to practice medicine in Indiana. Spine is an Indiana Professional Corporation engaged in a healthcare practice involving interventional pain management, and its principal place of business is in Fort Wayne.

On June 8, 2007, Dr. Nolan and Spine entered into the Agreement, which provided, among other things, that if Dr. Nolan left Spine's employment, he could not work within a twenty-five-mile radius of any location where Spine provided medical

services "previously or currently for a period of two years." Appellant's App. p. 136.

More specifically, the Agreement stated:

> Paragraph 7 Termination. This Agreement and employee's employment with SPINE may be terminated prior to the expiration of the term or any extension or renewal of this Agreement as follows:
>
> . . .
>
> (c) Employee may terminate his or her employment with SPINE upon not less than sixty (60) days written notice to SPINE, but SPINE shall have the option of making the effective date of termination earlier than specified in the employee's notice.
>
> Paragraph 12 Non-Competition Covenant. Employee shall not during the period of his or her employment and for a period of two (2) years immediately following his or her termination for any reason, directly or indirectly, whether as an individual or sole proprietor or as an owner, partner, shareholder (except a holder of one percent (1%) or less of any class of outstanding security listed under National Security Exchange or actively traded over the counter market), officer, director, manager, employee, agent, consultant or formal or informal advisor of any hospital, surgery center, medical practice, person, firm, association, partnership, venture, corporation, or any other entity, to the extent permitted by applicable law:
>
> (a) Provide products or services competitive with those of SPINE within a twenty-five (25) mile radius of any office of SPINE or healthcare facility at which professional employees of SPINE provide medical or educational services, previously or currently for a period of two (2) years;
>
> (b) Provide to any patients of SPINE any products or services competitive with those provided by SPINE;
>
> (c) Solicit, divert, or take away or attempt to solicit, divert, or take away any business of SPINE;
>
> . . .
>
> (f) Act of any other manner that would be considered to be in competition with SPINE.

> (15) Attorney's fees and court costs. In the event any suit or other action is commenced to construe and enforce any provision of this Agreement, the prevailing party shall be paid by the other party, reasonable attorney's fees and court costs.

Id. at 131, 132, 136, 137 (emphasis added).

Dr. Nolan commenced his employment with Spine in September 2007. Spine provided Dr. Nolan with clinic and office space, equipment, staff, and other resources for his practice. When Dr. Nolan began his employment, Spine had Indiana offices in Fort Wayne, Auburn, Bluffton, and Huntington.[1] During the course of his employment, Dr. Nolan treated patients in Angola and Fort Wayne.

In October 2007, representatives from Spine informed Dr. Nolan that there was a possibility of expanding Spine's offices to Warsaw. Spine had also informed its employees that it might open a Warsaw office. Moreover, some of Spine's patients had urged Dr. William Hedrick, the principal owner of Spine, to open an office in Warsaw so they could avoid the nearly one-hour drive to Fort Wayne. Dr. Hedrick had contemplated opening an office in Warsaw for nearly four years, and in his nine years of practice, Dr. Hedrick had established a substantial patient base in Warsaw and surrounding towns.

Sometime in the fall of 2008, Dr. Nolan began exploring other employment opportunities. Although Dr. Nolan preferred to stay in Fort Wayne, he believed that Warsaw was his best opportunity and began exploring his options there. Dr. Nolan believed that if he practiced in Warsaw, the patients he treated at Spine might refer other patients to him.

[1] Spine also had offices in Michigan and Ohio.

By December 2008, Dr. Nolan made plans to leave Spine and practice in Warsaw. On January 12, 2009, Dr. Nolan tendered his letter of resignation to Spine, providing sixty days notice in accordance with the Agreement. That same day, Dr. Nolan formed a limited liability company for the purpose of practicing medicine in Warsaw.

Toward the end of January 2009, Rhonda Barnes, the director of operations for Spine, searched for office space in Warsaw. Within two weeks, Barnes found office space and signed a lease that commenced on February 1, 2009.

On February 9, 2009, Spine sent Dr. Nolan a letter accepting his resignation and setting forth Dr. Nolan's non-compete obligations under the Agreement. The letter advised Dr. Nolan, among other things, that that he could not compete within a twenty-five mile radius of Spine's offices.

On February 16, 2009, after Spine accepted Dr. Nolan's resignation, it opened a Warsaw office and began treating patients there. Specifically, Dr. Hedrick treated four patients at the Warsaw office for a total of approximately one hour and ten minutes. Although those patients had originally been scheduled for treatment at the Fort Wayne office, they had been rescheduled to Spine's new Warsaw location.

Spine first learned that Dr. Nolan intended to practice in Warsaw on February 10, 2009, when Dr. Nolan's counsel sent a letter to Spine, notifying it of his intent to practice there. Despite Spine's initial acceptance of Dr. Nolan's resignation, Spine terminated Dr. Nolan's employment on February 24, 2009. Thereafter, Dr. Nolan began employment at a hospital in Mishawaka.

On March 2, 2009, Dr. Nolan filed a complaint for declaratory relief and damages against Spine, claiming that the terms of the Agreement did not prohibit him from practicing in Warsaw. Thus, Dr. Nolan claimed that the Agreement—to the extent that it attempted to prohibit him from practicing there—was unenforceable. Dr. Nolan also claimed that Spine's termination of his employment was a material breach of the Agreement. Moreover, because Spine purportedly failed to pay Dr. Nolan's wages through March 13, 2009, which was the date that Spine recognized in its acceptance letter as the last day of Dr. Nolan's employment, Dr. Nolan asserted that an additional material breach of the Agreement had occurred.

In response, Spine filed a counterclaim for a preliminary and permanent injunction, seeking to prevent Dr. Nolan from practicing in Warsaw. More specifically, Spine asserted that "a preliminary injunction is necessary to preserve the status quo until the issues raised by the plaintiff's complaint and the defendant's Counterclaim can be determined and is appropriate because Spine is likely to prevail on the merits of its Counterclaim." Id. at 49.

On April 29, 2009, the trial court conducted a hearing on Spine's request for a preliminary injunction, which it subsequently denied. The trial court's order of June 8, 2009, provided that

> 15. There is no record that Nolan used any of Spine's resources to establish physician-patient relationships in Warsaw, Indiana. The patients that were treated by Spine in Warsaw, Indiana prior to Nolan's termination were existing patients of Spine. Nolan had no experience in Warsaw, and as of the date of the hearing, had never treated a patient in Warsaw.

> 16. Spine had no legitimate, protectable interest in Warsaw, Indiana as of the date of Nolan's termination of employment.
>
> 17. Notwithstanding the fact the Court has determined Spine has no legitimate, protectable interest, the scope of the geographic restriction is also unreasonable.
>
> . . .
>
> 19. Since Nolan had not used any of Spine's resources to establish doctor/patient relationships in Warsaw or Kosciusko County, the area sought to be restricted by Spine is geographically overbroad and, therefore, unenforceable.

Id. at 7-15.

Thereafter, on June 22, 2009, the trial court amended the above order and granted a preliminary injunction against Dr. Nolan that prohibited him from competing with Spine within twenty-five miles of Spine's offices in Fort Wayne, Huntington, Auburn, and Bluffton. This order provided that

> On April 29, 2009, the date of hearing conducted on Defendant's Motion for Preliminary Injunction, counsel for Plaintiff Daniel H. Nolan, M.D. . . . stipulated on the record to an injunction being entered prohibiting Nolan from engaging in a practice competitive with that of Spine . . . within twenty-five miles of Spine's offices as of the date of the signing of the Agreement. Those locations as of June 8, 2007, the date of signing, included Spine's offices . . . in Fort Wayne, . . . and the offices in Huntington, Auburn, and Bluffton. . . .
>
> Spine did not allege that Nolan had engaged in a practice within 25 miles of Spine's offices; nor did Spine allege any breach of the June 8, 2007 Agreement by Nolan.
>
> Pursuant to Plaintiff's stipulation on the record, the Court enters an injunction prohibiting Plaintiff Nolan from engaging in a practice competitive with that of Spine within twenty-five miles of Spine's offices . . . in Fort Wayne, . . . and the offices located in Huntington, Auburn, and Bluffton.
>
> In the Court's Finding Number 24, the parties agreed that "the only issue before the Court" was whether the Agreement's non-competition covenant

> prohibited "Nolan form providing medical services in Warsaw . . . competitive with the services provided by Spine in Warsaw.
>
> Since that was the only issue before the court and since no other violation of the Agreement has been alleged, the Court's June 8, 2009 Order is amended only to the extent as provided herein.
>
> In all other respects, the Court re-affirms its Order of June 8, 2009.
>
> By agreement of the parties, the court now stays Plaintiff's Motion for Summary Judgment pending a decision by the Court of Appeals or upon a request for relief by either party.

Id. at 17. Spine now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that to obtain a preliminary injunction, the moving party must demonstrate by a preponderance of the evidence that: 1) its remedies at law are inadequate, causing irreparable harm pending the resolution of the substantive action if the injunction does not issue; 2) it has a reasonable likelihood of success at trial by establishing a prima facie case; 3) the threatened injury to the plaintiff outweighs the threatened harm the grant of injunction may inflict on the defendant; and 4) the public interest would not be disserved if the preliminary injunction is granted. Central Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 727 (Ind. 2008). If the plaintiff fails to prove any one or more of these requirements, the trial court's grant thereof is an abuse of discretion. Id.

We generally review a trial court's grant or denial of a preliminary injunction for an abuse of discretion. Id. However, in this case, the trial court denied the preliminary

injunction request because it determined that the non-competition provision contained in the Agreement was not reasonable.

Noncompetition covenants in employment contracts are in restraint of trade and disfavored by the law. Id. at 728-29. Moreover, noncompetition covenants in employment contracts are construed strictly against the employer. Id. at 729. Although noncompetition agreements are enforceable, they must be reasonable. The question of reasonableness in noncompetition agreements is a question of law. Coffman v. Olson & Co., P.C., 906 N.E.2d 201, 207 (Ind. App. 2009). We review questions of law under a de novo standard and owe no deference to a trial court's legal conclusions. Id.

II. Spine's Claims

Spine argues that the trial court erred in denying its request for a preliminary injunction because the evidence established that it has a legitimate protectable interest in precluding Dr. Nolan from practicing in Warsaw and that the remaining standards for injunctive relief were satisfied. However, as Dr. Nolan correctly asserts, the threshold question in this appeal is whether a medical practice in Warsaw would violate the terms of the parties' Agreement. In other words, if Dr. Nolan's activity is not prohibited by the Agreement, the extent of Spine's protectable interest is irrelevant because Spine did not contract to protect that interest.

Typically, when determining whether a non-competition agreement is reasonable, the employer must initially establish that it has a legitimate interest to be protected by the agreement. Id. The employer must also show that the agreement is reasonable in scope as to the time, activity, and geographic area restricted. Id. However, "in any situation,

non-competition agreements are always strictly construed against the covenantee, and will never be extended beyond the express terms of the agreement." Franke v. Honeywell, Inc., 516 N.E.2d 1090, 1092-93 (Ind. Ct. App. 1987) (emphasis added). Moreover, when determining the meaning of contractual terms, we should give effect to the parties' intentions "as established at the time they entered into the agreement." Ryan v. Ryan, 659 N.E.2d 1088, 1092 (Ind. Ct. App. 1995).

As set forth above, Paragraph 12 of the Agreement provides that

> Employee shall not during the period of his or her employment and for a period of two (2) years immediately following his or her termination for any reason . . .
>
> > (a) Provide products or services competitive with those of SPINE within a twenty-five (25) mile radius of any office of SPINE or healthcare facility at which professional employees of SPINE provide medical or educational services, previously or currently for a period of two (2) years. . . .

Appellant's App. p. 136. In light of this non-compete clause, Spine asserts that

> The phrase "office of Spine . . . previously or currently" . . . in Section 12(a). . . clearly modifies the prior phrase that "the employee shall not during the period of his employment." The undisputed evidence in this case is that the period of Dr. Nolan's employment extended until his termination on February 24, 2009. At that time, Spine had an office in Warsaw. . . . When reading the Agreement as a whole, it is apparent that the parties intended to preclude competition with any office of Spine which existed "currently," i.e., during the period of his employment. That, based on the undisputed evidence, includes the Warsaw office.
>
> The parties simply could not have intended that the non-competition provision applied to only locations where Spine was operating at the time the Agreement was executed.

Appellant's Reply Br. p. 4.

Notwithstanding Spine's contentions, the evidence established that Dr. Nolan and Spine entered into the Agreement on June 8, 2007, and it is undisputed that Spine did not have a Warsaw office at that time. Moreover, Spine did not have a Warsaw office when Dr. Nolan resigned on January 12, 2009, and Spine's lease of the new facility did not commence until February 1, 2009.

Although Spine maintains that the word "currently," as used in the Agreement is ambiguous, we note that "currently" has been defined as "at this time period; now," and a listed synonym of "currently" is "presently." Dictionary.com, WordNet(R) 3.0, Princeton University, http:"//dictionary.reference.com/browse/currently (accessed: January 8, 2010).[2] Moreover, during the hearing on April 29, 2009, Spine's witnesses had no difficulty responding to questions posed by counsel about their "current" job title or where they were "currently" employed. Tr. p. 86, 91, 96, 101, 110, 133. Matt Cavacini, the CEO for Spine, testified about Spine's "current" locations and where Spine had plans to expand in the future. Id. at 136-37, 160-61, 185-86. Cavacini expressed no confusion about the "current" offices of Spine, as they existed on April 29, 2009, as opposed to potential future offices. Id. Hence, contrary to Spine's argument, there was no confusion that "currently" means "now" or "presently," as used in the Agreement, June 8, 2007.

In our view, it is apparent that the Agreement prohibits Dr. Nolan from competing within twenty-five miles of any office of Spine that existed at the time of Dr. Nolan's January 2009 departure from Spine's employment. More specifically, the words "for a

[2] This court has held that the plain and ordinary meaning of terms may be ascertained from dictionary. Niccum v. Niccum, 734 N.E.2d 637, 640 (Ind. Ct. App. 2000).

period of two (2) years" in the non-compete provision must refer to a two-year period following Dr. Nolan's termination or resignation from Spine. Otherwise, if that period was construed to apply to the time following the execution of the Agreement, the non-compete clause would be a nullity if Dr. Nolan continued in Spine's employment for more than two years. Thus, it would be incongruous for the preceding words "previously or currently" to refer to the time of the signing of the Agreement, particularly because they are part of the same phrase qualifying Dr. Nolan's obligation not to open a competing practice.

Finally, because we have determined that the words "previously or currently" in the Agreement refer to Dr. Nolan's tendered resignation date of January 12, 2009, there is no merit to the contention that Spine enjoyed a "roving" non-compete agreement that would subject Dr. Nolan to indefinite obligations following his resignation. Again, Spine did not have a Warsaw office as of January 12, 2009, its lease for that office commenced on February 1, 2009, and Spine opened the office on February 16, 2009. Therefore, because Spine did not "previously or currently" have an office in Warsaw when Dr. Nolan tendered his resignation, the express terms of the Agreement did not prohibit Dr. Nolan from opening a medical practice in Warsaw. That said, Dr. Nolan relied on a reasonable interpretation, if not the clear import of the Agreement, when deciding to open his practice. In short, we decline to enforce the non-compete provision in the Agreement as Spine suggests. See Indiana-Kentucky Elec. Corp. v. Green, 476 N.E.2d 141, 145 (Ind. Ct. App. 1985) (noting courts may not rewrite and then enforce contracts that the parties themselves did not enter into).

CONCLUSION

In sum, the evidence demonstrated that Spine did not have an office in Warsaw on June 8, 2007, when the Agreement was signed. Moreover, the Agreement prohibited Dr. Nolan from competing within twenty-five miles of any office of Spine that previously or currently existed when Dr. Nolan tendered his resignation from Spine's employment. Because Spine did not "previously or currently" have a Warsaw office as of that date, the Agreement did not prohibit Dr. Nolan from opening a medical practice in Warsaw.[3] As a result, Spine cannot enjoin Dr. Nolan from working at that location, and we conclude that the trial court properly denied Spine's motion for a preliminary injunction.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.

[3] As an aside, even assuming solely for the sake of argument that the terms of the Agreement prohibited Dr. Nolan from practicing in Warsaw, the burden rested on Spine to also demonstrate that it had a legitimate protectable interest in the twenty-five mile radius surrounding Warsaw. As our Supreme Court observed in Krueger:

> An employer has invested in creating its physician's patient relationships only where the physician has practiced. We agree with the courts that have held that noncompetition agreements justified by the employer's development of patient relationships must be limited to the area in which the physician has had patient contact.

882 N.E.2d at 723 (emphasis added). As noted above, Dr. Nolan never worked in Warsaw and none of Spine's physicians practiced there prior to Dr. Nolan's resignation and Spine's acceptance of that resignation.