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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

April 26, 2010

MEMORANDUM OPINION ON REHEARING

BAKER, Chief Judge

Appellant-defendant Spine, Sports, and Pain Medicine, P.C. (Spine) petitions for rehearing of our unpublished memorandum decision in Spine, Sports, and Pain Medicine, P.C., v. Nolan, No. 02A03-0906-CV-279 (Jan. 20, 2010), where we affirmed the trial court's decision denying Spine's request for a preliminary injunction against appellee-plaintiff Daniel H. Nolan, M.D., regarding Dr. Nolan's alleged violation of a non-compete Employment Agreement (Agreement).

We grant Spine's petition for rehearing for the limited purpose of clarifying a portion of our analysis and deny the petition in all other respects.

To reiterate, the parties entered into the Agreement on June 8, 2007, that provided 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." Slip op. at 3.

Dr. Nolan treated patients in Fort Wayne and Huntington and by December 2008, he made plans to leave Spine's offices[1] 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. Despite Spine's initial acceptance of Dr. Nolan's resignation, Spine terminated Dr. Nolan's employment on February 24, 2009.

In the initial appeal, we determined, among other things, that the express terms of the Agreement did not prohibit Dr. Nolan from opening a medical practice in Warsaw

[1] Spine had offices in Fort Wayne, Auburn, Bluffton, and Huntington.

because Spine did not "previously or currently" have an office in Warsaw when Dr. Nolan tendered his resignation. Slip op. at 12.

Spine agrees on rehearing that we properly construed the Agreement to the extent that it prohibited Dr. Nolan from competing within twenty-five miles of Spine's offices that existed when he departed from Spine's employment. However, Spine asserts that our decision was based on the "erroneous assumption that Dr. Nolan's employment with Spine 'terminated' at the time he tendered his resignation" in January 2009. Petition for Rehearing at 2. However, we very clearly set forth both the date that Dr. Nolan resigned and his last day of employment with Spine.

Moreover, notwithstanding Dr. Nolan's deposition testimony that he was still in Spine's employ on February 16, 2009, we also pointed out in our original decision that Dr. Nolan had made plans to leave Spine and practice in Warsaw prior to tendering his resignation. Indeed, the evidence established that Dr. Nolan reviewed the Agreement and observed that it purported to prohibit him from being employed within twenty-five miles of an office that Spine "previously or currently" operated. Because Dr. Nolan knew that Spine never had an office in Warsaw, he decided to practice in Warsaw in an effort to comply with his "reasonable interpretation . . . of the Agreement." Slip op. at 12.

Spine does not explain how Dr. Nolan could have anticipated where Spine might open an office between the time of his resignation and the acceptance of the resignation. Moreover, were we to hold that Spine enjoyed a "roving" non-compete clause that would encompass a geographical area incapable of identification and subject Dr. Nolan to indefinite obligations following his resignation, the Agreement would not be enforceable.

See MacGill v. Reid, 850 N.E.2d 926, 930 (Ind. Ct. App. 2006) (observing that a covenant not to compete must give the employee a clear understanding of what conduct is prohibited).

Subject to the clarification set forth above, we otherwise deny Spine's petition for rehearing and affirm our original decision in all other respects.

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