

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1268

**CARDIOVASCULAR INSTITUTE OF THE SOUTH,
A PROFESSIONAL MEDICAL CORPORATION**

VERSUS

PETER M. ABEL, M.D.

Judgment Rendered: **MAR 09 2015**

**Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Case No. 127,186**

The Honorable Vincent J. Borne, Judge Presiding

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Morgan City, Louisiana**

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Peter M. Abel, M.D.**

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Cardiovascular Institute of the
South, A Professional Medical
Corporation**

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

Edly - Dissents w/o written reasons -

THERIOT, J.

In this suit arising from an alleged violation of a non-compete agreement, the defendant appeals the judgment of the 16th Judicial District Court enjoining him from certain medical practices. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Peter M. Abel, M.D., holds certifications from the American Board of Internal Medicine in the fields of internal medicine and cardiovascular disease. He was first certified in internal medicine in 1984 and cardiovascular disease in 1987. He was employed by Cardiovascular Institute of the South, A Professional Medical Association (CIS)¹ since 1990 as an “interventional cardiologist.” Dr. Abel’s practice was located at CIS’s clinic in Morgan City, Louisiana.

In 2011, due to personal health reasons, Dr. Abel was forced to limit his practice. On December 28, 2011, he executed a part-time physician employment agreement with CIS. Section 3.01 of the agreement refers to Dr. Abel’s applicable duties generally as “all professional medical and related services.” Section 8.01, which is the section at issue in this appeal, falls under the restrictive covenants chapter of the agreement and reads:

Upon the expiration of this Agreement or termination of the Agreement for any reason whatsoever, [Dr. Abel] agrees, for a period of two (2) years following his last day of employment with CIS, not to carry on or engage in the business of the practice of medicine in the sub-specialty of cardiology in the Parishes of Acadia, Evangeline, Lafayette, St. Landry, St. Martin, St. Mary, Iberia, Vermillion, Terrebonne, Lafourche, and East Baton Rouge. This covenant not to compete shall be in force and effect in each listed Parish so long as CIS or any physician employed by CIS engages in the practice of medicine in the sub-specialty of cardiology. In the event [Dr. Abel] violates the covenants not to compete or solicit, CIS shall have the right to seek injunctive relief and shall be entitled to all

¹ CIS is the successor to the Houma Heart Clinic, P.C. with which Dr. Abel was first associated.

damages and any other remedies provided by the laws of the State of Louisiana.

Dr. Abel continued to work at CIS until December 24, 2013. On or about April 1, 2014, Dr. Abel opened a private practice at the Prevention Plus Clinic (Prevention Plus) in Morgan City, Louisiana. Believing that Dr. Abel was practicing cardiology at Prevention Plus, CIS filed a verified complaint for injunction and damages on May 7, 2014.

Following a hearing on May 30, 2014, the district court orally issued a preliminary injunction against Dr. Abel, prohibiting him from practicing medicine in the sub-specialty of cardiology, but did not list specific services that Dr. Abel could not provide. The judgment of preliminary injunction was signed June 9, 2014, enforcing section 8.01 of the non-compete agreement. That same day, Dr. Abel moved for declaratory judgment, seeking from the district court a declaration that the non-compete agreement did not restrict him from practicing in the fields of “internal medicine,” “preventative medicine,” and “wellness.”

Following a hearing on July 11, 2014, the district court signed a judgment on July 22, 2014, confirming its previous judgment on the preliminary injunction and further prohibiting Dr. Abel from practicing in the fields of “internal medicine,” “preventative medicine,” and “wellness,” where the focus of any services rendered by Dr. Abel would be cardiology.

Dr. Abel filed a motion to appeal the June 9, 2014, preliminary injunction on June 13, 2014. That appeal was lodged by this court on October 6, 2014. Out of an abundance of caution, Dr. Abel subsequently filed a supervisory writ concerning the district court’s judgment of July 22, 2014, moving this court to consolidate the July 22, 2014 judgment with the

present appeal.² CIS has not opposed consolidation of the issues. We find the merits of the appeal and writ to be virtually identical, therefore, we shall consolidate them.

ASSIGNMENTS OF ERROR

Dr. Abel presents five assignments of error:

1. The trial court committed reversible error when it failed to strictly construe the covenants and reformed a narrow prohibition against the practice of medicine in the “sub-specialty of cardiology” to a prohibition against the performance of anything claimed to be performed by the former employer or claimed to, in any way, related to cardiology, even though regularly performed by many other clinical physicians including internists and general practitioners.
2. The trial court committed reversible error when it granted CIS’s preliminary injunctions without requiring a *prima facie* showing, when it failed to require any security or proper security, and failed to provide reasonable detail of the acts sought to be restrained.
3. The trial court committed reversible error when it failed to rule unequivocally that the restrictive agreement does not prohibit Dr. Abel from engaging in the practice of medicine in the specialties of “internal medicine,” “preventative medicine,” or “wellness,” within St. Mary Parish.
4. The trial court committed reversible error when it erred in its contractual interpretation of the “practice of medicine in the sub-specialty of cardiology” and when it misconstrued the testimony of Dr. Abel, who defined the word “cardiology” in the pure sense to be “the study of the heart.”
5. The trial court committed reversible error with its conclusion that Dr. Abel had violated the terms of the restrictive covenants.

STANDARD OF REVIEW

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art 3601(A). The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court and will not be disturbed on review unless a clear abuse of discretion

² 2014 CW 1270.

has been shown. *State Machinery & Equipment Sales, Inc. v. Iberville Parish Council*, 2005-2240 (La. App. 1 Cir. 12/28/06), 952 So.2d 77, 81.

DISCUSSION

Any contract or agreement that restrains a person from engaging in a lawful profession is generally prohibited by law; however, La. R.S. 23:921(C) provides an exception, which allows for legal non-compete agreements:

Any person ... who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment ...

Public policy requires that the provisions of noncompetition agreements be strictly construed in favor of the employee. *Turner Professional Services, Ltd. v. Broussard*, 1999-2838 (La. App. 1 Cir. 5/12/00), 762 So.2d 184, 185, *writ denied* 2000-1717 (La. 9/29/00), 770 So.2d 356. The phrase “carrying on or engaging in a business similar to that of the employer” in La. R.S. 23:921(C) means carrying on or engaging in the employee’s own business similar to that of the employer. *Vartech Systems, Inc. v. Hayden*, 2005-2499 (La. App. 1 Cir. 12/20/06), 951 So.2d 247, 256.

At the preliminary injunction hearing on May 20, 2014, Dr. Darrell Solet, a board certified cardiologist at CIS who once worked with Dr. Abel, testified to the procedures he would employ on patients in his practice of cardiology at CIS. Those procedures included cardiovascular imaging, echo-cardiograms, stress testing, and preventative care. These procedures were employed to assess blockage in arteries and the likelihood of the patient suffering a stroke in the future. Dr. Solet stated that all the

procedures related to heart disease, and that often times he would treat patients without cardiovascular disease, such as diabetes, for preventative care, since their chances for developing cardiovascular disease in the future were high. Dr. Solet stated that there are several levels of preventative medicine he would use for patients who did and did not have symptoms of cardiovascular disease.

Dr. Abel testified to both the similarities and the differences between his practice at CIS and his practice at Prevention Plus. Dr. Abel stated that cardiology is a sub-set of internal medicine, because many patients exhibit cardiovascular issues that require electro-cardiograms, stress tests, and other heart-monitoring procedures. At Prevention Plus, Dr. Abel stated he employs the same levels of prevention used by Dr. Solet to determine if the patient is likely to have a cardiovascular event. He testified that as an interventional cardiologist at CIS, he would employ procedures such as angioplasty to alleviate existing conditions of arterial blockage, whereas at Prevention Plus, he would often see patients who did not have arterial blockage that required angioplasty and would take preventative measures in order to avoid the need for angioplasty in the future. Dr. Abel did not perform angioplasty procedures at Prevention Plus.

Dr. Abel related one instance where he saw a patient, who was complaining of chest pains, performed an echo-cardiogram on her, and found the results to be abnormal. Although the patient had no history of heart problems, Dr. Abel believed she had a high likelihood of acute coronary syndrome and heart attack and recommended that she go to the hospital for an angiogram. She was subsequently diagnosed with acute coronary syndrome. The patient then returned to Prevention Plus for further treatment, and Dr. Able told her, "You know, you can go to CIS, or I can

take care of your secondary prevention at this point.” The patient decided to stay with Dr. Abel and have her secondary prevention treatment at Prevention Plus.

Dr. Abel characterized his approach to patients at Prevention Plus to be “clearly different” from what he did at CIS. He also noted that a lot of things were the same, but that he has added to his repertoire of procedures at Prevention Plus. These new procedures he employs are used to evaluate status and risk for cardiovascular events.

On cross-examination, Dr. Abel testified he was never given a definition by CIS as to what was meant by “the sub-specialty of cardiology,” that he did not participate in the drafting or negotiation of the non-compete agreement, and that the agreement was “just stuck in front” of him while he was in the middle of seeing a patient. He signed it and went back to seeing his patients. Dr. Abel also suggested that it’s nearly impossible to practice medicine without practicing cardiology, since “[c]ardiology is part of medicine in general.”

A brochure for Prevention Plus was introduced at the hearing as plaintiff’s exhibit “M.” The front of the brochure shows a photograph of Dr. Abel. Above his photograph is the logo of Prevention Plus, which is in the shape of a heart. Inside, the brochure reads: “Dedicated to helping you reduce your risk for heart attack and stroke, we use an advanced approach to predict, prevent, manage, and reverse heart and vascular disease.” The brochure contains a “Do you know” and a “frequently asked questions” section pertaining strictly to cardiovascular issues, such as heart attack, stroke, plaque in arteries, and cholesterol. Dr. Abel admitted that the preventative medicine he practices at Prevention Plus is of the same kind Dr. Solet practices at CIS, although some of his methods and procedures may

differ. He stated that reversing heart and vascular disease is one of the focuses at Prevention Plus. Dr. Abel responded affirmatively that he treated patients at CIS for the “prediction, prevention, management, and reversal of heart and vascular disease,” just as stated in his Prevention Plus brochure.

Taking all of the testimony and evidence admitted at the hearing, we find the district court did not abuse its discretion in finding that Dr. Abel’s practice at Prevention Plus violated section 8.01 of the non-compete agreement. Dr. Solet, a cardiologist at CIS who practices the same kind of medicine Dr. Abel had practiced at CIS, described his duties at CIS. Many of his diagnostic procedures and his practice of preventative medicine mirror the procedures and practices employed by Dr. Abel at Prevention Plus. Dr. Abel himself stated that, while his approach to patients may be different, much of his practice at Prevention Plus focuses on cardiovascular disease. Illustrating this point is the time he discovered a patient had acute coronary syndrome. While the patient could have remained at CIS for treatment, she returned to Dr. Abel for further care. This is precisely the type of action Section 8.01 of the physician employment agreement was designed to prevent. Finally, the brochure for Prevention Plus focuses on cardiovascular disease. There is no mention of a general practice or specialized field other than what can be construed as cardiology.

The non-compete agreement requires Dr. Abel “not to carry on or engage in the business of the practice of medicine in the sub-specialty of cardiology” in the Parish of St. Mary, where the Prevention Plus clinic is located, for a period of two years following his departure from CIS. While Dr. Abel’s practice at Prevention Plus may not have been identical to his practice at CIS, we find the practice conforms to the language of La. R.S. 23:921(C) in that it is “a business similar to that of the employer.” Whether

Dr. Abel chooses to call his practice “internal medicine,” “preventative medicine,” or “wellness,” the district court’s ruling was clear enough to restrict Dr. Abel from performing services and procedures one would receive at CIS.

Dr. Abel’s contention that the district court failed to post security when the preliminary injunction was ordered is moot at this point. Louisiana Code of Civil Procedure article 3610 requires the applicant for a preliminary injunction to post security to “indemnify the person wrongfully restrained or enjoined for payment of costs incurred and damages sustained.” Since we have found Dr. Abel was not wrongfully enjoined, the posting of security is no longer an issue.

CONCLUSION

It is clear from the record of the preliminary injunction that Dr. Abel is an experienced physician with expertise in the field of cardiology; as such, his practice upon leaving CIS had that focus. Prevention Plus did not advertise itself as a general medicine clinic, and its preventive medicine clearly had a focus on the heart and circulatory system while other ailments of the human body played an ancillary role. Dr. Abel’s practice at Prevention Plus is therefore too similar to the practices and procedures employed at CIS and fall within the restrictions of the non-compete agreement.

DECREE

The district court’s judgment of preliminary injunction executed on June 9, 2014, and the judgment executed on July 22, 2014, are affirmed. All costs of this appeal are assessed to the appellant, Peter M. Abel, M.D.

AFFIRMED.