

## WESTLAW

West's Florida Statutes Annotated

Title XXXIII. Regulation of Trade, Commerce, Investments, and Solicitations (Chapters 494-560)

**542.335. Valid restraints of trade or commerce**

FL ST § 542.335 West's Florida Statutes Annotated Title XXXIII. Regulation of Trade, Commerce, Investments, and Solicitations (Chapters 494-560) (Approx. 4 pages)

West's F.S.A. § 542.335

## 542.335. Valid restraints of trade or commerce

## Currentness

(1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought.

(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
3. Substantial relationships with specific prospective or existing customers, patients, or clients.
4. Customer, patient, or client goodwill associated with:
  - a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
  - b. A specific geographic location; or
  - c. A specific marketing or trade area.
5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

(d) In determining the reasonableness in time of a postterm restrictive covenant not predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions:

1. In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, and not associated with the sale of all or a part of:
  - a. The assets of a business or professional practice, or
  - b. The shares of a corporation, or
  - c. A partnership interest, or
  - d. A limited liability company membership, or
  - e. An equity interest, of any other type, in a business or professional practice,

## NOTES OF DECISIONS (318)

Admissibility of evidence  
 Attorneys' fees  
 Breach of covenants  
 Burden of proof  
 Commission splitting agreements  
 Conflicts of law  
 Construction and application  
 Discretion of court  
 Enforceability of covenants  
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 Legitimate business interests  
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 Non-competition agreements  
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 Review  
 Scope of covenants  
 Sufficiency of evidence  
 Temporary injunctions  
 Training

a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration.

2. In the case of a restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark and not associated with the sale of all or a part of:

- a. The assets of a business or professional practice, or
- b. The shares of a corporation, or
- c. A partnership interest, or
- d. A limited liability company membership, or
- e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 1 year or less in duration and shall presume unreasonable in time any restraint more than 3 years in duration.

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of:

- a. The assets of a business or professional practice, or
- b. The shares of a corporation, or
- c. A partnership interest, or
- d. A limited liability company membership, or
- e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 3 years or less in duration and shall presume unreasonable in time any restraint more than 7 years in duration.

(e) In determining the reasonableness in time of a postterm restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of 5 years or less and shall presume unreasonable in time any restraint of more than 10 years. All such presumptions shall be rebuttable presumptions.

(f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

(g) In determining the enforceability of a restrictive covenant, a court:

1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.
2. May consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction.
3. Shall consider all other pertinent legal and equitable defenses.
4. Shall consider the effect of enforcement upon the public health, safety, and welfare.

(h) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

(i) No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper

bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(k) In the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant. A court shall not enforce any contractual provision limiting the court's authority under this section.

(2) Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the laws of the United States or of this state.

(3) This act shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before July 1, 1996.

#### Credits

Laws 1996, c. 96-257, §§ 1, 3.

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#### Notes of Decisions (318)

West's F. S. A. § 542.335, FL ST § 542.335

Current with laws, joint and concurrent resolutions and memorials through July 4, 2023, in effect from the 2023 Special B Session and the 2023 first regular session. Some statute sections may be more current, see credits for details. The statutes are subject to change as determined by the Florida Revisor of Statutes. (These changes will be incorporated later this year.)

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WESTLAW

252 So.3d 287

District Court of Appeal of Florida, First District.

**Ansaarie v. First Coast Cardiovascular Institute, P.A.**

District Court of Appeal of Florida, First District. | June 28, 2018 | 252 So.3d 287 | 43 Fla. L. Weekly D1496 (Approx. 8 pages)

v.

**FIRST COAST CARDIOVASCULAR INSTITUTE, P.A., Appellee.**

No. 1D17-2191

June 28, 2018

**Synopsis**

**Background:** Cardiovascular medicine and sleep disorder center sought temporary injunction against doctor formerly employed by center, alleging that doctor's continued practice breached their employment agreement. The Circuit Court, Duval County, Tyrie Boyer, J., granted relief. Doctor appealed.





**Holdings:** The District Court of Appeal, Roberts, J., held that:

- 1 center had legitimate business interest in relationships with existing patients;
- 2 non-competition provision was reasonably necessary to protect center's interests; and
- 3 center was entitled to temporary injunctive relief.

Affirmed.

**West Headnotes (6)**

Change View

- 1 **Appeal and Error**  Preliminary injunction; temporary restraining order  
Appellate court reviews a lower court's factual findings in an order for temporary injunction for an abuse of discretion, but reviews legal conclusions de novo.
- 2 **Injunction**  Grounds in general; multiple factors  
To be entitled to a temporary injunction, party must establish the following four elements: (1) the likelihood of irreparable injury, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) a temporary injunction will serve the public interest.  
  
1 Case that cites this headnote
- 3 **Injunction**  Non-competition and non-solicitation issues  
Cardiovascular medicine and sleep disorder center had legitimate business interest in its substantial relationships with existing patients and its substantial investment in existing patient and client goodwill, in support of its request for temporary injunction in action alleging breach of non-competition and non-solicitation provisions prohibiting doctor from providing or soliciting competing cardiovascular services after termination of employment; although center did not offer evidence of specific prospective patients it lost, it provided evidence of its efforts to cultivate a cardiac practice in county as well as evidence that a number of its patients had recently requested to transfer their files to doctor, and that it had lost physician referral sources. Fla. Stat. Ann. § 542.335(1)(b, c).  
  
3 Cases that cite this headnote
- 4 **Injunction**  Non-competition and non-solicitation issues  
Non-competition provision prohibiting doctor from providing competing cardiovascular services within a five-mile radius of cardiovascular medicine and sleep disorder center's practice for two years after termination of employment was reasonably necessary to protect interests of center against doctor, who formerly worked at center, in support of center's request for temporary injunction in its action for breach of parties' employment agreement; center made substantial financial and time investment to establish its cardiology practice in county and to recruit doctor as a primary in the practice. Fla. Stat. Ann. § 542.335(1)(c).

**RELATED TOPICS**

Grounds and Proceedings to Procure

Court of Appeals Review of Trial Court Entry of Temporary Injunction

Requisites and Validity

Face Contracts

Preliminary and Interlocutory Injunctions

Result of Former Employee Violation of Restrictive Covenants

**5 Contracts** Presumptions and burden of proof

Once former employer established prima facie case that restrictive covenants were reasonably necessary to protect its legitimate business interests, burden shifted to former employee to establish that the restrictive covenants were overbroad, overlong, or otherwise not reasonably necessary. Fla. Stat. Ann. § 542.335(1)(c).

4 Cases that cite this headnote

**6 Injunction** Non-competition and non-solicitation issues

Cardiovascular medicine and sleep disorder center was entitled to temporary injunctive relief to restrain doctor from breaching non-competition and non-solicitation provisions prohibiting doctor from providing competing cardiovascular services or soliciting such services within a five-mile radius of center's practice for two years after termination of employment, in center's action for breach of parties' employment agreement; doctor did not rebut presumption of irreparable injury raised by doctor's violation of valid restrictive covenant, and center also showed the unavailability of an adequate remedy at law, a substantial likelihood of success on the merits, and that a temporary injunction would serve the public interest. Fla. Stat. Ann. § 542.335(1)(j).

4 Cases that cite this headnote

\*288 On appeal from the Circuit Court for Duval County. Tyrie Boyer, Judge.

**Attorneys and Law Firms**

Seth Schwartz, Albert J. Tasker, IV, and Jesse Berryman of The Schwartz Law Group, P.A., Jacksonville, for Appellant.

Bryan S. Gowdy of Creed & Gowdy, P.A., Jacksonville; Michelle Barnett and Todd A Wright of Alexander Degance Barnett, P.A., Jacksonville, for Appellee.

**Opinion**

Roberts, J.

The appellant, Dr. Imraan Ansaarie, challenges a temporary injunction entered by the lower court on behalf of the appellee, First Coast Cardiovascular Institute, P.A. (FCCI), that severely restricted his ability to practice medicine in Putnam \*289 County, Florida. We find no error with the temporary injunction and affirm.

*Facts*

FCCI is a professional medical practice that provides medical care in the fields of cardiovascular medicine and sleep disorders. FCCI operates medical offices in several Florida counties, including Putnam County. In 2013, FCCI began expending substantial resources to develop a cardiology practice in Putnam County, which included marketing, hiring physicians and support staff, and constructing a large catheterization laboratory within walking distance of the local hospital, Putnam County Medical Center (PCMC). PCMC also has its own catheterization laboratory wherein cardiologists employed by FCCI, as well as cardiologists who are not employed by FCCI, can practice. In 2013, FCCI contracted with PCMC to provide 24/7 "STEMI" services<sup>1</sup> at the hospital. FCCI expends significant resources annually in order to meet its contractual requirement with PCMC.

In furtherance of its efforts in Putnam County, FCCI recruited Dr. Ansaarie, a well-respected interventional cardiovascular surgeon, from out-of-state. Dr. Ansaarie entered into a Physicians Employment Agreement (the Agreement) with FCCI in April 2014, wherein he agreed to be bound by the terms and restrictive covenants of the Agreement. The non-competition provision prohibited Dr. Ansaarie from providing competing cardiovascular services within a five-mile radius of FCCI's practice for two years after termination of employment. The non-solicitation provision prohibited Dr. Ansaarie from soliciting<sup>2</sup> an FCCI patient, referral source, or vendor for competing cardiovascular services within the restricted geographic area and time period.

Dr. Ansaarie began his employment with FCCI in September 2014. FCCI invested in Dr. Ansaarie's success by marketing him and by providing him with access to FCCI's patients and referral sources. FCCI also arranged for Dr. Ansaarie to become the medical director of the PCMC Catheterization Laboratory, which position he assumed in 2015.

In October 2016, while still employed with FCCI, Dr. Ansaarie filed articles of incorporation with the Florida Department of State to create his own independent medical practice in Putnam County.<sup>3</sup> In November 2016, FCCI gave Dr. Ansaarie notice that his employment would terminate on March 23, 2017. After termination, Dr. Ansaarie continued to see patients at his independent medical practice and continued to treat patients at PCMC. He also continued to serve as director of the PCMC Catheterization Laboratory.

*Injunctive Relief*

FCCI immediately sought injunctive relief to restrain Dr. Ansaarie from breaching the restrictive covenants. FCCI alleged that it had legitimate business interests in its substantial relationships with specific prospective

and/or existing patients and referral sources as well as legitimate business interests in the customer and patient goodwill that it had established in the area. FCCI put forth evidence that its referral \*290 sources had declined since Dr. Ansaarie's departure and that many existing patients had asked to have their files transferred to Dr. Ansaarie's practice. The lower court granted the motion for temporary injunction, finding FCCI had satisfied all of the elements for temporary injunctive relief. The lower court found FCCI's asserted interests were "legitimate business interests," the restrictive covenants were valid and enforceable, and Dr. Ansaarie's contravention of these covenants would irreparably harm FCCI.

The order temporarily enjoined Dr. Ansaarie from, among other things, providing cardiovascular services within the prohibited five-mile radius, including treating patients at PCMC; soliciting FCCI's patients, and soliciting FCCI's referral sources or PCMC. On appeal, Dr. Ansaarie seeks relief from the temporary injunction.

#### Standard of Review

1 We review a lower court's factual findings in an order for temporary injunction for an abuse of discretion, but review legal conclusions *de novo*. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So.3d 928, 933–34 (Fla. 1st DCA 2012). See also *White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So.3d 774, 779 (Fla. 2017) (applying a *de novo* review to the issue of whether home health care service referral sources were a protected legitimate business interest under section 542.335, Florida Statutes (2016)).

2 To be entitled to a temporary injunction, FCCI had to plead and establish the following four elements: (1) the likelihood of irreparable injury, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) a temporary injunction will serve the public interest. *DePuy*, 95 So.3d at 938 (citations omitted). A temporary injunction is an available remedy when a party establishes that it has a valid, enforceable restrictive covenant that was violated. § 542.335(1)(j), Fla. Stat. (2016). Subsections 542.335(1)(b) and (c), Florida Statutes (2016), set the standard for enforcing restrictive covenants and require the party seeking enforcement to plead and prove: (1) the existence of "one or more legitimate business interests" justifying the restrictive covenant and (2) the contractually specified restraint is reasonably necessary to protect the legitimate business interest(s). The lower court properly determined the restrictive covenants were valid and enforceable here.

#### Legitimate Business Interests

##### 1. Prospective and Existing Patients

3 A "legitimate business interest" includes, but is not limited to, substantial relationships with "specific prospective or existing customers, patients or clients." § 542.335(1)(b) 3., Fla. Stat. (2016). The lower court found FCCI had demonstrated a legitimate business interest in prospective and existing patients. In *University of Florida, Board of Trustees v. Sanal*, 837 So.2d 512, 516 (Fla. 1st DCA 2003), this Court examined the language of section 542.335(1)(b) 3. and concluded "specific" modified "prospective"; therefore, in order for a relationship with a prospective patient to qualify as a legitimate business interest, a party had to prove the relationship was with a particular, identifiable individual. FCCI did not offer any evidence of "specific" prospective patients to meet this burden.

However, FCCI's proof that it lost existing patients distinguishes this case from *Sanal* wherein the injunction was denied for the aforementioned reasons, but also because the University was unable to prove that Dr. Sanal had treated any existing patients. *Id.* at 514. FCCI put forth evidence of its efforts to cultivate a cardiac practice in Putnam County before 2014 as well as evidence that a number of its patients \*291 had recently requested to transfer their files to Dr. Ansaarie. The lower court properly found FCCI demonstrated a legitimate business interest in its substantial relationships with its existing patients. See *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.*, 939 So.2d 268, 272 (Fla. 4th DCA 2006) (affirming a temporary injunction where a clinic established a legitimate business interest in its existing patients, forty-nine of which had been seen by the competing doctor in the same geographic area).

##### 2. Substantial Investment: Existing Patient and Client Goodwill

"Legitimate business interest" also includes "customer, patient, or client goodwill" associated with "a specific geographic location" or "a specific marketing or trade area." § 542.335(1)(b) 4., Fla. Stat. (2016). In addition to proving a legitimate business interest in its substantial relationships with existing patients, FCCI also proved its substantial investments in developing its existing patient, client, and customer base as well as patient, client, and customer goodwill in Putnam County. See *Southernmost Foot & Ankle Specialists, P.A. v. Torregrosa*, 891 So.2d 591, 594 (Fla. 3d DCA 2004) (affirming the lower court's finding that Southernmost's investment in developing a podiatry practice in the Keys and recruiting Torregrosa for that practice constituted a legitimate business interest).

The lower court appropriately determined FCCI met its requirement under section 542.335(1)(c) by pleading and proving at least two legitimate business interests. Dr. Ansaarie ignores proof of the aforementioned legitimate business interests and contests two additional legitimate business interests on appeal. First, he argues that the lower court erred in interpreting physician referral sources to be a legitimate business interest. We reject this argument in light of the supreme court's recent holding that physician referral sources can constitute a legitimate business interest under section 542.335(1)(b). *Mederi Caretenders*, 226 So.3d at 786 (concluding that home health services referral sources may be a protected legitimate business interest "depending upon the context and proof adduced."). The lower court's finding in this regard was supported by competent, substantial evidence. Second, Dr. Ansaarie argues that FCCI's relationship with PCMC was not a

legitimate business interest. We decline to address this argument as irrelevant because FCCI proved legitimate business interests necessary to justify the injunction's restrictions relating to existing patients, investment in Putnam County, and referral sources.

#### *Reasonably Necessary*

After demonstrating one or more legitimate business interests, FCCI was also required to plead and prove that the restraints were reasonably necessary to protect those interests. § 542.335(1)(c), Fla. Stat. (2016). The lower court properly found FCCI met this burden.

#### *1. Restriction on Competition*

4 Testimony showed the substantial financial and time investment FCCI had spent since 2013 to establish its cardiology practice in Putnam County and to recruit Dr. Ansaarie as a primary in the practice. The trial court found these efforts generated a substantial patient base and relationships that were legitimate business interests. Dr. Ansaarie does not challenge the two-year time limitation or the five-mile radius of the non-competition provision. FCCI proved that the restrictive covenants were reasonably necessary to protect its interests. See *Torregrosa*, 891 So.2d at 594 (finding similar evidence supported trial court's proper finding that a non-compete was reasonably necessary); see also *Litwinczuk*, 939 So.2d at 272.

#### *\*292 2. Restriction on Solicitation*

Case law has recognized the right of employers to enforce similar non-solicitation provisions when a former employee solicits its customers. *Smart Pharmacy, Inc. v. Viccari*, 213 So.3d 986, 989 (Fla. 1st DCA 2016); *Litwinczuk*, 939 So.2d at 270, 272–73; *Torregrosa*, 891 So.2d at 593–96. Dr. Ansaarie does not focus his argument on whether the non-solicitation was reasonably necessary. He mainly argues that there was no evidence that he directly solicited any of FCCI's patients, clients, or customers. Dr. Ansaarie's argument is misplaced in that FCCI made a sufficient evidentiary showing that enforcement of the restrictive covenants was reasonably necessary to protect its interests. See *Infinity Home*, 180 So.3d at 1067 (finding evidence that former employee was soliciting the same referral sources and employer's evidence of a decline in referrals after former employee's departure was sufficient to find enforcement of restrictive covenants was reasonably necessary to prevent unfair competition).

5 Once FCCI established a *prima facie* case that the restrictive covenants were reasonably necessary, the burden shifted to Dr. Ansaarie to establish that the restrictive covenants were overbroad, overlong, or otherwise not reasonably necessary. § 542.335(1)(c), Fla. Stat. (2016). Dr. Ansaarie did not make any arguments below that the restrictive covenants were overbroad or overlong.

#### *Injunctive Relief*

6 The lower court properly concluded that the restrictive covenants were valid and enforceable. The court also found that Dr. Ansaarie violated the terms of the restrictive covenants, which finding was supported by competent, substantial evidence. *Litwinczuk*, 939 So.2d at 271. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of the restrictive covenant. § 542.335(1)(j), Fla. Stat. (2016). Once the presumption passed from FCCI, it became Dr. Ansaarie's burden to demonstrate the absence of irreparable injury, which the trial court found he failed to do. *Environmental Servs., Inc. v. Carter*, 9 So.3d 1258, 1266 (Fla. 5th DCA 2009); see also *Variable Annuity Life Ins. Co. v. Hausinger*, 927 So.2d 243, 245 (Fla. 2d DCA 2006) (recognizing the presumed harm under section 542.335 includes potential damages to a party's longstanding relationships with its customers and the protection of confidential client information). Dr. Ansaarie does not challenge the trial court's findings on the other three prongs for injunctive relief: the unavailability of an adequate remedy at law, a substantial likelihood of success on the merits, and a temporary injunction will serve the public interest. Those findings were properly made and were supported by the evidence. We find the temporary injunction was properly entered and AFFIRM.

Rowe and Winokur, JJ., concur.

#### **All Citations**

252 So.3d 287, 43 Fla. L. Weekly D1496

#### **Footnotes**

- 1 STEMI stands for ST-elevation myocardial infarction, which in layman's terms, encompasses serious heart attack patients.
- 2 The Agreement defined "solicit" to mean "initiate contact, or knowingly receive contact, or to in any manner cause or encourage contact."
- 3 Dr. Ansaarie's medical office was outside of the restricted five-mile area, but he could not perform any cardiovascular procedures in the office.

WESTLAW

**Supinski v. Omni Healthcare, P.A.**

District Court of Appeal of Florida, Fifth District.

853 So.2d 526

District Court of Appeal of Florida,

August 29, 2003 853 So.2d 526 2003-2 Trade Cases P 74;136 28 Fla. L. Weekly D2042 (Approx. 9 pages)

Edward SUPINSKI, M.D., Appellant,

v.

OMNI HEALTHCARE, P.A., Appellee.

Nos. 5D03-563, 5D03-720.

Aug. 29, 2003.



## RELATED TOPICS

[Actions For Injunctions](#)[Form of Injunction Enforcing Contract](#)[Preliminary and Interlocutory Injunctions](#)[Result of Former Employee Violation of Restrictive Covenants Terms, Conditions, and Amount of Injunction Bond](#)**Synopsis**

Doctor appealed temporary injunction issued by the Circuit Court, Brevard County, [George W. Maxwell III, J.](#), enforcing covenant not to compete with medical practice that formerly employed him. The District Court of Appeal, [Monaco, J.](#), held that: (1) injunction was not overbroad; (2) alleged breach of contract did not prevent injunctive relief; and (3) remand was necessary for trial court to conduct an evidentiary hearing on whether parties stipulated to bond amount.

Affirmed and remanded.

**West Headnotes (11)**[Change View](#)**1 Injunction** **Non-competition and non-solicitation issues**

So long as the covenant not to compete fits within the parameters of statute governing restraints on trade or commerce, it may be enforced by the injunctive power of the courts. [West's F.S.A. § 542.335.](#)

[1 Case that cites this headnote](#)**2 Appeal and Error** **Preliminary injunction; temporary restraining order**  
**Appeal and Error** **Preliminary injunction; temporary restraining order**

The grant or denial of a temporary injunction comes to an appellate court clothed with the presumption of correctness, and may be reversed only upon a showing of a clear abuse of discretion.

[1 Case that cites this headnote](#)**3 Injunction** **Grounds in general; multiple factors**

A party seeking a temporary injunction must demonstrate that: (1) there is a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) the petitioner has a substantial likelihood of success on the merits; (3) the threatened injury to the petitioner outweighs any possible harm to the respondent; and (4) the granting of a temporary injunction will not disserve the public interest.

[2 Cases that cite this headnote](#)**4 Injunction** **Non-competition and non-solicitation issues**

Injunction prohibiting doctor from seeing any patients from medical practice that formerly employed him, as provided for in covenant not to compete, was not overbroad, and should not have been limited to only those patients he treated while employed by practice; medical practice had legitimate business interests to protect, issuance of a temporary injunction was necessary to protect those interests, and doctor admitted that 40% of his clientele were persons he treated while employed by practice. [West's F.S.A. § 542.335.](#)

[3 Cases that cite this headnote](#)

**5 Injunction**  **Non-competition and non-solicitation issues**

Injunction prohibiting doctor from practicing medicine within 10 mile radius of any clinic operated by medical practice that formerly employed him was not overbroad, where clinics operated by practice were located in confined area of county, and doctor was free to work in other part of county or in any other county. [West's F.S.A. § 542.335](#).

[2 Cases that cite this headnote](#)

**6 Injunction**  **Non-competition and non-solicitation issues**

Alleged failure of medical practice to pay \$1,000 of doctor's \$108,823.50 yearly compensation was not a material breach of employment contract preventing injunctive relief enforcing covenant not to compete between doctor and practice; practice claimed that \$1,000 was withheld to pay for "tail" insurance after doctor resigned. [West's F.S.A. § 542.335](#).

[1 Case that cites this headnote](#)

**7 Injunction**  **Non-competition and non-solicitation issues**

One applying for a temporary injunction to enforce a noncompete agreement must show, among other things, a likelihood of success on the merits.

[3 Cases that cite this headnote](#)

**8 Injunction**  **Plaintiff's encouragement, acquiescence, or bad faith**  
**Injunction**  **Adverse employment actions**

The person against whom the injunction is sought may offer as a defense that the moving party has materially breached the contract; if an employee introduces evidence of the employer's breach employer must then demonstrate that it is likely to succeed on the merits of the proffered defense, as well. [West's F.S.A. § 542.335](#).

[2 Cases that cite this headnote](#)

**9 Appeal and Error**  **Particular Issues**

Remand was necessary for trial court to conduct an evidentiary hearing on whether parties stipulated to bond amount, where parties presented contradictory evidence as to whether bond amount was stipulated to at earlier injunction hearing, and no record was made of discussion concerning bond. [West's F.S.A. § 542.335](#).

[2 Cases that cite this headnote](#)

**10 Injunction**  **Amount**

Before setting the amount of an injunction bond a trial court must have some basis for the exercise of its discretion.

[2 Cases that cite this headnote](#)

**11 Appeal and Error**  **Evidence or Other Material Not Considered Below**

Appellate courts will not consider evidence that was not presented to the trial court for its consideration in making its decisions.

[1 Case that cites this headnote](#)

**Attorneys and Law Firms**

**\*527** [Douglas B. Brown](#) and [R. Travis Rentz](#), of Rumberger, Kirk & Caldwell, Orlando, for Appellant.

[Jack A. Kirschenbaum](#), [Alec D. Russell](#) of Gray, Harris & Robinson, P.A., Melbourne, for Appellee.

**Opinion**

MONACO, J.

Edward Supinski, M.D. ("Dr. Supinski"), appeals the entry of a temporary injunction issued in response to alleged breaches by him of a noncompetition restrictive covenant contained in his employment agreement with the appellee, Omni Healthcare, P.A. ("Omni"). We have jurisdiction of this nonfinal appeal in accordance with Article V, section (b)(1), Florida Constitution, and [Rule 9.130\(a\)\(3\)\(B\), Florida Rules of Appellate Procedure](#). As we conclude that the temporary injunction met the necessary legal requirements, we affirm, but remand for further consideration of the bond amount.

The facts, in truncated form, reflect that Dr. Supinski was recruited by Omni in the year 2000 to move to Florida from Pennsylvania to work in one of Omni's facilities in Brevard County. Omni is a physician owned multi-specialty medical practice that operates three medical offices exclusively in central and southern Brevard County, and mainly in the Melbourne area. The parties negotiated an employment agreement

effective August 1, 2000, for an initial term of 24 months. It was to terminate on July 31, 2002, unless automatically extended pursuant to its terms. More particularly, the agreement provided that it would automatically renew unless either party provided written notice of nonrenewal at least 180 days prior to the termination date.

The employment agreement contained a noncompetition restrictive covenant that was enforceable by injunction. In essence, the parties agreed that for a period of two years after the conclusion of his employment, Dr. Supinski would not compete against Omni within a ten mile radius of any of its offices in Brevard County, nor would he solicit Omni's patients or employees. Dr. Supinski also agreed not to misappropriate Omni's trade secrets or confidential information for a period of five years. He acknowledged that the restrictive covenant was reasonable and necessary for Omni's protection and that he \*528 could earn a living outside the boundaries of the restricted territory.

Dr. Supinski began his employment in accordance with the contract. There is evidence that Omni assisted Dr. Supinski in becoming credentialed by various managed care organizations, helped him gain staff privileges at hospitals, hired his staff, advertised his practice, and aided him in establishing a patient base. On May 10, 2002, well short of the 180 day requirement, Dr. Supinski sent a letter to Omni asserting that he was not renewing his employment agreement, and that he would leave its employment on July 31, 2002.

As soon as his resignation was effective, Dr. Supinski opened his new practice approximately 4 miles from the care center at which he had previously been employed. Three days later Omni filed suit, asserting that Dr. Supinski had breached his employment agreement in a number of ways, including the failure to give the minimum notice of nonrenewal and the violation of the noncompetition provisions. Omni sought liquidated damages and temporary and permanent injunctive relief pursuant to the terms of the agreement and [section 542.335, Florida Statutes \(1999\)](#).

During the course of pleadings and discovery, Dr. Supinski denied that his resignation was untimely, and alleged that Omni had earlier breached the contract in a number of ways, the details of which are unimportant for purposes of this appeal. He admitted, however, that he had established his new office within 10 miles of an Omni care center, and that 40% of the patients at his new office were patients he treated while employed by Omni.

An evidentiary hearing was held to consider entry of a temporary injunction. Upon consideration of the evidence, the trial court concluded that the restrictive covenant was supported by legitimate business interests associated with a specific geographic location and a specific marketing area; that the terms of the restriction were reasonable; that Dr. Supinski materially breached the covenant by opening his practice within the proscribed area; that Omni would suffer irreparable harm unless an injunction were issued; and that the agreement did not violate public policy. The court granted the temporary injunction, and set bond at \$50,000.

Several months later Dr. Supinski moved for an emergency modification of the temporary injunction. The motion contained many of the arguments previously considered by the trial court; asserted that the injunction was overbroad because it precluded him from opening an office within 10 miles of any Omni office, and covered all patients, not just those he had treated while at Omni; and argued that the bond amount was not supported by evidence. Dr. Supinski alleged that there was a "change in circumstances" to support the modification; namely a decision by the First District Court of Appeal in the case of [University of Florida, Bd. of Trustees v. Sanal](#), 837 So.2d 512 (Fla. 1st DCA 2003). Omni responded that there were no changed circumstances, and that the bond amount had been stipulated to by the attorney who had previously represented Dr. Supinski at the earlier injunction hearing. Omni's counsel indicated in this regard that the hearing had been running late and that the court reporter was unable to stay. Both sides agreed to waive the presence of a court reporter for the legal argument that was to follow. Omni's counsel indicated further that the stipulation occurred during the time the reporter was not present.

The trial court declined to modify the injunction. As to the bond amount, the court said that he would not modify it based on the representations made by Omni's counsel, and his own recollection \*529 that he did not pull the bond number "from thin air." Counsel for Dr. Supinski asserted that he was surprised by the claim of a stipulation, and that he would have had the prior attorney present to testify if he had known. Counsel for Omni offered to have the prior attorney appear immediately by telephone to confirm that there was a stipulation on the amount of the bond. Apparently, however, the prior lawyer was not called. The trial court concluded the hearing, saying that Dr. Supinski had not met his burden for modification or vacation of the injunction. Dr. Supinski then appealed both the rendition of the temporary injunction, and the denial of his motion to modify.

1 2 The parties appear to agree that [section 542.335\(1\), Florida Statutes \(1999\)](#), is applicable to this case. 1 So long as the \*530 covenant not to compete fits within the parameters of [section 542.335](#), it may be enforced by the injunctive power of the courts. The grant or denial of a temporary injunction comes to an appellate court clothed with the presumption of correctness, and may be reversed only upon a showing of a clear abuse of discretion. See [Knox v. District School Bd. of Brevard](#), 821 So.2d 311, 314 (Fla. 5th DCA 2002); [Rollins, Inc. v. Parker](#), 755 So.2d 839, 841 (Fla. 5th DCA 2000); [Anich Industries, Inc. v. Raney](#), 751 So.2d 767 (Fla. 5th DCA 2000).

3 It is well-settled that a party seeking a temporary injunction must demonstrate that: (1) there is a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) the petitioner has a substantial likelihood of success on the merits; (3) the threatened injury to the petitioner outweighs any

possible harm to the respondent; and (4) the granting of a temporary injunction will not dissuade the public interest. See *Anich*; *Estate of Barsanti*, 773 So.2d 1206 (Fla. 3d DCA 2000); *Florida High School Activities Ass'n v. Kartenovich*, 749 So.2d 1290 (Fla. 3d DCA 2000). In the present case the trial court made findings of fact confirming that Omni satisfied each of these requirements.

4 Dr. Supinski urges initially, however, that the injunction is overbroad, and should be limited to preventing him from offering medical services only to those patients he actually treated while an employee of Omni. In support of this position Dr. Supinski cites *University of Florida v. Sanal*, 837 So.2d 512 (Fla. 1st DCA 2003).

In *Sanal* the University of Florida sought review of a summary final judgment entered against it on its complaint seeking enforcement of a noncompete provision contained in a contract of employment it had entered into with a physician. The contract provided that:

... you will not engage in a community based clinical practice within a radius of 50 miles from any location which has been the situs of your major faculty clinical teaching assignment within the 2 years preceding the date of termination.

After his employment ended Dr. Sanal began working with a Jacksonville oncology group which had a community based clinical practice located less than 50 miles from the University's facility in Jacksonville. The University filed a complaint and one of Dr. Sanal's affirmative defenses was that the non-compete agreement was "not reasonably necessary to protect any legitimate business interest of the University and was, therefore, unenforceable as a matter of law."

In agreeing with the trial court's decision not to enforce the covenant, the *Sanal* court noted that the University was unable to establish that Dr. Sanal had provided care to any of its former patients and was, in fact, unable to identify a single patient treated by Dr. Sanal during his employment with it who had followed him for continuing care. Moreover, the University had not realized any marked decrease in its hematology/oncology patient population since Dr. Sanal started working for a competitor group. Dr. Sanal had treated only established patients of the Jacksonville oncology group and there was no evidence that a relationship with any existing patient had been affected. Nonetheless, the University argued that it was entitled to injunctive relief because it had a legitimate business interest in its "prospective patient base." According to the University, its prospective patient base included all persons residing within a 50 mile radius of its \*531 Jacksonville facility because they "might need the services of a hematologist/oncologist in the future."

The lower court denied the University's request for temporary injunctive relief and granted Dr. Sanal's motion for summary judgment. The court specifically indicated that it was not precluding the University from filing another action in the event that the doctor either actively or passively solicited business from patients he formerly treated while employed at the University. The First District Court of Appeal affirmed, holding that the University failed to establish that it would suffer irreparable injury to a "legitimate business interest," as that term is defined in [section 542.335\(1\)\(b\), Florida Statutes \(1999\)](#).

Dr. Supinski can draw little solace from *Sanal*. The lower court found, based on substantial competent evidence in the record and in accordance with [section 542.335](#), that Omni had legitimate business interests to protect and that the issuance of a temporary injunction was necessary to protect those interests. Dr. Supinski has admitted that 40% of his clientele were persons he treated while at Omni, and that his new office was well within the proscribed area. Omni established to the satisfaction of the trial judge that Dr. Supinski interfered with "substantial relationships with prospective ... patients" within the meaning of the statute, and we do not perceive any abuse of discretion by the trial court in this regard.

5 Dr. Supinski also suggests that the trial court erred in enforcing the spatial aspects of the injunction so that he is prohibited from opening an office within 10 miles of each of its several facilities. He argues that he should only be prohibited from competing within 10 miles of the office he actually worked in. This argument might have some merit if the various offices were widespread. The fact is, however, that the various Omni facilities are all located primarily in a confined area of southern Brevard County, and that Dr. Supinski is free to work in the north part of the county or in any other county. That the distance is measured from more than one office is, thus, largely irrelevant. If the geographic restriction had been defined as encompassing all of Brevard County, we suspect there would have been no reason for Dr. Supinski to complain. As the restriction covers far less, the force of his argument wanes.

This case is unlike *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So.2d 415 (Fla. 3d DCA 2002), where the restricted party worked in one county, yet was barred from practicing in three. The lower court found that the provision was too restrictive, and declined to enforce it on such a widespread basis. The Third District affirmed on this point, finding that the trial court's assessment regarding the overbroad nature of the restriction was correct, but remanded for the trial court to modify and narrow the breadth of the covenant in accordance with the requirements of the statute. In the present case, however, we find no abuse of discretion in the enforcement of the geographic restriction as written.

6 Dr. Supinski next argues that because Omni breached the employment agreement, he was entitled to terminate the agreement without the onus of the restrictive covenant barring his options. More specifically, he argues that the trial court misinterpreted the contract with respect to his compensation. As a subset of this

position, Dr. Supinski argues that according to Omni's calculations, although he was entitled to be paid as a part of his compensation \$108,823.50 for net adjusted collections during the second year of his employment, he was actually paid \$1,000.00 less than that. Omni responded <sup>532</sup> by asserting that the withhold was necessary because Dr. Supinski failed to purchase "tail insurance," as he was required to do under the contract, and that Omni would have to do so on its own. The trial judge disagreed with Dr. Supinski, and we do as well.

7 8 One applying for a temporary injunction to enforce a noncompete agreement must show, among other things, a likelihood of success on the merits. See *Cordis Corp. v. Praoslin*, 482 So.2d 486, 489 (Fla. 3d DCA 1986). The person against whom the injunction is sought may offer as a defense that the moving party has *materially* breached the contract. If the employee introduces evidence of the employer's breach, as the employee is entitled to do pursuant to section 542.335(g) 3, Florida Statutes (1999), the employer must then demonstrate that it is likely to succeed on the merits of the proffered defense, as well. See *Bradley v. Health Coalition, Inc.*, 687 So.2d 329, 333 (Fla. 3d DCA 1997).

The trial court found that Dr. Supinski "failed to produce sufficient evidence to establish a breach of contract or wrongful act" by Omni, and determined that Omni "has established a significant likelihood that it will prevail on the merits after trial." After carefully reviewing the record, we find no abuse of discretion in these findings and substantial competent evidence to support them. Moreover, given the small differential in the claimed net adjusted collections versus the paid adjusted collections, the materiality of the breach, if any, is questionable.

9 Finally, Dr. Supinski argues that the lower court erred in setting the amount of the injunction bond. He alleges that the court heard no evidence justifying the amount of the bond, and that the bond was, therefore, arbitrary. Omni argues that prior counsel for Dr. Supinski stipulated to the \$50,000 bond amount at a time when the court reporter had been discharged. According to Dr. Supinski, however, the court reporter was discharged only for purposes of recording the final arguments of the attorneys, and for no other purpose. The trial judge apparently has no strong recollection of the events that led to the bond amount being inserted, and Dr. Supinski's former attorney was not present at the hearing to confirm or deny the existence of a stipulation.

10 11 Before setting the amount of an injunction bond a trial court must have some basis for the exercise of its discretion. See *AOT, Inc. v. Hampshire Mgmt. Co.*, 653 So.2d 476 (Fla. 3d DCA 1995); *Resorts Mgmt., Inc. v. Olsen*, 651 So.2d 194 (Fla. 2d DCA 1995). Given the confusion in the setting of this bond amount, the fairest thing to do under these peculiar circumstances is to affirm the issuance of the temporary injunction, but remand the case to the lower court with directions to conduct an evidentiary hearing concerning whether the bond amount was the subject of a stipulation of the parties. If there was a stipulation, then the bond should remain as set. If not, then the court is directed to hold an evidentiary hearing addressing the proper amount of the injunction bond. Pending those determinations, however, the injunction as issued shall remain in place.<sup>2</sup>

AFFIRMED and REMANDED.

SAWAYA, C.J., and ORFINGER, J., concur.

#### All Citations

853 So.2d 526, 2003-2 Trade Cases P 74,136, 28 Fla. L. Weekly D2042

#### Footnotes

1 Section 542.335(1), Fla. Stat. (1999), reads in pertinent part:

(1) ... [E]nforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

...

(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
3. Substantial relationships with specific prospective or existing ... patients....
- 4... [Patient], or client goodwill associated with:
  - a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
  - b. A specific geographic location; or

c. A specific marketing or trade area.

5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

...

(g) In determining the enforceability of a restrictive covenant, a court:

1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought....

3. Shall consider all other pertinent legal and equitable defenses.

4. Shall consider the effect of enforcement upon the public health, safety, and welfare.

(h) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

...

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

2

We note that the "Supplemental Appendix" filed on behalf of Dr. Supinski contains nothing but documents that came into existence after these appeals were filed. In addition, a number of documents in the original Appendix came into existence after the orders being appealed. These documents were clearly not before the trial court when it made its determinations and rendered the orders being reviewed. It is elemental that appellate courts will not consider evidence that was not presented to the trial court for its consideration in making its decisions. Our function is to determine whether the trial court committed error on the basis of the evidence and issues before it. See, e.g., *Hillsborough County Bd. of County Cmm'rs. v. Public Employees Relation Comm'n.*, 424 So.2d 132, 134 (Fla. 1st DCA 1982). Omni has moved to strike Dr. Supinski's briefs and appendices because of this transgression. Rather than do so and consequently prolong these proceedings, we have noted the motion and have ignored any document filed after the rendition of the orders being appealed, as well as any comments in Dr. Supinski's briefs referencing them.

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