

cuted for his failure to report.³

In summary, any person who is being prosecuted under this Reporting Ordinance may raise the argument that plaintiffs seek to raise in this litigation, namely that Pittsburgh did not have authority to enact this Ordinance. But a challenge by persons who have not been and may never be charged with violating the Reporting Ordinance will not be considered because a court may intervene only where there is actual harm.

In *Cherry v. City of Philadelphia*, 692 A.2d 1082 (Pa. 1997), an attorney whose office was located outside of Philadelphia challenged the legality of a provision in the Philadelphia Code requiring all nonresidents to obtain a business privilege license and to pay an annual City tax on the profits they earned as a result of doing business in Philadelphia. The plaintiff had failed to pay taxes on legal work conducted in Philadelphia or to obtain a business privilege license and Philadelphia had notified him that he was in violation of the tax and license provisions of the Philadelphia Code.

The Pennsylvania Supreme Court upheld the lower court's dismissal of the lawsuit on the ground that the plaintiff-attorney had not yet been harmed by the Code provisions that he was challenging:

This Court need not reach the constitutional issue raised by appellant because his claim is not justiciable. Because appellant filed his declaratory judgment action before the City took any steps to assess or collect taxes or enforce the license provision, there is no actual controversy. Appellant has not suffered any damage nor is there an actual potential for damage as a result of the City's letter to him notifying him of his violations. Where no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained. See *Gulnac v. South Butler County School District*, 526 Pa. 483, 488, 587 A.2d 699, 701 (1991) ("Only where there is a real controversy may a party obtain a declaratory judgment"); *Zinc Corp. of America v. Department of Environmental Resources*, 145 Pa. Commw. 363, 361-68, 603 A.2d 288, 290-91 (1992), *aff'd without op.*, 533 Pa. 319, 623 A.2d 321 (1993) (declaratory judgment action seeking pre-enforcement review of environmental regulation does not present justiciable issue); *Allegheny County Constables Association v. O'Malley*, 108 Pa. Commw. 1, 5-6, 528 A.2d 716, 718 (1987) (declaratory judgment is not appropriate to determine rights in anticipation of events that may never occur; generally, the presence of an actual controversy is required). 692 A.2d at 1085.

The Pennsylvania Supreme Court's ruling in *Cherry* governs this litigation because it was far more likely that the Philadelphia Code provisions would be enforced against the plaintiff-attorney in *Cherry* as compared to the likelihood that plaintiffs in this case will ever be charged with violating the Reporting Ordinance.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 21st day of July, 2009, it is hereby ORDERED that defendants' preliminary objections are sustained, and plaintiffs' complaint is dismissed on the ground of a lack of standing.

BY THE COURT:

/s/Wettick, J.

¹ He has not alleged that the theft occurred after the enactment of Ordinance No. 2008

² The Honorable Jane Cutler Greenspan is currently a Justice of the Pennsylvania Supreme Court.

³ Plaintiffs also seek to distinguish Judge Greenspan's ruling on the ground that she held a hearing before making her rulings. However, in making my ruling, I assume that the facts alleged in plaintiffs' complaint are true and correct.

Allegheny Specialty Practice Network and The West Penn Allegheny Health System v. Joseph J. Colella, M.D.

*Preliminary Injunctive Relief—Employment Agreement—
Non-Competition Restrictive Covenants*

1. Moving party must establish all six essential pre-requisites to obtain preliminary injunctive relief.

2. Restrictive covenants not to compete are enforceable if the restrictive covenants are ancillary to employment, enforcement of the restrictive covenants is reasonably necessary to protect legitimate business interests and the geographic and temporal limitations of the restrictive covenants are reasonable.

(Meg L. Burkardt)

Joseph Leibowicz and Matthew J. Fader for Plaintiffs.
David J. Porter and Brendan G. Stuhan for Defendant.

GD 09-006813. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

INTRODUCTION

Ward, J., June 9, 2009—Plaintiffs, Allegheny Specialty Practice Network ("ASP") and The West Penn Allegheny Health System ("WPAHS"), have filed the above captioned action against Defendant, Joseph J. Colella, M.D. ("Dr. Colella"). On April 7, 2009, ASP presented its Motion for Special Injunction to the Court. ASP sought immediate injunctive relief enjoining Dr. Colella from providing medical services for any hospital outside the WPAHS system for two years. When ASP presented this Motion, the parties agreed to the entry of a Consent Order ("Consent Order") under which Dr. Colella would be temporarily allowed to practice medicine at Magee-Women's Hospital, a hospital outside the WPAHS system, and be employed by University of Pittsburgh Physicians ("UPP"), a subsidiary of University of Pittsburgh Medical Center ("UPMC"). During the term of the Consent Order, Dr. Colella agreed not to provide services to patients he had served while at ASP or who had been referred to him by a WPAHS physician.

On April 17, 2009, ASP moved for leave to amend its Complaint, primarily for the purpose of adding WPAHS as an additional plaintiff. In the First Amended Verified Complaint, Plaintiffs, ASP and WPAHS, allege that WPAHS is an intended beneficiary of the Employment Agreement between ASP and Dr. Colella ("Employment Agreement"). In their Amended Motion for Preliminary Injunction, Plaintiffs seek the same injunctive relief that

ASPEN had sought, namely enforcement of the non-competition restrictive covenant under the Employment Agreement. Also, Plaintiffs allege that Dr. Colella exploited confidential information, while still employed by Plaintiffs, by: (a) removing without Plaintiffs' knowledge or permission confidential patient lists with the intent of soliciting those patients to follow him to UPMC; (b) attempting to solicit and recruit key employees of Plaintiffs to UPMC; and (c) engaging in activities that were competitive with Plaintiffs, all of which demonstrated the need to protect Plaintiffs' interests by enforcing the non-competition restrictive covenant.

On April 30, 2009, the Court held the hearing on Plaintiffs' Amended Motion for Preliminary Injunction. The preliminary injunction hearing was transcribed to create the notes of transcript of the courtroom proceedings ("Transcript"). Plaintiffs elicited testimony from Dr. Colella, Kim Sperring, Jeffrey Bushong, Debbie Auth and Dawn Gideon, Esq. Defendant elicited testimony from Dr. Colella, Ed Kabala, Esq., Dana Macklin, Dr. David Medich, Janet Troff, Dr. Marshall Webster and Suzie Mercadante. At the conclusion of the April 30, 2009 hearing, the parties agreed to have the Consent Order remain in place until further Order of Court.

Based upon the testimony and evidence presented at the preliminary injunction hearing and pre-hearing depositions, along with the respective exhibits, briefs and other submissions of the parties, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. FACTUAL BACKGROUND

A. NON-PROFIT HOSPITAL SYSTEMS AND THEIR AFFILIATE RELATIONSHIPS IN WESTERN PENNSYLVANIA

1. WPAHS health care system, a non-profit corporation, has as its affiliate several other non-profit corporations, such as ASPN, whose sole purpose is to employ physicians on behalf of hospitals within the WPAHS system. Transcript at 228-229; Plaintiff's Exhibits 137, 151.

2. ASPN, a physician practice network, is one of several non-profit corporations within the WPAHS system that, according to its Bylaws as revised September 18, 2008, was "formed and is to be operated exclusively for the following charitable, scientific, and educational purposes.... supporting, benefiting and carrying out the functions of a regional health care system, comprised of corporations, each of which" has a common "sole corporate member," which is WPAHS. Transcript at 227-228; Plaintiff's Exhibit 137, Art. II. §1.

3. A "sole corporate member" is, in essence, the Pennsylvania non-profit analogue to the sole shareholder in a for-profit corporation. WPAHS is "the sole voting member" of ASPN, with substantial rights and governance powers over it. Plaintiff's Exhibit 137, Art. III. §§1-2.

4. As such, according to its Bylaws, ASPN "is a constituent entity of the health care system serving western Pennsylvania known as [WPAHS] which, as of the date of the adoption of these Bylaws, is comprised of affiliated hospitals and certain other affiliated organizations." Plaintiff's Exhibit 137, Art. II. § 2.

5. According to the Articles of Incorporation of WPAHS, the purposes of WPAHS include:

(a) To provide, maintain, operate, and support, directly and through its controlled affiliates, the provision, maintenance, management, and operation of, on a not-for-profit basis, in-patient and out-patient hospital facilities and health care services for the benefit of persons who

require medical care and services of the kind customarily furnished most effectively by hospitals....

(b) To support and manage a regional health care system, comprised of the Corporation and its controlled affiliates, each of which (i) operates, raises funds for, or conducts activities otherwise ancillary to the operation of, health care facilities in order to extend health care to sick, injured and disabled persons....

Plaintiff's Exhibit 151, pp. 1-2.

6. ASPN, then, as one of the "controlled affiliates," exists for the purpose to employ physicians for research and academic purposes to support the operation of the regional health care system known as WPAHS, and the provision of medical, clinical and health care services by WPAHS hospitals. Transcript at 227-228; Plaintiff's Exhibit 137, Art. II. §1.

7. ASPN acts as the employer of physicians and non-physician health care providers of hospital and clinical care to patients of Allegheny General Hospital ("AGH"), a licensed hospital facility within the WPAHS system. ASPN also provides certain administrative, faculty and research services to AGH. Transcript at 227, 229-230; Plaintiff's Exhibit 2.

8. WPAHS is the successor to AGH by merger effective December 31, 2007.² Since the merger, AGH is no longer a separate corporate entity. As a result of the merger, WPAHS generally has succeeded to the liabilities and rights of AGH. Transcript at 229-230.

9. The far larger UPMC, another so-called non-profit health care system, also provides hospital and clinical care in western Pennsylvania. Transcript at 282-283.

10. UPP is an affiliate of UPMC. UPP employs physicians who practice in the UPMC system. *Id.*

B. DR. COLELLA

11. Dr. Colella currently resides in Wexford, Pennsylvania. After graduating from the University of Pittsburgh School of Medicine, Dr. Colella entered a residency training program in general surgery at AGH, which he completed in 1991. Transcript at 32, 125.

12. After completing his residency, Dr. Colella's practice for several years was primarily general surgery, vascular surgery and trauma surgery. Dr. Colella was in private practice from 1991 until 1997. Transcript at 33, 125.

13. In early 1997, Dr. Colella entered into an employment contract with a physician network affiliated with AGH. That employment contract was transferred to ASPN in 1999. Transcript at 33.

14. Dr. Colella began learning bariatric surgery from Dr. Reuben Zemel who operated a private practice in Pittsburgh, Allegheny County, Pennsylvania. Dr. Zemel's private practice was substantially bariatric surgery. Although he was in private practice, Dr. Zemel had operating privileges at AGH and performed his work physically on the premises of AGH. Dr. Colella took over Dr. Zemel's AGH-based bariatric surgery practice in 2001. Transcript at 35, 125-127.

15. At all times from 1997 through April 2009, Dr. Colella considered AGH (now WPAHS) to be his employer. Transcript at 33-34.

16. From the beginning of his residency until his April 5, 2009 departure, Dr. Colella's medical practice was at all times based at AGH. Transcript at 32-33.

C. ELECTIVE BARIATRIC SURGERY

17. Bariatric surgery is a specialized weight loss surgery for obese individuals that have a Body Mass Index ("BMI")

of over 40, whose weight cannot be reduced to healthy levels by non-surgical means. Defendant's Exhibit 21.

18. As Dr. Colella testified, bariatric surgeries are "...elective surgeries, number one. It is not like anybody is going to die if I don't operate on them that day." Transcript at 74.

19. As Dr. Medich, also a surgical specialist and a former co-worker of Dr. Colella when employed by ASPN, commented on Dr. Colella's chosen specialty of bariatric elective surgery, by stating: "Neither of us take un-referred calls from the emergency department because it is not something we need to do or choose to do only wish other people would do." Transcript at 263.

20. Bariatric patients must undergo an arduous, emotional path, often lasting six to ten months, involving pre-operative medical assessments by cardiologists, dieticians, and psychologists or psychiatrists, as well as sustained non-surgical weight loss efforts through diet and exercise, before they can qualify for surgery. The experience can be very traumatic for the patients, and involves substantial contact between each patient and the bariatric center staff. Transcript at 75, 173-174, 181-182; Defendant's Exhibit 21.

21. To assure that bariatric patients receive appropriate care in all necessary respects, standard setting bodies have created the "Center of Excellence" certification, which certifies surgeons, hospitals and bariatric programs as Centers of Excellence based on factors including the skill of the surgeons, the quality of facilities, the qualifications of staff, and the overall resources devoted to the bariatric program, as well as a commitment to participate in studies to determine outcomes. Certain insurers and Medicare, in turn, require that bariatric surgical programs attain the Centers of Excellence designation as a condition of reimbursement. Transcript at 41-42, 45-47, 310.

22. WPAHS's bariatric program at AGH in Pittsburgh, Allegheny County Pennsylvania is certified as a Center of Excellence. UPMC's bariatric program at Magee-Women's Hospital in Pittsburgh, Allegheny County, Pennsylvania is certified as a Center of Excellence. UPMC's bariatric program at UPMC Horizon in Greenville, Mercer County, Pennsylvania is also a certified as Center of Excellence. Transcript at 42, 309-310; Plaintiff's Exhibit 77.

23. A majority of patients treated by Dr. Colella while employed by ASPN came from Allegheny County. Transcript at 50.

24. Dr. Colella is familiar with and knows of other full-time bariatric surgeons within the WPAHS system who are employed by ASPN. Transcript at 127.

25. Dr. Colella has performed bariatric surgical procedures on more than a hundred high-risk patients who had a BMI of over 60. Transcript at 152.

26. Dr. Colella is not the only bariatric surgeon in Allegheny County to have operated on morbidly super-obese or bariatric patients with BMIs greater than 60. Another bariatric surgeon, Dr. Gagne, who practices at the West Penn Hospital in Allegheny County, operates routinely on patients with BMIs greater than 60, having performed over a hundred of such procedures. Two other bariatric surgeons in private practice in Allegheny County, Dr. Felix and Dr. Wilcox, also operate on patients with BMIs greater than 60. Two other bariatric surgeons based at Magee-Women's Hospital in Allegheny County, Dr. Courcoulas and Dr. Ramanathan, also operate on patients with BMIs greater than 60. Transcript at 164-166, 277-278.

27. In order for Dr. Colella and other physicians to perform these high-risk bariatric surgeries on patients with BMIs greater than 60, the facility where the surgeries are performed must have specialized equipment and the full gamut of specialty care services that are only available at a

tertiary care hospital. Transcript at 150-153, 277-278; Defendant's Exhibit 21.

28. UPMC requires most bariatric surgery patients with a BMI of over 60 to lose weight until their BMI is below 60 before they are generally eligible for bariatric surgery. However, some patients who cannot lose enough weight to reach a BMI below 60 may undergo bariatric surgery, if the bariatric surgery is considered to be a safe procedure. Transcript at 275-278.

29. UPMC's practice of refraining from operating on super-obese patients with a BMI of over 60 except in extraordinary circumstances is borne out by the numbers for its program: during the past year, eighty-four patients in the UPMC Magee-Women's Hospital bariatric surgery program had BMIs of over 60. Of those eighty-four patients, only four (<5%) have had surgeries, about forty are attempting to lose weight so that they qualify for a surgical procedure, and the others are not currently candidates for surgery. Transcript at 276.

II. EMPLOYMENT AGREEMENT BETWEEN ASPN AND DR. COLELLA IN 2002

A. ASPN AND DR. COLELLA ACTIVELY NEGOTIATE TERMS OF AN EMPLOYMENT AGREEMENT

30. In late 2001, ASPN and Dr. Colella began to negotiate a new employment. During the negotiations, Dr. Colella was represented by an experienced attorney, Ed Kabala, Esq. Transcript at 197, 238.

31. At his counsel's suggestion, Dr. Colella negotiated the new employment agreement directly with Kim Sperring, then AGH's vice-president for surgery and perioperative services. Transcript at 36, 167-168, 239.

32. At the time of the contract negotiations, AGH had decided to build the bariatric program around Dr. Colella. In order to protect its investment in its program and in Dr. Colella, AGH sought to include restrictive covenants of "Loyalty and Non-competition" in Section 9 of the initial proposed agreement it gave to Dr. Colella. Transcript at 76, 170; Plaintiff's Exhibit 139.

33. The negotiation of the terms of the Employment Agreement involved a give-and-take process in which AGH/ASPN agreed to a number of changes to their initial proposal based on requests made by Dr. Colella, including:

- (a) increasing the term from 4 years to 5 years, early in the process, Plaintiff's Exhibit 138;
- (b) increasing the term from 5 years to 7 years, later in the process, Plaintiff's Exhibit 3;
- (c) adding a provision permitting Dr. Colella to engage in a certain amount of medico-legal consulting, Plaintiff's Exhibit 1, § 3(a);
- (d) adding a provision requiring consultation with Dr. Colella before setting his schedule, Plaintiff's Exhibit 1, § 3(c);
- (e) adding a provision permitting mutual termination on 180 days' notice, Plaintiff's Exhibit 1, § 6(e);
- (f) a handwritten modification of Section 9(e) to avoid any conflict with the added Section 9(h). Plaintiff's Exhibit 3.

Transcript at 169, 192-197; Plaintiff's Exhibit 1 (redline showing certain changes); Plaintiff's Exhibit 3 (final agreement); Plaintiff's Exhibit 139 (original draft provided to Dr. Colella).

34. The non-competition covenants in the proposed agreement were discussed with Dr. Colella prior to and in a letter

of intent that Ms. Sperring sent to Dr. Colella on December 21, 2001. Transcript at 169-170; Plaintiff's Exhibit 138.

35. The non-competition covenants initially proposed to Dr. Colella underwent changes at his request. The original draft sent to Dr. Colella included AGH's then-standard covenants, including Section 9(b), which was a generally-applicable non-competition covenant that prohibited Dr. Colella from practicing medicine in Allegheny County for the term of the Employment Agreement plus an additional two years. Transcript at 171; Plaintiff's Exhibit 139.

36. In his discussions with Ms. Sperring, Dr. Colella objected to Section 9(b)'s broad non-competition covenant, but expressed an understanding of AGH's desire to protect the bariatric surgery program and told Ms. Sperring that he had no interest in doing anything that would jeopardize AGH's program or harm the hospital. Transcript at 171-173.

37. Dr. Colella told Ms. Sperring that he wanted an alternative to Section 9(b)'s complete prohibition on his practicing medicine in Allegheny County for two years and specifically suggested that he be permitted the option of entering private practice in Allegheny County at the end of the term, which he knew other physicians who had left AGH in the past had done. Transcript at 171-172.

38. AGH responded to Dr. Colella's request by adding Section 9(h) to the proposed Employment Agreement. Transcript at 171-172; Plaintiff's Exhibit 1.

39. Section 9(h) of the Employment Agreement applied in the event that ASPN decided to terminate the Employment Agreement prior to the end of the term by not renewing it (the option that ASPN ultimately chose):

If ASPN, however, does not offer to renew this Agreement prior to the end of the Initial term or any Renewal Term, Section 9(b) above shall not apply. Instead, Physician hereby agrees that for a period of two (2) years following the expiration of this Agreement, Physician shall not accept employment or enter into a contract of any type to provide clinical, administrative or any type of medically-related service within a hospital or health care provider, or subsidiary, affiliate of affiliated physician organization thereof, and shall not provide clinical services at any non-WPAHS hospital or affiliated ambulatory surgery center during the two (2) year period of restriction. This restriction shall not preclude Physician from establishing a private medical practice at any location in Allegheny County Pennsylvania or elsewhere, and shall not preclude Physician from performing clinical services at any WPAHS hospital or affiliated surgery center (currently [AGH], the Western Pennsylvania Hospital, Alle-Kiski Medical Center, Canonsburg General Hospital, Forbes Regional Hospital and Suburban General Hospital).

Plaintiffs' Exhibit 3.

40. Thus, under the express terms of Section 9(h), the only options available to Dr. Colella in order to comply with Section 9(h) were to (1) establish a private practice and perform clinical services at a WPAHS facility (relying on WPAHS to allow him privileges to use its facilities exclusively to provide clinical services); or (2) establish a private practice in Allegheny County or elsewhere which did not require him to perform clinical services. *Id.*

41. Section 9(h), which by its terms is applicable only in the event ASPN were to decide not to renew the Employment Agreement, was expressly designed as a substitute for the

broader Section 9(b). Section 9(h) is a more permissive provision that only prohibits Dr. Colella from becoming employed by, or providing clinical services for, non-WPAHS entities in Allegheny County during the two-year period, but otherwise permits him to enter private practice in Allegheny County. It imposes no limits of any kind on him outside of Allegheny County. Transcript at 172, 175-177; Plaintiff's Exhibit 3.

42. Everyone who read, discussed, or interpreted Section 9(h) prior to the filing of this Action (including Dr. Colella; Dr. Colella's lawyer, Mr. Kabala; and Dr. Colella's new employer, UPP/UPMC) understood that the geographic scope of Section 9(h) was limited to Allegheny County. Transcript at 105, 176-177, 249-251, 293-294, 298-300, 308-309. Plaintiff's Exhibits 14, 17, 78, 142.

B. ASPN AND DR. COLELLA REACH TERMS OF THE 2002 EMPLOYMENT AGREEMENT EXECUTED BY THE PARTIES

43. Dr. Colella executed the Employment Agreement with ASPN on February 25, 2002 with an initial term that continued through March 31, 2009 ("Employment Agreement"). At that time, Dr. Colella and his counsel understood that Section 9(h) applied specifically to the circumstance of ASPN deciding not to renew the Employment Agreement. Transcript at 77-78, 253; Plaintiff's Exhibit 3.

44. At the time he entered into the Employment Agreement, Dr. Colella claims to have believed that he was entering into an agreement with AGH (now WPAHS). Transcript at 37.

45. The Employment Agreement contains a number of provisions demonstrating a specific intent to benefit and protect ASPN and/or AGH (now WPAHS). These include:

(a) The first "Whereas" clause of the Employment Agreement explains that "ASPN was formed to facilitate the provision of clinical services to patients of Allegheny General Hospital ("Hospital") and to provide certain administrative, faculty, and research services to Hospital;"

(b) Article 9(a) prohibits Dr. Colella from directly or indirectly engaging in "any activity competitive with or adverse to the business, practice, management, administration, or affairs of ASPN, Hospital, or their affiliates;"

(c) Article 9(c) prohibits Dr. Colella from soliciting "patients or employees of ASPN, Hospital, or their affiliates;"

(d) Article 9(h) prohibits Dr. Colella from providing services within Allegheny County except at WPAHS facilities;

(e) Article 10(a) prohibits Dr. Colella from disclosing confidential information "relating to ASPN, Hospital or their affiliates;"

(f) Article 11 expressly provides for remedies, including injunctive relief, to enforce breaches of Article 9 or 10 based on "adverse harm on ASPN and Hospital."

Plaintiff's Exhibit 3.

46. Section 11 of the Employment Agreement provides:

Physician acknowledges that a breach of any of the covenants set forth in Article [Section] 9 or 10 of this Agreement will have irreparable, material, and adverse harm on ASPN and Hospital, that damages

arising from such harm may be difficult to ascertain, and that damages alone shall not be an adequate remedy for any breach by Physician of the covenants contained in Article 9 or 10 of this Agreement. Physician agrees that in addition to any other remedies that ASPN may have, ASPN shall be entitled to injunctive relief in any court of competent jurisdiction for any breach or threatened breach of any such covenants by Physician....

Id.

III. EFFORTS TO NEGOTIATE A NEW EMPLOYMENT AGREEMENT BETWEEN ASPN AND DR. COLELLA IN 2008-2009

A. ASPN SEEKS A NEW EMPLOYMENT AGREEMENT

47. Around the time that AGH appointed Dr. Colella to be Director of the Bariatric Surgery Center, Dr. Colella's Employment Agreement with ASPN was amended effective July 1, 2004. The principal effect of the 2004 amendment was to increase Dr. Colella's base salary from \$350,000 a year to \$550,000 a year. All of the other terms of his Employment Agreement, except for his base compensation, remained in full force and effect. Transcript at 38, 43; Plaintiff's Exhibit 4.

48. As the end date of Dr. Colella's Employment Agreement was approaching, ASPN determined that nationally recognized data tracking the productivity and compensation of bariatric surgeons by Medical Group Management Association, known as MGMA standards, did not support the \$550,000 base compensation amount he was receiving under his Employment Agreement. Transcript at 202-204, 212; 355-358; Plaintiff's Exhibit 114.

49. Plaintiffs' ultimate goal and intention was to retain Dr. Colella and enter a new employment agreement with him that would more directly align his salary with productivity targets to provide additional incentives for him to further grow the AGH bariatric practice. Transcript at 55, 200-201, 357-358; Colella Deposition at 143-146.

50. In order to facilitate the process of negotiating a new employment contract, and to prevent the old employment contract from automatically renewing on the same terms, ASPN was contractually required to provide Dr. Colella with 180 days' notice of non-renewal. Consequently, on September 29, 2008, ASPN hand delivered to Dr. Colella the requisite notice of non-renewal. In the notice, as well as in a personal message conveyed by ASPN's Vice President, Suzie Mercadante, ASPN informed Dr. Colella that it wanted "to discuss the framework of a new employment agreement." Transcript at 53-55; Plaintiff's Exhibits 3, 7.

51. After sending the notice of non-renewal in September 2008, Ms. Mercadante met with Dr. Colella to review the MGMA survey information, as well as his productivity statistics, and solicited any additional information Dr. Colella might be able to provide to support a higher market value for his compensation. Dr. Colella never provided any such information. Transcript at 202-203; Mercadante Deposition at 34.

B. ASPN MAKES INITIAL OFFER TO DR. COLELLA

52. After initial discussions that focused on the productivity guidelines ASPN was using to create the terms of an offer, ASPN provided Dr. Colella with its first term sheet offer. The first offer was heavily weighted toward incentives, proposing a lower initial base salary of \$350,000 for an initial term of three years. The initial salary would be guaranteed for the first year, and guaranteed for the last two years provided Dr. Colella met at least 90% of a physician productivity threshold measured in worked relative value units ("WRVU's"). Transcript at 56; Plaintiff's Exhibit 20.

53. The productivity threshold in the first term sheet

offer was set at 8,000 WRVU's, meaning that Dr. Colella's base salary of \$350,000 would have been guaranteed as long as Dr. Colella achieved at least 7,200 WRVU's each year. By comparison, Dr. Colella's WRVU totals in fiscal years 2006, 2007 and 2008, respectively, had been 9375, 8524 and 7741, all well in excess of the minimum required to meet the base salary in the first offer. Transcript at 356-357, 360; Plaintiff's Exhibits 20, 114.

54. In addition to the base salary, the first term sheet offered numerous opportunities to increase Dr. Colella's compensation beyond the \$350,000, including:

- (a) \$20,000 per year for maintaining the Center of Excellence designation;
- (b) \$20,000 per year for engaging in community outreach and meeting or exceeding practice budget;
- (c) \$15,000 for being on call during evenings and weekends; and, most significantly
- (d) payment of 90% of the actual practice value of each WRVU attained above the target of 8000.

The final element in this list offered the opportunity for significant increases in compensation based on additional productivity. Plaintiff's Exhibit 20.

C. ASPN MAKES SECOND OFFER TO DR. COLELLA

55. After Dr. Colella rejected the first term sheet offer, ASPN made a second offer in January 2009. The second offer, which was also based on MGMA survey data, began with a significantly higher base salary of \$500,000. Of that amount, \$100,000 was guaranteed income for performing administrative duties. The remaining \$400,000 was guaranteed for the first year, and guaranteed for the second and third year if Dr. Colella achieved 8,055 WRVU's, which is 90% of a WRVU target of 8,950. The second term sheet also offered additional incentive opportunities, including payment of 90% of the actual practice value of each WRVU attained above the target. Transcript at 60, 356-357; Plaintiff's Exhibits 28, 114.

56. Ms. Mercadante presented both of these first two offers to Dr. Colella in person, going through the terms and explaining the basis for the salary and productivity incentive targets based on Dr. Colella's historical WRVU numbers. Dr. Colella also rejected the second offer and then ceased communicating with Ms. Mercadante, instead telling her to communicate with his attorney. Transcript at 56-58, 60, 62.

D. NEGOTIATIONS CONTINUE THROUGH AND BEYOND THE INITIAL TERM OF THE EMPLOYMENT AGREEMENT

57. As the March 31, 2009 end date of Dr. Colella's Employment Agreement approached, Dr. Colella and his lawyer met with higher and higher representatives of ASPN and WPAHS, including Duke Rupert, Vice-President of Operations of AGH, Janice James, Interim CEO and President of AGH, Jeff Bushong, interim Chief Operating Officer for the WPAHS physician network (which includes ASPN), and Roy Santarella, the Chief Administrative Officer for WPAHS. Transcript at 63.

58. During a meeting on March 31, 2009, Mr. Bushong and Mr. Santarella both stressed to Dr. Colella how much WPAHS wanted to retain Dr. Colella and how important he was to AGH's program. They also explained the principles that were guiding their approach to physician contracts, including Dr. Colella's, particularly the goal to match productivity measured primarily by MGMA standards to physician compensation. Transcript at 200-201.

59. During this meeting, Mr. Bushong and Mr. Santarella

also explained to Dr. Colella that WPAHS was striving to limit physician contracts to three-year terms, but that exceptions would be considered on a case-by-case basis. Transcript at 200-202.

60. On Tuesday, March 31, 2009, ASPN informed Dr. Colella that ASPN was planning on making an additional offer and asked Dr. Colella to continue to work past March 31, 2009. Dr. Colella agreed to perform the surgeries scheduled for that week. Transcript at 89.

61. On April 1, 2009, Dr. Colella met with Roy Santarella, ASPN's interim President, and Jeffrey Bushong, ASPN's interim Chief Operating Officer, to discuss the status of ASPN's offer. Santarella and Bushong informed Dr. Colella that ASPN would provide its last, best offer on April 2, 2009, and asked Dr. Colella to consider a 10-day extension. Dr. Colella, now working without an employment agreement, agreed to consider the offer and continued to negotiate a new employment agreement with ASPN. Transcript at 87-89, 203-205.

E. ASPN MAKES THIRD OFFER TO DR. COLELLA

62. Mr. Bushong and Dr. Colella met again on April 2, 2009 to go over a slight revision to ASPN's second term sheet offer. ASPN gave Dr. Colella its third and final term sheet on April 2, 2009. This third sheet was not materially different from ASPN's second term sheet (January 2009) offer. This third term sheet contained the same base salary and productivity targets, but introduced cash collections for the practice as an alternate measure of productivity. During the April 2, 2009 meeting, Dr. Colella objected to the base salary, the three-year term, and the productivity targets in the offer. Transcript at 143, 205-208, 359-360; Defendant's Exhibit 15.

63. The next day, April 3, 2009, Dr. Colella called Mr. Bushong to reject ASPN's most recent offer. Dr. Colella proceeded to set forth four "very important" demands that he insisted must be contained in any employment agreement: (a) a \$600,000 guaranteed base salary; (b) a five-year term; (c) reduced productivity requirements, at least in the initial years; and (d) the termination of AGH's other bariatric surgeon, Dr. Miro Ucha, so that the productivity requirements could be achieved. Transcript at 66-67, 208-209.

64. Later that day, Mr. Bushong called Dr. Colella and told him that Dr. Colella's package of demands was not acceptable to ASPN, but that ASPN's most recent offer was still on the table. Dr. Colella told Mr. Bushong that he wanted to take the weekend to think about it. Transcript at 209-210.

65. During the discussions from March 31, 2009 through April 3, 2009, Mr. Santarella and Mr. Bushong offered to extend Dr. Colella's Employment Agreement for an additional 90 days, or any shorter period of time, to permit the parties to continue negotiating a new contract. Dr. Colella never accepted or rejected these proposals, but he continued to come to work through April 3, 2009. Transcript at 87, 204-205.

66. On Friday, April 3, 2009, Dr. Colella told Mr. Bushong about the terms of the UPP/UPMC offer that he had been simultaneously negotiating. Dr. Colella asked Mr. Bushong for ASPN yet again to reconsider its third term sheet offer. Mr. Bushong replied that ASPN would not make any offers other than what was set forth in the third (April 2, 2009) term sheet. Transcript at 209; Defendant's Exhibit 16.

67. On Sunday, April 5, 2009, Dr. Colella decided to reject ASPN's third term sheet offer and signed an employment agreement with UPP/UPMC ("UPP/UPMC employment agreement"). Later that day, Dr. Colella notified Mr. Bushong of his decision and that he would not be returning to work at AGH on April 6, 2009. Transcript 71-72, 216; Plaintiff's Exhibit 78.

IV. DR. COLELLA'S NEGOTIATIONS AND ACCEPTANCE OF EMPLOYMENT WITH UPP/UPMC

A. DR. COLELLA INITIATES NEGOTIATIONS WITH UPP/UPMC

68. Unknown to Plaintiffs until the latest stages of the negotiations described above, Dr. Colella had initiated discussions to join UPMC in early November 2008 by contacting UPMC's Dr. Marshall Webster. Plaintiff's Exhibit 12.

69. Dr. Webster is the President of UPP, the Chief Medical Officer of UPMC, and the Executive Vice-President of the Physician Division of UPMC. As such, Dr. Webster occupies the second highest management position in the UPMC system, reporting directly to Jeffrey Romoff, UPMC's President and Chief Executive Officer. Transcript at 282, 307-308, 318.

70. Although UPP employs approximately 2,000 physicians and recruits hundreds of physicians a year, Dr. Webster gets involved in physician recruitment only occasionally. Transcript at 282, 320.

71. Dr. Webster, the UPMC person most involved in the recruitment of Dr. Colella from the beginning to the end, kept Mr. Romoff apprised of the status of the negotiations throughout that timeframe. Transcript at 291, 305-306.

72. UPMC agreed to indemnify Dr. Colella for up to \$250,000 in legal expenses incurred if ASPN threatened or filed any action of any nature against Dr. Colella to enforce the loyalty and non-competition covenants in his Employment Agreement with ASPN. Plaintiff's Exhibit 78 at Exhibit C.

B. UPMC OFFERS DR. COLELLA THE OPTION OF COMPLYING WITH THE TERMS OF HIS NON-COMPETITION COVENANT

73. From the outset and throughout the negotiations, Dr. Colella and UPMC considered how Dr. Colella might be able to join UPMC in ways both consistent and inconsistent with the non-competition covenant in his Employment Agreement with ASPN. Transcript at 78-84, 293-300; Plaintiff's Exhibits 14, 17, 22, 27, 32, 78.

74. Dr. Colella did not seriously consider the private practice option, and claimed doing so was not a feasible option in Allegheny County. His negotiations with UPMC subsequently focused on whether his employment would be within or outside of Allegheny County. Transcript at 81-84, 107-108, 156-159, 298-300, 320-323; Plaintiff's Exhibit 27, 32, 37, 78.

75. As late as January 2009, UPMC believed that Dr. Colella would be willing to enter an employment relationship pursuant to which he would practice medicine for UPMC for two years outside of Allegheny County, at either UPMC Cranberry or at its Horizon facility in Greenville, Pennsylvania. UPMC currently performs bariatric surgeries at its Horizon facility in Greenville, Pennsylvania, a bariatric surgery Center of Excellence, and was apparently open to having Dr. Colella perform them in Cranberry as well. Transcript at 309-310; Plaintiff's Exhibit 27.

76. From the earliest drafts of the proposed employment agreement with UPP/UPMC, an Exhibit C was included that required Dr. Colella to make a representation that the loyalty and non-competition provisions in his ASPN Employment Agreement were not enforceable. This representation was allegedly based on the advice of Dr. Colella's "personal legal counsel." Exhibit C provided UPMC with the right to have Dr. Colella perform his medical services outside of Allegheny County if ASPN threatened or filed litigation. Transcript at 319-322; Plaintiff's Exhibits 44, 78.

77. Toward the end of negotiations with UPP/UPMC, at Dr. Colella's request, an extra provision to Exhibit C was added that extended the term of employment by two years,

with all other terms (including compensation) remaining the same, in the event UPMC exercised its right to have Dr. Colella provide medical services outside of Allegheny County. Transcript at 107-108; 323; Plaintiff's Exhibit 78.

78. At Dr. Colella's request, a new non-competition covenant at Section 8.8.1.2 was added to his UPP/UPMC employment agreement. This new provision, which Dr. Colella has described as "exactly similar" to Section 9(h) of the ASPN Employment Agreement, is meant to apply if UPP decides not to renew that employment agreement and permits Dr. Colella to engage in a limited form of private practice in Allegheny County for two years following termination of the agreement. Dr. Colella represented in the UPP/UPMC employment agreement, which he signed on April 5, 2009, that the restrictive covenant at Section 8.8.1.2 was "reasonable and necessary to protect the legitimate business interests of UPP." Transcript at 104, 106; Colella Deposition at 99; Plaintiff's Exhibit 78.

V. DR. COLELLA'S HARDSHIP AND THREATS OF HARM TO PLAINTIFFS

A. PLAINTIFFS' INVESTMENT IN AND PROMOTION OF DR. COLELLA AS THE FACE OF ITS BARIATRIC SURGERY CENTER

79. During the decade that Dr. Colella was employed by ASPN, Plaintiffs invested in developing the goodwill of the Bariatric Surgery Center at AGH by:

- (a) giving Dr. Colella the title of Director of the Bariatric Surgery Center and Director of the Division of Bariatric Surgery, titles that increased Dr. Colella's visibility in the community;
- (b) promoting him as the face of the Bariatric Surgery Center at AGH;
- (c) promoting him in publications to the AGH community;
- (d) purchasing television advertisements to promote him and the Bariatric Surgery Center; and
- (e) making efforts to ensure that all referring physicians in the community were aware of his work with the Bariatric Surgery Center, and promoted him through physician outreach efforts.

Transcript at 43-44, 174.

80. AGH also devoted the resources and staff to enable the bariatric program at AGH to qualify as a Center of Excellence, and for Dr. Colella to qualify as its Center of Excellence Certified Surgeon. In effect, Dr. Colella became synonymous with AGH's bariatric program itself. Transcript at 42, 47, 179.

81. During the winter of 2008-2009, while ASPN and Dr. Colella were negotiating towards a new employment agreement, Dr. Colella became the first surgeon in Allegheny County to perform bariatric surgery employing robotic techniques. During a time when Dr. Colella now asserts Plaintiffs were attempting to usher him out the door, WPAHS promoted this achievement and Dr. Colella with press releases and radio spots. Dr. Colella's achievement with robotic bariatric surgery subsequently ended up being a major promotional point included in UPMC's press release announcing his recruitment. Transcript at 48-49; Plaintiff's Exhibit 77.

B. POTENTIAL HARM TO PLAINTIFF IF DR. COLELLA IS PERMITTED TO WORK FOR A COMPETITOR IN ALLEGHENY COUNTY

82. Dr. Colella's compliance with the non-competition provisions of the ASPN Employment Agreement, either by practicing medicine outside of Allegheny County or by entering private practice in Allegheny County without any affiliation with a competing health system or hospital, would provide Plaintiffs the opportunity to attempt to protect their goodwill, patient relationships and patient referral network while rebuilding, or restructuring, their bariatric program. Transcript at 173-179.

83. The majority of the AGH Bariatric Surgery Center's patients come from Allegheny County. As a specialty medical practice, in which the central surgical procedure is usually done only once, bariatric surgeons are heavily dependent on referrals for their business. Most of those referrals come from previously treated patients and referring physicians. Dr. Colella believes that the reputation he developed while an employee of ASPN and the Director of the Bariatric Surgery Center at AGH is a significant source of new patient referrals. Transcript at 50-53, 173-174.

84. Dr. Colella's patient-to-patient referrals developed as a result of the close bond he formed with patients while treating those patients as an employee of ASPN and as the Director of the Bariatric Surgery Center at AGH. Transcript at 117-118.

85. At the time of his departure from AGH, Dr. Colella had significantly more than a hundred patients at various stages of preoperative preparation. In addition to providing new referrals, postoperative patients are also a direct source of future business for Plaintiffs, since they often require follow-up procedures with other specialists. Transcript at 124-126.

86. If Dr. Colella works for UPP outside of Allegheny County, even for a limited amount of time, he would be less likely to capture patients or referrals from former patients and referring physicians than if he went to work for UPP at UPMC's Magee-Women's Hospital in Allegheny County. Transcript at 118, 179, 336.

87. If Dr. Colella is permitted to practice bariatrics within Allegheny County at Magee-Women's Hospital, it could be devastating to the AGH bariatric surgery program, even if he was precluded from treating existing ASPN and WPAHS patients, given the importance of the referral base to future patient referrals. Transcript at 179, 185-186.

C. EFFORTS BY DR. COLELLA TO MARKET UPMC AND TO SOLICIT PATIENTS AND EMPLOYEES OF AGH

88. During a ninety-minute private meeting with Ketul J. Patel, the Chief Operating Officer of Magee-Women's Hospital, on March 26, 2009, Mr. Patel and Dr. Colella discussed a plan to provide patients who were already scheduled for surgery at AGH with Dr. Colella's cell phone number so that he could attempt to "push" those patients to Magee-Women's Hospital. Plaintiff's Exhibit 53.

89. On March 26, 2009, UPMC produced its comprehensive marketing plan "to announce the arrival" of Dr. Colella at UPP/UPMC, born out of the marketing meetings Dr. Colella began attending in February 2009. This UPMC marketing plan was expressly designed to target Dr. Colella's "prospective, current, and former patients." Plaintiff's Exhibit 52.

90. Among other key points, the UPMC marketing plan:

- (a) noted UPMC's intent to take advantage of "Dr. Colella's strong reputation among patients, referring physicians, and the community at large;"

- (b) stated as a goal for "Phase I" of the marketing campaign ensuring that Dr. Colella's

"prospective, current, and former patients are aware that Dr. Colella has joined UPMC;"

(c) stated as another goal using Dr. Colella's reputation to "[b]uild awareness and preference" for the competing bariatric surgery program at Magee;

(d) planned an advertising campaign that would enable "former, current and prospective patients... to schedule appointments" with Dr. Colella;

(e) proposed initiating a "[v]iral [m]arketing" campaign by enlisting Dr. Colella's former patients "to post word of the announcement on obesity blogs and websites;"

(f) on the assumption that Dr. Colella would start working at Magee on April 1, 2009, planned an aggressive advertising campaign involving the placement of a significant number of advertisements in three different publications to run on dates between April 1 and April 19, 2009.

Id.

91. On April 5, 2009, the same day Dr. Colella informed Mr. Bushong that he would not be coming to work the following day, UPMC issued a press release, entitled "Prominent Bariatric Surgeon, Joseph J. Colella, M.D., Joins UPMC," announcing Dr. Colella's new practice coming to Magee-Women's Hospital and inviting patients to schedule appointments to see him. Plaintiff's Exhibit 77.

92. On April 5, 2009, Mr. Romoff, the Chief Executive Officer of UPMC, reacting to news of Dr. Colella's signing his employment agreement with UPP/UPMC stated:

The recruitment of Dr. Joe Colella, a prominent AGH non-invasive bariatric surgeon, after many months will likely have symbolic value as well as giving us the vast majority of cases as joins [sic] our successful program at Magee. He has been a "feature surgeon" for them....

Plaintiff's Exhibit 84.

93. On April 6, 2009, Dr. Webster stated in an e-mail he sent to Mr. Romoff that "We are already getting calls from [Dr. Colella's] patients, and I bet that within a month Colella will be going nearly full steam." Plaintiff's Exhibit 95.

94. In mid-March 2009, while in the midst of his marketing discussions with Mr. Patel about pushing patients to UPMC, Dr. Colella removed from AGH about five months' worth of confidential patient schedules containing names, social security numbers and contact information of every patient he had been scheduled to see from September 2008 through early March 2009. Dr. Colella admits that he took the list of patient schedules so he could have the means to contact the patients identified on them to inform them that he had joined UPMC. Many of the patients on the list would have been in various stages of preoperative preparation, thus making them candidates to be "push[ed]" to UPMC for their surgeries. ASPN was aware that Dr. Colella had generated the list. Dr. Colella did not use, disclose or give the list to anyone. Dr. Colella returned the list to ASPN prior to the preliminary injunction hearing. Transcript at 96-100.

95. UPP/UPMC employees made phone calls to ASPN employees for whom Dr. Colella had provided contact information for possible positions at UPMC if Dr. Colella began practicing at UPMC, but no AGH staff members left AGH as a result of these phone calls. Transcript at 224-225.

VI. ENFORCING THE RESTRICTIVE COVENANTS WILL NOT HARM DR. COLELLA OR THE PUBLIC INTEREST

96. On April 5, 2009, Dr. Colella signed the five-year UPP/UPMC employment agreement providing a total base, administrative and faculty compensation of \$650,000 per year, along with \$125,000 worth of retention bonuses to be paid out in subsequent years. Transcript at 109-110; Plaintiff's Exhibit 78 at Exhibit A.

97. Exhibit C of the UPP/UPMC employment agreement provides for a contingency plan in the event an Action is threatened or filed to enforce the loyalty and non-compete restrictive covenants in the ASPN Employment Agreement. The contingency plan allows UPP to relocate Dr. Colella to a hospital facility that provides medical services on behalf of UPP/UPMC outside of the geographic restrictions in the ASPN Employment Agreement. In the event that UPP requires Dr. Colella to relocate his practice outside of Allegheny County, the UPP/UPMC employment agreement is to be extended for an additional two years, with all of the other terms, including Dr. Colella's lucrative compensation terms, remaining the same. Plaintiff's Exhibit 78 at Exhibit C.

98. There is no shortage of bariatric surgeons in Allegheny County. If one had to stop working in Allegheny County, the population would not suffer. Transcript at 28 (Defendant's Opening Statement).

DISCUSSION

On appeal from the grant or denial of a preliminary injunction, the appellate court examines the record to determine if there were any apparently reasonable grounds for the action of the court below. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 645-646, 828 A.2d 995, 1000 (2003). As the *Summit Towne Centre* appellate court stated, "Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the trial court." *Id.*

The Supreme Court of Pennsylvania in *Warehime v. Warehime*, 580 Pa. 210, 860 A.2d 41 (2004) set forth the six essential prerequisites that a moving party must establish prior to obtaining preliminary injunctive relief:

The party must show 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

Id. at 46-47 (citations omitted)

A preliminary injunction may properly issue only when all of the necessary elements are established. *Id.* The burden of proof is on the party who requested the preliminary injunctive relief. *Id.*

As fully discussed below, Plaintiffs have established all of the necessary elements, and thus are entitled to a prelimi-

nary injunction.

I. ABSENT AN INJUNCTION, PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM

An analysis of the existence of irreparable harm in the context of a preliminary injunction enforcing a physician non-competition covenant has been set forth in *West Penn Specialty MSO, Inc. v. Nolan*, 737 A.2d 295 (Pa.Super. 1999):

An injury is regarded as "irreparable" if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard. Our courts have held, accordingly, that it is not the initial breach of the covenant which necessarily establishes the existence of irreparable harm but rather the unbridled threat of the continuation of the violation, and incumbent disruption of the employer's customer relationships.

Thus, grounds for an injunction are established where the plaintiff's proof of injury, although small in monetary terms, foreshadows the disruption of established business relations which would result in incalculable damage should the competition continue in violation of the covenant. The effect of such disruption may manifest itself in a loss of new business not subject to documentation, the quantity and quality of which are inherently unascertainable.... Consequently, the impending loss of a business opportunity or market advantage also may be aptly characterized as an "irreparable injury" for purposes of equitable relief.

Id. at 299. (citations omitted)

For healthcare employers, irreparable damage includes disruption of current or future patient relationships; damage to the employer's referral base, goodwill, business opportunities or market advantage; and loss of the employer's investment in the physician's training or practice. *See, Id.* at 298 (referring to the "disruptive effect of [a doctor's] departure on [the employer's] current or future patient relationships"); *Einstein Cmty. Health Assocs. v. Shortridge*, No. 1814, 2000 WL 35496540, at *12 (Pa. Cm. Pls. Dec. 13, 2000) (a doctor's "[k]nowing solicitation" of patients "in violation of a restrictive covenant" constitutes irreparable harm) (quoting *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1168 (Pa. 1977)); *WellSpan Health v. Bayliss*, 869 A.2d 990, 998-99 (Pa.Super. 2005) (holding that a medical institution's referral base is a protectable interest that can justify an injunction); *Id.* at 997 (goodwill and positive business reputation) (citing *Hess v. Gebhard & Co.*, 808 A.2d at 912, 922 (Pa. 2002)). "The injury caused by a violation of a covenant not to compete is particularly difficult to quantify for damages purposes." *Medical Wellness Assocs. P.C. v. Heithaus*, 2001 WL 1112991 at *26, 51 Pa. D. & C.4th 1 (Pa. Com. Pl. Feb. 13, 2001). "It is not the initial breach of a covenant which necessarily establishes the existence of irreparable harm but rather the threat of the unbridled continuation of the violation and the resultant incalculable damage to the former employer's business that constitutes the justification for equitable intervention." *Sling Testing*, 369 A.2d at 1167. "The covenant seeks to prevent more than just the sales that might result by the prohibited contact but also the covenant is designed to prevent a disturbance in the relationship that has been established between appellees and their accounts through prior dealings. It is the possible consequences of this unwarranted interference with customer

relationships that is unascertainable and not capable of being fully compensated by money damages." *Id.*

If Dr. Colella is permitted to practice medicine at Magee-Women's Hospital, a hospital outside the WPAHS system, and be employed by UPP/UPMC, he will likely cause significantly more disruption to Plaintiffs' relationships with their current patients and even more disruption to relationships with their patient referral base, which depends on referrals from referring physicians (both employed and private) and patients they have previously treated. The risk of immediate, irreparable harm is demonstrated by the facts in this case. An injunction requiring Dr. Colella to comply with his restrictive covenants is thus reasonably necessary to protect Plaintiffs from that harm.

Therefore, we find that the first prerequisite to the issuance of a preliminary injunction has been satisfied because Plaintiffs have adequately demonstrated imminent irreparable harm that cannot be adequately compensated by damages.

II. GREATER HARM WOULD RESULT IF AN INJUNCTION WERE NOT GRANTED

Once the employer has articulated protectable business interests that are at risk of immediate and irreparable harm, the "the next step in analysis of a non-competition covenant is to apply the balancing test defined by our Supreme Court. First, the court must balance the employer's protectable business interest against the employee's interest in earning a living. Then, the court balances the employer and employee interests with the interests of the public." *WellSpan*, 869 A.2d at 999 (citing *Hess*, 808 A.2d at 920). Dr. Colella bears the burden of proving that the hardships imposed by the non-competition provisions in Section 9(h) of the Employment Agreement are unreasonable. *WellSpan*, 869 A.2d at 999 ("In weighing the competing interests of employer and employee, the court must engage in an analysis of reasonableness...with the party claiming unreasonableness as a defense against enforcement of the covenant bearing the burden of proof."). *See, Sling Testing*, 369 A.2d at 1169 (same).

A. The Injunction Would Impose Minimal Hardship on Dr. Colella

Enforcing the Section 9(h) non-competition restrictive covenants through an injunction would not impose any serious hardship on Dr. Colella. Not only would he be perfectly capable of earning a living while abiding by the terms of the restrictive covenants, but he has already negotiated a lucrative contract that would actually reward him with greater job security if he is required to abide by the restrictive covenants. In "weighing...the employer's need for protection...against the hardship of the restriction to be imposed upon the employee[...]" undue hardship to the employee may be found where, for example, he would "encounter difficulty in transferring his particular experience and training to another line of work,... [or would] find it difficult to uproot himself and his family in order to move to a location beyond the area of potential competition with his former employer." *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 734 (Pa.Super. 1995) (quoting *Morgan's Home Equipment Corp. v. Martucci*, 136 A.2d 838, 846 (Pa. 1957)). Such considerations are absent here.

Dr. Colella contends that working outside of Allegheny County might be inconvenient for him and might not permit him to perform the high-risk bariatric surgeries. The Court finds this perceived harm to be minimal under the facts of this case. In balancing the equities, the irreparable harm to Plaintiffs clearly outweighs any temporary inconvenience that might accompany Dr. Colella earning potentially in

excess of \$650,000 employed by UPP for two years at hospitals within western Pennsylvania, but outside of Allegheny County.

Therefore, under these facts, it is reasonable to conclude that the balance of hardships tips in favor of granting preliminary injunctive relief.

III. THE INJUNCTION WILL RESTORE THE PARTIES TO THEIR STATUS PRIOR TO DR. COLELLA'S WRONGFUL CONDUCT

"A preliminary injunction operates to maintain affairs between the parties as they existed prior to the underlying dispute and 'to compel a wrongdoer to give up the status he appropriated before an action could have been instituted against him.'" *West Penn Specialty*, 737 A.2d at 298 (quoting *Herman v. Dixon*, 141 A.2d 576, 577 (Pa. 1958)). Plaintiffs request an injunction returning the parties to the status quo before Dr. Colella entered an employment relationship to perform medical services for UPP/UPMC in Allegheny County in violation of the loyalty and non-competition restrictive covenants in his Employment Agreement.

Therefore, under these facts, the issuance of a preliminary injunction will properly restore the parties to their status, as it existed immediately prior to the alleged wrongful conduct.

IV. PLAINTIFFS ARE LIKELY TO PREVAIL IN THEIR BREACH OF CONTRACT CLAIMS REGARDING DR. COLELLA'S VIOLATION OF THE RESTRICTIVE COVENANTS IN HIS EMPLOYMENT AGREEMENT

Plaintiffs are likely to prevail in their claim that Dr. Colella's acceptance of employment with UPP/UPMC within Allegheny County violated the duty of loyalty and non-competition covenants of his Employment Agreement. Giving the former employer time to rebuild its customer and business relationships free from competition by the departing employee is the very purpose of non-competition covenants, which Pennsylvania courts clearly and regularly enforce. *See, Sling Testing*, 369 A.2d at 1170. (purpose is not a permanent protection from competition, or even from fair competition at all, but protection for a reasonable period of time to protect an employer's legitimate relationships and investment in the short term)

A. WPAHS IS AN INTENDED BENEFICIARY OF THE EMPLOYMENT AGREEMENT

A party is a third-party beneficiary of a contract when the parties to a contract express an intention to benefit the third-party in the contract or when the circumstances are so compelling "that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Hay Acquisition Co. v. Schneider*, No. Civ.A. 2:04-CV-1236, 2005 WL 1017804, at *8 (E.D. Pa. April 27, 2005) (quoting *Scarpitti v. Weborg*, 609 A.2d 147, 150 (Pa. 1992). *See, Burks v. Federal Ins. Co.*, 883 A.2d 1086, 1088 (Pa.Super. Ct. 2005) (even an unnamed party can be a third-party beneficiary of a contract if both "parties to the contract so intended....").

It is clear that a contracting party may enforce the contract to protect the interests of a third-party beneficiary. *See, Barium Steel Corp. v. Wiley*, 108 A.2d 336 (Pa. 1954) ("a person with whom or in whose name a contract has been made for the benefit of another" may sue to enforce that contract).

It is also clear that a third-party beneficiary of a contract can bring an action to enforce that contract, including in the

context of enforcing restrictive covenants. *See, Omicron Sys., Inc. v. Weiner*, No. 669 Aug. Term 2001, 2002 WL 452238, at *1 n.2, *7 (Pa. Com. Pls. March 14, 2002) ("At the least, [employer's affiliate] could be considered a third-party beneficiary under the Restrictive Covenant Agreement and would therefore be entitled to enforce the Agreement's terms against [employee].") (citing *Scarpitti*, 609 A.2d at 150-51); *Hay Acquisition*, 2005 WL 1017804 at *2 n.2, *9 (party is a third-party beneficiary where an employment contract creates a right in a third-party "to benefit from [the employee's] services" and imposes on the employee the duty to perform services for that third-party).

As a result, ASPN and WPAHS may seek to protect WPAHS's third-party beneficiary interests in this Action to enforce the restrictive covenants. The facts and circumstances in this case, demonstrate that the parties to the Employment Agreement (i.e. ASPN and Dr. Colella) manifested an express intention that Allegheny General Hospital (now WPAHS), would be an intended third-party beneficiary of the Employment Agreement.

B. ASPN HAS THE RIGHT TO ENFORCE ITS OWN INTERESTS AND THE INTERESTS OF WPAHS

Notwithstanding WPAHS's right to enforce the restrictive covenants, ASPN clearly has the independent right to protect its own interests and the interests of WPAHS as the intended beneficiaries of the restrictive covenants. This right arises both from the common law right of a party to a contract to enforce the agreement for the benefit of an intended beneficiary and the language of the Employment Agreement itself. Section 11 of the Employment Agreement, expressly contemplates and authorizes ASPN to bring this Action for an injunction based on harm to ASPN and Allegheny General Hospital (now WPAHS), resulting from a breach by Dr. Colella of the loyalty, non-competition or confidentiality covenants of Sections 9 or 10 of the Employment Agreement. That is precisely the Action that Plaintiffs have brought here.

C. THE CIRCUMSTANCES OF DR. COLELLA'S DEPARTURE DO NOT PRECLUDE ENFORCEMENT OF THE RESTRICTIVE COVENANTS

Dr. Colella argues that this Court must disregard his non-competition covenant, and in support of that position, Dr. Colella relies primarily on our Superior Court's decision in the *Brobston* case. In *Brobston*, the employer fired the employee, a salesman, for poor performance and then sought to enforce a two-year, 300-mile restrictive covenant against him. *Brobston*, 667 A.2d at 738. The *Brobston* court found that the employer had essentially deemed the employee to be worthless, and reasoned:

Where an employee is terminated by his employer on the grounds that he has failed to promote the employer's legitimate business interests, it clearly suggests an implicit decision on the part of the employer that its business interests are best promoted without the employee in its service. The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as

worthless to its legitimate business interests.

Id. at 735.

A trial court in deciding a request for preliminary injunctive relief should consider the circumstances surrounding the former employee's termination, a factor which affects both the legitimacy of the employer's interests and the degree of hardship imposed upon the departing employee. *Id.* at 737. Noting that the reasonableness of a restrictive covenant must be "determined on a case-by-case basis," the *Brobston* court found that the trial court erred in not considering the fact that the employee had been fired as a factor in its determination of reasonableness. *Id.* at 735, n.6, 737. In the few cases in which courts have found the circumstances of termination to favor disregarding a non-competition covenant, the employer's actions evidenced an intent to completely sever ties with the employee. *See, Brobston*, 667 A.2d at 735 (employee fired as "worthless"); *Nephrology Assocs. of Central Pa. v. Elnour*, No. 07-0648 Civil Term, 2007 WL 5770086, at *35-37 (Pa. Com. Pl. Mar. 9, 2007) (one partner in medical practice voted out by the other partners). There is no Pennsylvania case cited by either party where a court has disregarded a non-competition covenant based on the failure of an employer and employee to come to agreement on the terms of a new employment agreement.

The ability to enforce restrictive covenants does not require the employer to be willing to meet whatever terms are demanded by the employee. *Hayes v. Altman*, 225 A.2d 670 (Pa. 1967). In *Hayes*, the employment agreement between an optometrist and his employer terminated on December 31, 1963. *Id.* at 671. The parties did not enter a new agreement, but continued to work under terms consistent with the prior agreement until March 13, 1964, when the employer "discharged" the employee. *Id.* Notwithstanding that the employer in that case had actually fired the employee, the *Hayes* court enforced the non-competition agreement where the employer discharged the employee after the parties failed to come to agreement on the terms of a new contract of employment. *Id.* A non-competition covenant is not to be disregarded based on the failure of an employer and employee to come to agreement on the terms of continued employment. *Id.*

This Court has thoroughly considered the circumstances surrounding Dr. Colella's departure from his former employer as a factor in its determination of reasonableness of enforcing the restrictive covenant by issuing a narrowly tailored preliminary injunction in this case. The facts of this case do not indicate that ASPN regarded Dr. Colella's value as an employee to be worthless or that ASPN unilaterally terminated Dr. Colella's employment for economic reasons.

Plaintiffs have a clear right to injunctive relief under the express terms of the Employment Agreement. The issuance of a preliminary injunction is appropriate because Plaintiffs have demonstrated, at least, a reasonable probability of success on the merits of a breach of contract claim.

V. THE PRELIMINARY INJUNCTION IS REASONABLY SUITED TO ADDRESS THE WRONG PLED AND PROVEN

An injunction prohibiting Dr. Colella from providing medical services in violation of the non-competition covenants of his Employment Agreement is reasonably suited to address his improper conduct. Covenants not to compete are enforceable if: (a) they are incident or ancillary to employment; (b) the restrictions imposed by the covenant are reasonably necessary to protect a legitimate business interest of the employer; and (c) the restrictions are reasonably limited in duration and geographic extent. *Hess*, 808 A.2d at 917, 920.

A. THE RESTRICTIVE COVENANTS ARE ANCILLARY TO EMPLOYMENT

The restrictive covenants in the Employment Agreement are ancillary to employment in that they were negotiated as part of the Employment Agreement, which provided Dr. Colella with, *inter alia*, a guaranteed term of employment and salary.

B. ENFORCEMENT OF THE RESTRICTIVE COVENANTS IS REASONABLY NECESSARY TO PROTECT LEGITIMATE BUSINESS INTERESTS

The Employment Agreement's restrictions on competition are reasonably necessary to protect Plaintiffs' legitimate business interests. The business interests that Plaintiffs seek to protect are those which Pennsylvania courts have long recognized as protectable through use of restrictive covenants and that nearly always lend themselves to injunctive relief. These legitimate business interests include goodwill, patient relationships, patient referral base, competitive information as well as the investment in Dr. Colella and the Allegheny General Hospital Bariatric Surgery Center built around him. *See, West Penn Specialty*, 737 A.2d at 299 (affirming an injunction enforcing oncologist's non-competition covenant in order to protect medical clinic's "existing patient relationships" and "market advantage"); *WellSpan*, 869 A.2d at 997-999 (protectable interests include a healthcare provider's patient referral base and "efforts and moneys" expended on the employee's training).

Goodwill developed by an employee in the context of the employment relationship belongs to the employer and is protectable through use of non-competition covenants. *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 252-53 (Pa. 1976) ("An employer's right to protect, by a covenant not to compete, interest in customer goodwill acquired through the efforts of an employee is well-established in Pennsylvania."); *WellSpan*, 869 A.2d at 997 (customer goodwill is protectable "even when the goodwill has been acquired through the efforts of an employee"); *Einstein Cmty. Health Assocs. v. Shortridge*, No. 1814, 2000 WL 35496540, at *9-10 (Pa. Com. Pl. Dec. 13, 2000).

Similarly, Pennsylvania courts have recognized a protectable interest in an employer's patient referral base, especially in connection with the provision of specialized medical care such as bariatric surgery. *WellSpan*, 869 A.2d at 997. In *WellSpan*, the Superior Court formally recognized a protectable interest in a patient referral base, noting that an investment in building such a base around a physician "is not truly compensable through monetary damages when the referral base depends on the network of professional relationships that have developed over time between referring physicians and the particular subspecialist physician." *Id.* at 998. Bariatric surgeons, like the perinatologist at issue in *WellSpan*, fit squarely within the type of subspecialist medical practice dependent on referrals that can be protected by restrictive covenants. *Id.* at 997. Plaintiffs have established a protectable interest in their patient referral base, built both with respect to physician referrals and referrals from other patients treated by Dr. Colella at Allegheny General Hospital.

The protection of confidential information obtained during employment is also an interest that courts have recognized as protectable by enforcement of restrictive covenants. *Id.* at 996. Here, Dr. Colella was the Director of Allegheny General Hospital's Bariatric Surgery Center and, as such, had access to confidential information including patient names and contact information, information about marketing strategies and information about the operation of the Bariatric Surgery Center generally, all of which he could readily exploit as an employee of a rival program in

Allegheny County.

C. THE GEOGRAPHIC AND TEMPORAL LIMITATIONS OF THE RESTRICTIVE COVENANTS ARE REASONABLE

The interpretation of a contract is a matter of law for the Court to decide. *Quinn v. Bupp*, 955 A.2d 1014, 1017 (Pa.Super. 2008). The only reasonable interpretation of the restrictive covenants limits its applicability to Allegheny County. Section 9(h) of the restrictive covenants applies only in the limited circumstance in which ASPN does not offer to renew the Employment Agreement, which happens to be precisely the scenario at issue in this litigation. In context, Section 9(h) of the restrictive covenants only limits Dr. Colella's practice of medicine in Allegheny County. He is free to engage in the practice of medicine without restriction outside of Allegheny County, and to refer patients to any hospital or surgery center outside of Allegheny County, without violating the non-competition covenant.

The non-competition covenants negotiated by the parties are reasonably limited in duration and geographic scope, in that they restrict Dr. Colella's medical practice only within Allegheny County, where the majority of Plaintiffs' bariatric surgery patients originate, and only for two years. "Pennsylvania courts have consistently affirmed covenants not to compete for terms between two and three years after employment ends." *Medical Wellness Assoc.*, 2001 WL 1112991 at *25 (enforcing a two-year covenant; citing cases); *See, Hayes*, 225 A.2d at 671 (three-year restriction on an optometrist); *WellSpan*, 869 A.2d at 995 (two-year restriction on perinatologist); *Geisinger Clinic v. W. DiCuccio, M.D.*, 606 A.2d 509, 514 (Pa.Super. Ct. 1992) (upholding a restrictive covenant that placed a two-year restriction on physician) *appeal denied*, 536 Pa. 625, 637 A.2d 285 (1993), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 904 (1995); *West Penn Specialty*, 737 A.2d at 296-297 (more than five years including the remaining term and an additional year); *Sling Testing*, 369 A.2d at 1170 (enforcing a three-year covenant not to compete where the employee had been the employer's principal representative for a decade and three years was "reasonably necessary for...the employers to strengthen and reaffirm their business contacts" in the wake of his departure).

A one-county restriction on a medical practice is likewise well within what has been approved in other cases. *See, Medical Wellness Assoc.*, 2001 WL 1112991 at *25 (45 mile radius); *WellSpan*, 869 A.2d at 995 (two county area); *Geisinger Clinic*, 606 A.2d at 514 (50 mile radius). Plaintiffs have, over the more than decade-long course of Dr. Colella's employment, built their bariatric surgery program around him. Two years is a relatively brief period of time to provide an opportunity to build the program around other physicians, and to attempt to secure Plaintiffs' interests in their patient relationships, referral base and program investment, before Dr. Colella can be permitted to use those relationships and that referral base to compete as an employee of a rival health care system in Allegheny County.

Accordingly, we find, under these facts, that the grant of preliminary injunctive relief is reasonably suited to address the offending activity.

VI. THE PRELIMINARY INJUNCTION WILL NOT BE ADVERSE TO THE PUBLIC INTEREST

Where a covenant not to compete "seeks to limit the professional practice of a physician," courts must evaluate the covenant's effect, if any, on the public interest. *West Penn Specialty*, 737 A.2d at 298 (affirming the granting of a preliminary injunction against the doctor). "In the context of non-compete agreements amongst physicians, our Supreme Court

has defined the public interest as a function of the availability of appropriate medical service to the community should an injunction be imposed." *West Penn Specialty*, 737 A.2d at 300 (citing *New Castle Orthopedic Assoc.*, 392 A.2d 1383, 1387-88 (Pa. 1978)). In *West Penn Specialty*, the Superior Court followed Supreme Court of Pennsylvania's holding in *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1387 (Pa. 1978) that the "public interest" is defined not in terms of a particular physician, but the general availability of physicians to treat patients. *Id.* at 298. In doing so, the Superior Court noted that "no jurisdiction has recognized a public interest in assuring the unrestricted ability of a particular patient in continuity of care with a single physician." *Id.*

Just as in Pennsylvania, courts in nearly every state continue to enforce restrictive covenants involving physicians as they would other restrictive covenants and to define the public interest in terms of lack of availability of medical care rather than lack of availability of a particular physician. *See, Herman v. Dixon*, 141 A.2d 576, 578 (Pa. 1958) (applying general contract rules to enforce restrictive covenant involving physician); *Geisinger Clinic*, 606 A.2d at 512 *et seq.* (same); *Concord Orthopaedics Professional Ass'n. v. Forbes*, 702 A.2d 1273, 1275-77 (N.H. 1997) (normal test of reasonableness applicable to physician covenants; no shortage as a result of restriction on physician); *Wall v. Firelands Radiology, Inc.*, 666 N.E.2d 235, 246-248 (Ohio Ct. App. 1995) (general contract principles govern; court will not rewrite parties' agreement; community not under-served), *appeal not allowed*, 659 N.E.2d 1289 (Ohio 1996); *Medical Specialists, Inc. v. Sleweon*, 652 N.E.2d 517, 526 (Ind. Ct. App. 1995) (no shortage of specialists in same field); *Fumo v. Medical Group of Michigan City, Inc.*, 590 N.E.2d 1103, 1109 (Ind. Ct. App. 1992) (consider availability of other physicians).

Accordingly, in the rare cases in which Pennsylvania courts have invoked the public interest in declining to enforce covenants not to compete on a physician, the evidence showed that there was a legitimate shortage of practitioners in the relevant area. *See, WellSpan*, 869 A.2d at 1000 (enforcement of the covenant would have deprived the county at issue of its only perinatologist); *New Castle Orthopedic*, 392 A.2d at 1388 (demand for orthopedic physicians was significantly greater than supply, leading to long wait times for a "desperately needed service").

Under the facts of this case, the public interest will not be adversely affected by enforcement of the non-competition restrictive covenants of the Employment Agreement. Therefore, we find the final prerequisite required for a grant of preliminary injunctive relief to be satisfied.

CONCLUSIONS OF LAW

1. Plaintiffs have established the immediate and irreparable harm requirement for preliminary injunctive relief.
2. Greater injury would result from refusing the injunction than from granting it, and the issuance of an injunction will not substantially harm Defendant.
3. A preliminary injunction will properly restore the parties to the status quo as it existed immediately prior to the wrongful conduct.
4. Plaintiffs are likely to prevail on the merits regarding a claim of breach of contract to enforce restrictive covenants in the Employment Agreement.
5. A preliminary injunction is reasonably suited to address the wrong pled and proven.

6. A preliminary injunction will not adversely affect the public interest.

BY THE COURT:

/s/Ward, J.

Dated: June 9, 2009

ORDER OF COURT

AND NOW, to wit, this 9th day of June, 2009 upon consideration of Plaintiffs' Amended Motion for Preliminary Injunction, Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and respective briefs and responses thereto and after hearing, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Amended Motion for Preliminary Injunction is GRANTED.

1) Defendant Joseph J. Colella, M.D., pending a final order after a trial on the merits, is hereby:

a) preliminarily enjoined from entering into or fulfilling the terms of any employment agreement or other contract of any type to provide clinical, administrative, or any medically-related services within Allegheny County, Pennsylvania for any other hospital, health care provider or surgery center outside the West Penn Allegheny Health System for a two (2) year period beginning April 1, 2009, further extended by the amount of time Defendant is found to be in breach of his restrictive covenants under the Employment Agreement with Allegheny Specialty Practice Network;

b) preliminarily enjoined from directly or indirectly soliciting Plaintiffs' employees or patients for a two (2) year period beginning April 1, 2009, further extended by the amount of time Defendant is found to be in breach of his restrictive covenants under the Employment Agreement with Allegheny Specialty Practice Network; and

c) preliminarily enjoined from accessing, obtaining, copying, using or sharing with any third parties any confidential information obtained during his employment with Allegheny Specialty Practice Network.

2) It is further ORDERED that Plaintiffs are to file a bond in the amount of \$250,000 by the 19th day of June 2009, pursuant to Pa.R.Civ.P. 1531(b), pending the final determination of this matter:

3) It is further ORDERED that the injunction shall not take effect until Plaintiffs file the required bond with security approved by the Court.

BY THE COURT:

/s/Ward, J.

Dated: June 9, 2009

Plaintiffs have objected to Defendant's Proposed Exhibit 22. Defendant's proposed Exhibit 22 is an Affidavit of John G. Krah purporting to authenticate a statement by the Allegheny County Medical Society entitled "Ethical Responsibilities in Change in Affiliation of Medical Practices or Separation of Employment." Defendant's Exhibit 22 does not constitute competent evidence in this proceeding. Moreover, Defendant's Exhibit 22 is not relevant to the issues in this litigation. The objection to Defendant's Proposed Exhibit 22 is sustained.

Plaintiffs have also objected to Defendant's Proposed Exhibit 27. The first page of Defendant's Proposed Exhibit 27 is a one-page document that purports to be a "comparison of statements made by plaintiffs about Dr. Colella with statements made by UPMC about Dr. Colella." The source documents for these statements comprise a total of 12 one-page e-mails, all of which are actually contained in Defendant's exhibit binder following the proposed "summary." The first page of Defendant's Proposed Exhibit 27 does not qualify as a summary exhibit under Pennsylvania Rule of Evidence 1006 because, it does not summarize writings that are voluminous; and the writings can be easily reviewed themselves by the Court to the extent, if any, they are found relevant. The objection to Defendant's Proposed Exhibit 27 is sustained as to the first page of Defendant's Proposed Exhibit 27, and overruled as to following 12 e-mails.

As described in the "Articles/Certificate of Merger" effective December 31, 2007 obtained from the Pennsylvania Department of State Corporation Bureau (Exhibit A to Plaintiff's Response to Defendant's Post-Hearing Memorandum of Law Addressing West Penn Allegheny Health System's Relationship to Allegheny Specialty Practice Network), the merger involved three entities, West Penn Allegheny Health System, Inc., Allegheny General Hospital and The Western Pennsylvania Hospital. The surviving corporate entity, which succeeded to the rights and liabilities of all three of the prior corporate entities, was the entity formerly named The Western Pennsylvania Hospital. The surviving entity, which is one of the Plaintiffs in this Action, then changed its name to West Penn Allegheny Health System, Inc. *Id.*