

[Cite as *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 2009-Ohio-6478.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Drs. Kristal & Forche, D.D.S., Inc.,	:	
Plaintiffs-Appellees,	:	No. 09AP-06
v.	:	(C.P.C. No. 05CVH08-8289)
Ronald S. Erkis, D.D.S.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on December 10, 2009

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*Gordon P. Shuler*, for appellees.

*Hollern & Associates*, and *Edwin J. Hollern*, for appellant.

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ON APPLICATION FOR RECONSIDERATION

CONNOR, J.

{¶1} On November 5, 2009, defendant-appellant, Ronald S. Erkis, D.D.S. ("Dr. Erkis"), filed an application for reconsideration pursuant to App.R. 26, requesting that this court reconsider its October 27, 2009 decision and judgment entry in *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 10th Dist. No. 09AP-06, 2009-Ohio-5671, in which we affirmed the judgment of the Franklin County Court of Common Pleas rendered in favor of plaintiffs-appellees, Drs. Kristal & Forche, D.D.S., Inc. ("the corporation"). The corporation has filed a memorandum in opposition.

{¶2} When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision, or raises an issue for consideration that was either not considered at all or not fully considered by the court when it should have been. *State v. Rowe* (Feb. 10, 1994), 10th Dist. No. 92AP-1763, citing *Matthews v. Mathews* (1981), 5 Ohio App.3d 140. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1996), 112 Ohio App.3d 334, 336. "App.R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified." *Id.* at 335.

{¶3} In our October 27, 2009 decision, this court determined Dr. Erkis did not retire within the meaning of the professional services agreement ("PSA") he signed with the corporation. We held that "retire," as used in the context of the PSA, meant retirement from the practice of orthodontics, without a re-entering of the profession at a later date. We further found that by opening a competing practice, Dr. Erkis thereby converted his "retirement" (an involuntary termination), into a voluntary termination. As a result, we determined Dr. Erkis was no longer entitled to deferred compensation payments, as the PSA did not provide for deferred compensation benefits under a voluntary termination.

{¶4} In his application for reconsideration, Dr. Erkis argues this court based its decision on two disputed facts which the court must have mistakenly believed were undisputed or upon which the court improperly made its own factual determination. First, Dr. Erkis points to the following language at ¶9 of our decision: "On October 1, 2004,

appellant opened a competing practice near the corporation and began to solicit employees, patients, and referral sources from the corporation." Dr. Erkis contends the sole basis for this statement is the false, self-serving affidavit of one of the corporation's shareholders. Dr. Erkis argues the veracity of that statement was never adjudicated and is disputed via his affidavits and deposition testimony.

{¶5} However, Dr. Erkis failed to point this court to a specific portion of his numerous affidavits or his lengthy deposition testimony that actually disputes this statement. To the contrary, in conducting our own review of the affidavits and testimony, we find Dr. Erkis acknowledged in his deposition testimony that he competed with the corporation for patients. (Dr. Erkis deposition, at 346.) Additionally, Dr. Erkis admitted that he spoke to some employees at the corporation prior to opening his practice while those employees still worked for the corporation. When those employees inquired about potential jobs with him, he informed them he would hire them if they were not working for the corporation. At least two of those employees stopped working for the corporation and began working for Dr. Erkis within weeks, at most. (Dr. Erkis deposition, at 466-70.)

{¶6} Dr. Erkis also acknowledged that he talked to several referring dentists about referring patients to him and that those same dentists had previously made referrals to the corporation. (Dr. Erkis deposition, at 471-76.) He further acknowledged that at least some of the corporation's loss of business was the result of his treatment of patients who had previously been treated by the corporation. (Dr. Erkis deposition, at 465-66.)

{¶7} In his application for reconsideration, Dr. Erkis states:

It is important to point out that the decision of the trial court on the Cross Motions for Summary Judgment was necessarily

based upon 'undisputed facts.' That decision was not based upon the erroneous and irrelevant fact that Dr. Erkis was soliciting former patients and employees because if it was, then clearly there was a material question of fact in dispute that could not be resolved by summary judgment. The alleged drop in revenue is also disputed and cannot be resolved summarily.

Id. at 3-4.

{¶8} We note that the trial court, in its decision granting the corporation's motion for partial summary judgment and denying Dr. Erkis' cross motion for partial summary judgment, stated:

The following facts are not in dispute.

\* \* \*

[O]n October 1, 2004, Dr. Erkis opened a competing orthodontic dentistry practice. Dr. Erkis began to solicit his former patients and started taking business away from [the corporation].

(October 4, 2006 decision granting plaintiff's motion for partial summary judgment and denying defendant's cross motion for partial summary judgment, at 1-2.) Notably, Dr. Erkis did not take issue with this particular "undisputed" factual finding when it was set forth by the trial court, even though he had an opportunity to do so when he filed two motions for reconsideration with the trial court and when he filed this initial appeal.

{¶9} Moreover, although we believe the statement at issue to be undisputed, even assuming for the sake of argument that the alleged solicitation is still in dispute, it is of no consequence, as the statement itself was not the basis for our decision in this matter. Nor did we reach our decision based upon the "perceived equities" of the dispute, or upon an emotional determination of which party in this dispute is the "victim," as asserted by Dr. Erkis.

{¶10} Instead, we reached our decision in this matter based upon our interpretation of the words "retire" and "retirement" as used in the context of the PSA. In reaching our decision, we relied upon the language used in the contract, as well as the rules of contract construction, in applying the only logical and reasonable interpretation of these words, neither of which were expressly defined within the PSA. Our interpretation of retire exemplifies the parties' intent to provide deferred compensation benefits only to those persons who left the corporation upon their death or disability or upon reaching the end of their career in their chosen field.

{¶11} Next, Dr. Erkis takes issue with the court's notation in footnote 3, found at page 13 of our decision, which references the affidavit of one of the corporation shareholders, in which we noted the shareholder averred that the corporation's revenues dropped by \$912,523 as a result of Dr. Erkis' competing practice. Dr. Erkis currently disputes that this drop in revenue is a result of his competing practice.

{¶12} Again, Dr. Erkis submits that the reason for this drop in revenue is disputed, but fails to provide evidence to refute it. Admittedly, Dr. Erkis does *argue*, without providing support, that the revenue drop was the result of the corporation becoming a two-person operation, rather than a three-person operation. More importantly, however, this court's decision did not rely upon the actual dollar figure provided by the corporation in its affidavit to determine that a drop in revenue occurred as a result of Dr. Erkis competing with the corporation. Instead, our footnote merely referenced the dollar amount the corporation claimed it had lost as a result of competition from Dr. Erkis. The veracity of the precise dollar amount lost to competition is not the determinative issue here.

{¶13} Our decision simply recognized that such competition would inevitably result in a significant decrease in gross revenues when Dr. Erkis was now treating the very same patients who had formerly been treated by the corporation and/or was treating patients who were referred by the same referral sources that had previously referred patients to the corporation. Significantly, when asked if he knew that, by starting his own practice in the same area where he had previously practiced, he would be taking patients away from the corporation, Dr. Erkis testified that it would be a "reasonable assumption." (Dr. Erkis deposition, at 489-90.) He later clarified that answer by responding, "yes." (Dr. Erkis deposition, at 490.) Eventually, Dr. Erkis himself acknowledged that at least some of the corporation's loss of business was "probably" a result of him seeing patients who had been treated by the corporation. (Dr. Erkis deposition, at 465-66.) Reason and common sense support this as well. Therefore, the fact that the corporation lost business as a result of Dr. Erkis' new practice is not a fact in dispute and our decision is not based upon an erroneous determination of fact, as Dr. Erkis asserts.

{¶14} The rules of contract construction require us to interpret a contract which may be susceptible to two constructions by using the interpretation which makes it a fair and reasonable agreement and which gives the contract meaning and purpose. See generally, *Foster Wheeler Enviroresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202, and *Doctors Hosp. West v. Family Med. Group, Inc.* (Feb. 8, 1977), 10th Dist. No. 76AP-702. As we previously stated, it is not reasonable to believe that the corporation would sign a contract permitting an orthodontist to retire from the corporation and receive \$160,000 annually in deferred compensation benefits, while

still allowing him to compete for the very same client base, particularly when the benefits payments are unfunded.

{¶15} Dr. Erkis' interpretation of "retire" would completely disregard the provisions which differentiate between voluntary termination and involuntary termination and would ignore the contract's exclusivity requirement. Notably, the contract specifically excludes deferred compensation benefits for an orthodontist who voluntarily terminates the agreement by choosing to leave the corporation, but that orthodontist is free to compete.

{¶16} Additionally, as we previously stated, the PSA's failure to specifically provide for a scenario where an employee "retires" and then re-enters the workforce in the same profession "lends itself to the inference that it did not consider such a scenario to constitute 'retirement' as it was intended under the terms of the PSA." *Drs. Kristal & Forche, D.D.S., Inc.* at ¶42.

{¶17} Having thoroughly reviewed Dr. Erkis' arguments in support of his application for reconsideration, we conclude the application neither calls our attention to an obvious error in our judgment, nor does it raise an issue for consideration that was not fully considered. Accordingly, we deny Dr. Erkis' application for reconsideration.

*Application for reconsideration denied.*

KLATT and SADLER, JJ., concur.

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