

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

WINCHESTER NEUROLOGICAL
CONSULTANTS, INC.,

Plaintiff,

v.

MARK A. LANDRIO, M.D.,

Defendant.


Civil Action No. 07-276

FINAL ORDER

THIS MATTER having come upon Plaintiff's Motion for Declaratory Judgment, and the Defendant's opposition thereto and upon oral argument, and following the Court's Findings of Fact and Conclusions of Law entered January 30, 2008, and attached hereto, it is hereby

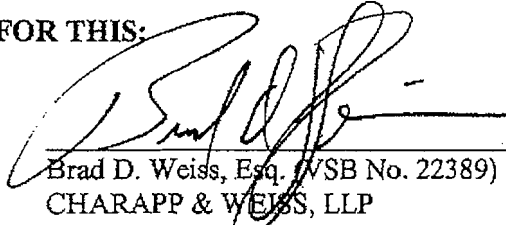
ADJUDGED, ORDERED, AND DECREED, that Winchester Neurological Consultants, Inc.'s Plea of Res Judicata is sustained, and Dr. Mark Landrio is barred from prosecuting his claim for payment of his stock before the Second Arbitration Panel of the American Arbitration Association and from prosecuting any other claims against Winchester Neurological Consultant's, Inc. based on either the 1998 Employment Agreement or the 2003 Shareholder's Agreement; that the Plaintiff be awarded its costs in the amount of \$ 91.00; and that the Plaintiff's Motion to Stay Arbitration be and hereby is GRANTED.

ENTERED THIS 21 day of February, 2008.



Judge John E. Wetsel, Jr.
Circuit Court for the City of Winchester

WE ASK FOR THIS:

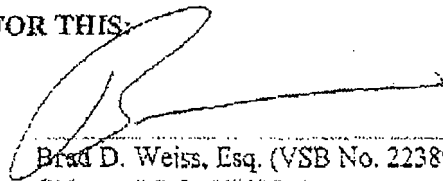


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SEEN AND OBJECTED TO:

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Counsel for Plaintiff Winchester Neurological Consultants, Inc.

SEEN AND OBJECTED TO:

Dr. Landrio objects to this Order and the ruling by the Court as set forth in its Findings of Facts and Conclusions of Law filed on January 30, 2008 for the reasons stated in the pleadings filed in this matter and the argument of counsel at the hearing of the matter on January 24, 2008.

Further, Dr Landrio objects on the following grounds:

1. The court erred by failing to follow the decision of the Supreme Court of Virginia in *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003) and failing to apply the test set forth therein for determining whether the bar of *res judicata* applies. The "same evidence" rule enunciated in the *Davis* opinion was not dicta. The Court has violated the principle of *stare decisis*.

2. The Court erred by failing to address the fact that there is no requisite identity of remedy necessary to the application of *res judicata* as the remedy requested by Dr. Landrio in the arbitration proceeding initiated by him on February 12, 2007 (damages for breach the Shareholders' Agreement entered by Dr. Landrio and WNC) is not the same as the remedy requested by him in the former proceeding initiated by WNC (damages suffered for lost revenues resulting from the temporary restraining order improperly obtained by WNC relative to that

proceeding). *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003).

3. The Court erred in finding that the basis of Dr. Landrio's claim for damages resulting from the injunction of his medical practice in Winchester asserted in the first arbitration arose out of the same transaction as his claim for damages due to WNC's breach of the Shareholders' Agreement. The Court's definition of the applicable transaction, "Dr. Landrio's termination of employment and the rights of the parties subsequent to that termination" (Findings of Fact and Conclusions of Law entered January 30, 2008), is incorrect as a matter of fact and law. Dr. Landrio's cause of action underlying his claim for damages in the first arbitration was not a right under the terms of any contract between Dr. Landrio and WNC, rather it was a right arising by virtue of the fact WNC obtained a temporary restraining order enjoining Dr. Landrio from the practice of medicine in Winchester, Virginia and which injunction was subsequently found to have been improperly obtained in reliance upon an unenforceable restrictive covenant. Further, Dr. Landrio's cause of action asserted in the second arbitration accrued at a different time than Dr. Landrio's cause of action asserted in the first arbitration and at a different time than the cause of action asserted by WNC in the first arbitration. The definable factual transactions which gave rise to Dr. Landrio's claims in the first and second arbitrations transaction are distinct.

4. The Court erred in finding that Dr. Landrio should have asserted all claims he could have maintained against WNC under the Shareholders' Agreement in the first arbitration. Such a conclusion effectively institutes a mandatory counterclaim rule in Virginia and is contrary to the existing law. Dr. Landrio had no duty to assert any counterclaims against WNC in the first arbitration so long as any claim he did assert would not constitute claim splitting. *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003). As the evidence necessary to prove the elements of

Dr. Landrio's claim in the first arbitration (the existence of the injunction, its unenforceability, and the amount of damages to Dr. Landrio- the lost revenues during the injunction period) is not the same as the evidence necessary to prove the elements of Dr. Landrio's claim in the second arbitration (existence of an enforceable contract - the Shareholders' Agreement, breach of its terms by WNC, and the amount of damages resulting from the breach or the value of Dr. Landrio's shares in WNC immediately prior to his resignation) Dr. Landrio did not engage in "claim-splitting" and was therefore under no obligation to bring any claims for WNC's breach of the Shareholders' Agreement at the time of the first arbitration. *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003).

5. The Court erred in its application of Supreme Court of Virginia Rule 1:6. Dr. Landrio did not assert any claims in the first arbitration arising out of the Shareholders' Agreement, the entry of which is a discrete transaction separate from the transaction which gave rise to Dr. Landrio's claim for damages in the first arbitration WNC's decision to obtain an injunction against Dr. Landrio prior to determination of its claims by the arbitration panel agreed upon by the parties. Accordingly, Dr. Landrio did not state a claim for relief in the second arbitration arising from the same transaction which is the basis of his claim for relief in the second arbitration. *See also, Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003).

6. The Court further erred in its application of Supreme Court of Virginia Rule 1:6 by reading it to require a defendant to assert all possible claims against a plaintiff in response to a suit. Nothing in the language of Rule 1:6 requires defendants to file "mandatory counterclaims" nor does it change the existing law in this regard.

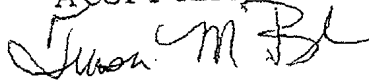
7. Dr. Landrio reserves the right to supplement these objections if appropriate.

HARRISON & JOHNSTON, PLC



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A COPY TESTE:



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WINCHESTER CIRCUIT COURT