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The owner of a chain of Ontario eyewear stores, now-suspended optician Bruce Bergez, is appealing a massive \$1-million contempt of court fine levied against him in late November.

The fine was set by Ontario Superior Court Justice David Crane after Bergez ignored a 2003 court order to stop dispensing eyewear without a prescription from an optometrist or physician.

After the 2003 order, Great Glasses stores, located in and around Hamilton, Ont., continued to dispense corrective eyewear based on the results of a free computerized "Eyelogic" test. The College of Optometrists applied to the Superior Court in Hamilton for an order of contempt against the respondents SHS Optical Ltd., Dundurn Optical Ltd., and John Doe — all carrying on business under the name Great Glasses; Joanne

Bergez; and Bruce Bergez. The College of Opticians intervened to support the application.

In November, Crane ordered Bruce and wife Joanne Bergez to disgorge all the income they earned through "illegal activity" since the original judgment. Crane calculated this amount to be \$3.6 million, made "generous allowances for the costs doing business, including income tax," and set the fine at \$1 million, which is believed to be a record in Canada. The fine has been set aside pending the appeal.

Other remedies in the order included permanently posting a prominent sign in all stores stating that customers must have a prescription from an optometrist before Great Glasses can dispense corrective eyewear, and that these items cannot be dispensed based on computerized tests conducted by Great Glasses.

The judge also ordered the respondents to run a similar notice in the Hamilton Spectator once a week for four weeks. As well, Crane imposed a \$50,000-per-day fine for every day the respondents were not in compliance with the judgment

In Ontario, all health professionals are governed by the Regulated Health Professions Act (RHPA) and by profession-specific acts. According to the RHPA, prescribing or dispensing for vision or eye problems, subnormal vision devices, contact lenses, or eyeglasses other than simple magnifiers is a controlled act.

Bergez represented himself, and one of his defences was that two physicians delegated the right to prescribe eyewear to each of the Great Glasses stores. When he refused to name the physicians, he was found in contempt and purged his contempt by saying that a group of physicians called "Physicians for Eyelogic" delegated the right to prescribe eyewear to the Ontario Optical Development Corp., a holding company he said owns Great Glasses.

He claimed a man named Buster Kafer owned the businesses, but that he only communicated with this man through voice mail. It was eventually discovered that Bergez's brother-in-law was the sole shareholder, director, and officer of Ontario Optical Development Corp., but had nothing to do with the business, and that 'Kafir' was Bergez's mother's maiden name and 'Buster' was his former dog.

Later, Bergez submitted that the inventor of the Eyelogic machine, an Alberta doctor, was effectively prescribing eyewear each time the machine printed out a reading, but he produced no affidavit or evidence from this doctor.

Crane found that, even if these defences were true, they would still not meet the requirements of the RHPA. The judge ruled that a physician or an optometrist must prescribe the eyewear dispensed by an optician.

"A computer printout that has not been reviewed by an optometrist or physician who in turn can engage their training by turning their mind to the patient at hand would not constitute a prescription under s. 5(1) of the Opticianry Act. To do otherwise would be antithetical to the congruency of the legislative scheme and permit those who the legislation intended not to prescribe to do exactly that."

Crane noted that delegation is not defined in the RHPA and there are currently no regulations to specify the delegation process, but said certain aspects of how delegation must work are clear from the legislation.

As part of his findings on delegation, Crane noted that delegation must come only from a person authorized to perform a controlled act, that a doctor-patient relationship is required for valid delegation, and that optometrists or physicians may use their professional judgment to delegate portions of an eye exam, however, they cannot delegate responsibility or accountability for the restricted act.

"Here the refractory portion of the eye examination may be delegated to an optician with an Eyelogic system — if the optometrist or physician in his or her professional judgment decides it is in the interest of his or her patient to do so. The decision is not the optician's."

Crane also wrote that Bergez's "highly provocative, arrogant and egregious" business conduct is "economically harmful to those professionals who are providing health care services in accordance with the law in the fields of optometry and opticianry. It is predatory practice on the health of the public and on the legitimate economic interests of professional competitors."

Consumers who take the free eye test may gain a false sense of security that someone has looked at the overall health of their eyes, says Roy Stephenson, a partner at Lerner LLP who represented the College of Optometrists along with senior associate Brian Moher. This is dangerous because a customer could have a serious eye condition, such as glaucoma, which is treatable with early detection, he says.

“The evidence was that Mr. Bergez himself, who was the only optician, the only one with any real training in the office, very seldom did these exams. He delegated it to his staff, and they’re just ordinary working stiff with no special training, no special education.”

Although the College of Opticians previously disciplined Bergez, and has now suspended his licence, it has no power to shut down his business, says Stephenson. If a physician is deemed to be an immediate danger to the public, the college can suspend the member on an interim basis, which would close his or her practice and relieve the concern.

“But here, you have an optician who is running a chain of stores and while you may be able to take action against him, you can’t take action against his business, except through the court system, which is what we did.”

Stephenson and Moher used s. 87 of the RHPA procedural code that allowed the college to go to court to get an injunction because Bergez was not operating in accordance with the act.

“But when you do that, you are subject to all the rules and safeguards of the court system,” he says, adding that the preparations, waiting time, and process took an extremely long time.

In the meantime, Bergez kept ignoring the order.

“There’s a gap,” says Stephenson. “I don’t know what the answer is. You can’t have regulators running around willy-nilly suspending people or closing their businesses. But if the proper safeguards were in place, I don’t know why we couldn’t do this type of extension.”

Bergez recently retained Louis Frapporti, a partner at Gowling Lafleur Henderson LLP in Hamilton for the appeal. Frapporti says Crane accepted that the colleges’ interests are the public’s interests, but that’s not the case.

The College of Optometrists and the College of Opticians deliver a service for profit and are just seeking to protect their monopoly and economic advantages by crushing people like his client, says Frapporti. He likens Bergez to groundbreaking mavericks such as Henry Mortgentaler and Paul Magder.

Clients who visit Great Glasses for a free eye test are under no illusion that they are being diagnosed with deeper health problems, says Frapporti. And much of the decision seemed to be clothed in the notion of potential harm to the public, he says, but despite the lengthy proceedings, there was no evidence of actual harm.

“I see this as about consumer choice, and about treating consumers as adults, not children,” he says. “You can go to a drugstore or to Wal-Mart and pick up a pair of reading glasses or corrective lenses without having to pay a monopoly to the college of optometry or opticians for obtaining that corrective lens. Why can’t someone go into a place like Great Glasses and get a more accurate assessment of their corrective lens needs in the same fashion?”

At the appeal, among other arguments he plans to raise technical issues about the interpretation of the legislation.

“There are no regulations [about delegation], which is at the heart of the dispute. The acts don’t define it and we say they don’t define it intentionally because it is intended in part to encourage the novel delivery of services.”

However, this time around, peculiar defences involving the name of Bergez’s dog are unlikely to resurface.

“A lot of the silliness that went on within the proceedings by Bruce were driven by his perception that the college’s questions about the financial aspect of his business were irrelevant. . . . He went about it the wrong way. There’s no question about that.”

The appeal will likely take place next summer or fall. Bergez is also appealing the suspension of his optician’s licence.

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