

MAINE STATE BOARD OF OPTOMETRY

IN RE: Licensure Discipline)
)
Larry W. Ritter, O.D.) DECISION AND ORDER

I. PROCEDURAL HISTORY

Pursuant to the authority found in 32 M.R.S.A. Sec.2431-A, et seq., 5 M.R.S.A. Sec. 9051, et seq. and 10 M.R.S.A. Sec. 8001, et seq., the Maine Board of Optometry (Board) met in public session at the Board's offices located in Gardiner, Maine on June 6, 2003 for the purpose of determining whether grounds exist to take disciplinary action against Dr. Ritter's license to practice Optometry. A quorum of the Board was in attendance during all stages of the proceedings. Participating and voting Board members were Acting Chairman Brian Daniels, O.D., N. Scott Ferguson, O.D., and David Heward, O.D. Nicole Shipp, O.D. was present to be counted as a member of the Board's quorum but did not participate in the hearing thereafter as a Board member. Judith Peters, Ass't. Attorney General, presented the State's case. Dr. Ritter was represented by Elizabeth Olivier, Esq. James E. Smith, Esq. served as Presiding Officer.

State's Exhibits 1-15 and Respondent's Exhibits 1-22 were admitted into the Record. Subsequent to opening statements, the taking of testimony, submission of exhibits, and the closing arguments by both parties, the Board deliberated and made the following findings of fact by a preponderance of the credible evidence regarding the violations alleged in the Complaint.

II. FINDINGS OF FACT

Douglas Gauvreau has been licensed as an optometrist for 30 years. He is the managing partner of Eye Care and Eye Wear Center of Maine (Eye Care) which is located in Westbrook, Maine. He has attended Photorefractive Keratectomy (PRK) surgery seminars and is trained in Lasik (Laser in Situ Keratomileusis) related procedures. The parties agreed that the performance of such surgery is not within the authorized scope of the practice of optometry, although services related thereto are authorized by the profession. Larry Ritter has been licensed as an optometrist for 25 years and is also employed by Eye Care. He has attended similar Lasik and PRK training courses. The training enabled Dr. Gauvreau and Dr. Ritter to co-manage cases involving refractive surgery. Co-management services consist of 2-3 hours of pre-surgical work-up including history, ophthalmoscopy, tonometry, dry and cycloplegic refraction, topography, corrected and uncorrected acuities, pupil size, dominant eye and binocular testing. All consent forms are completed and each patient watches a LASIK video followed by taking a 12 question true-false test. A complete packet is then forwarded to the surgeon.

On June 28, 2000, both Drs. Gauvreau and Ritter received a letter from Charles M. Plourde, O.D., Board Complaint Officer. The Board was concerned that certain advertising by them might be confusing to the general public and directed them to answer certain questions related to the ads. In particular, one ad stated "LASIK Vision Surgery \$1200 Per Eye, Eye Care and Eye Wear Center of Maine" with the doctors' names and business addresses also listed. The ad did not mention that surgery was not performed by the two optometrists and did not state that the services offered by

Eye Care were co-management, not surgical. In response, Dr. Gauvreau wrote the Board on June 29, 2000 and stated that "First, let me state that this complaint is being filed by our competitors and, as such, is based on economic competition rather than our professional conduct." He then went on to outline the services that Eye Care provides to its patients and associated fees. On August 31, 2000, the Board wrote a Letter of Guidance to Drs. Gauvreau and Ritter informing them that it voted to dismiss the complaint regarding the advertising but that a majority of the Board:

"felt that the Lasik advertisement in question could be misleading to the public. There were two specific concerns: 1. The advertisement did not make clear that refractive surgery is not available in your office. You certainly are entitled to claim that pre-operative evaluations and post-operative care are available; and 2. It's not clear that the price quoted is not available at all locations; patients must travel to Bangor for this. In future advertisements we would recommend that you address these concerns."

In response, Drs. Gauvreau and Ritter changed the wording in 195 ads. However, they failed to address a yellow pages ad which listed, among other services, six related to eye care. Those were: "Eye Exams, Eye Disease and Injuries, Contact Lens Specialists, Bifocal Contact Lenses, **Laser Refractive Surgery**, Vision Related Learning Problems."

No complaints were made by the public to the Board or Eye Care regarding the ad. However, a nurse at an ophthalmological center read the above ad and complained to the Board by letter dated August 8, 2002 that the ad's language was deceptive in that laser refractive surgery was not being performed at Eye Care by the two doctors. This individual had received several phone calls from prospective patients who were confused by the ad in that it referred to laser refractive surgery and Drs. Gauvreau and Ritter in connection therewith. The nurse testified that her ophthalmological center also advertised in the yellow pages and that between 10-15 individuals called her office per month as a result of those advertisements.

Karl Colbath, D.O., has been licensed as an optometrist for 27 years and is a past Board member. He served as the Complaint Officer in this matter and, after reviewing the relevant documents and Letter of Guidance, rendered his opinion that the subject yellow pages ad was false, deceptive, and misleading. He reached this conclusion since optometrists are not licensed to perform laser refractive surgery. Additionally, patients may be lead to believe that Eye Care's optometrists are more qualified to perform laser services due to the listing of laser refractive surgery than other optometrists who rightly did not list that as an option. Moreover, patients who appear at Eye Care may be too embarrassed to leave that practice once they learn that neither Dr. Gauvreau or Ritter are qualified to perform the surgery. Eye Care could have placed ads using appropriate words including "Laser surgery management" or "Laser surgery assessment and post operation services." This would have the effect of placing Eye Care on an equal footing with other providers who placed ads that were not misleading or deceptive.

At hearing, both Drs. Gauvreau and Ritter continued to maintain that the yellow pages ad was not in violation of the law and for that reason saw no reason to change it. Additionally, Dr. Gauvreau testified that he had "forgotten about" and "filed away" the Letter of Guidance and was "shocked" that certain Board members didn't agree that the ad was not misleading or deceptive. Dr. Ritter testified in accordance with Dr. Gauvreau's testimony but added that he would not "willingly or knowingly or intentionally" place an ad that he considered to be deceptive.

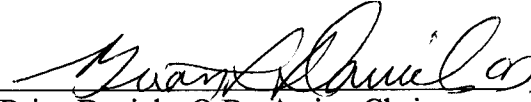
III.

CONCLUSIONS OF LAW

The Board, having considered the credibility of the witnesses and their testimony and the exhibits in this proceeding and exercising its experience and training in the practice of optometry, voted 2-1 that Dr. Gauvreau and Dr. Ritter violated the provisions of 32 M.R.S.A. Sec.2431-A.2.I. by engaging in false, misleading or deceptive advertising. The Board further voted, 3-0, to impose the following sanctions on the licenses of Dr. Douglas K.Gauvreau and Dr. Larry W. Ritter.

1. This Decision shall serve as a Letter of Warning not to engage in similar false, misleading or deceptive advertising in the future.
2. The licensees shall **pay one-half the \$1,584 costs** of the hearing which amounts to \$792 by July 31, 2003. (Hearing Officer-30 minutes pre-hearing for conference of counsel and record review; 7 hours and 30 minutes at hearing; 2 hours and 30 minutes to write Decision @ \$100 per hour = \$1050; copying costs of 136 pp.@ .25 per page=\$34; Dr. Karl Colbath's services = \$ 500). The check or money order should be made payable to the Maine Board of Optometry and mailed to Cathy Neumann, Complaint Coordinator, Department of Professional and Financial Regulation, Office of Licensing and Registration, 35 State House Station, Augusta, Maine 04333-0035.
3. The licensees shall **pay a total fine of \$500** by check or money order by July 31, 2003 made payable to the State of Maine and mailed to Cathy Neumann, Complaint Coordinator, Department of Professional and Financial Regulation, Office of Licensing and Registration, 35 State House Station, Augusta, Maine 04333-0035.

Dated: June 16 , 2003


Brian Daniels, O.D., Acting Chairman
Maine Board of Optometry

IV.

APPEAL RIGHTS

Pursuant to the provisions of 5 M.R.S.A. Sec. 10051.3 and 10 M.R.S.A. Sec. 8003, any party that appeals this Decision and Order must file a Petition for Review in the Superior Court within 30 days of receipt of this Order. The petition shall specify the person seeking review, the manner in which they are aggrieved and the final agency action which they wish reviewed. It shall also contain a concise statement as to the nature of the action or inaction to be reviewed, the grounds upon which relief is sought and a demand for relief. Copies of the Petition for Review shall be served by Certified Mail, Return Receipt Requested upon the Maine Board of Optometry, all parties to the agency proceedings and the Attorney General.