

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF OPTICIANS OF ONTARIO**

PANEL:

Marvin Ross chair
Peggy Dreyer member
Steven Sanger member
Eve Hoch member
Mike Smart member

BETWEEN:

COLLEGE OF OPTICIANS OF ONTARIO)	<u>ROBERT COSMAN AND ANTONIO DI</u>
)	<u>DOMENICO</u> for the College of Opticians of
)	Ontario
- and -)	
)	<u>Self Represented</u>
<i>Bruce Bergez RO</i>)	
REGISTRATION # C-1192)	
)	<u>LUISA RITACCA.</u>
)	Independent Legal Counsel
)	
)	
)	Heard: <i>April 27, 28 and 29, 2009</i>

DECISION AND REASONS

This matter came on for a hearing before a panel of the Discipline Committee on April, 27, 28, 29, 2009 at the College of Opticians of Ontario (“the College”) at Toronto.

The Allegations

The allegations against Mr. Bruce Bergez (the Member) as stated in the Amended Notice of Hearing dated August 12, 2008 are as follows:

It is alleged that with respect to the complaint of Ms Deb Hammond, you committed acts of professional misconduct as defined in section 51(c) of the Code, paragraphs 5, 6, 26, and 28 of Regulation 828/93, as amended, promulgated pursuant to the Opticianry Act, S.O. 1991, c 34 (the “Act”) and as defined in subsection 9(1) and (3) of the Act, in that you:

- (a) Permitted, counselled or assisted persons who are not registered under the act to perform an act that should be performed by a member, namely, prescribing and/or dispensing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers

- (b) Verbally abused a client
- (c) Contravened a provision of the Act by holding yourself out as an optician while your certificate of registration was suspended
- (d) Contravened a provision of the Act by using the title "optician" while your certificate of registration was suspended; and
- (e) Engaged in conduct in the course of practicing opticianry, that, having regard to all the circumstances, would reasonably be regarded by members of the College of Opticians as disgraceful, dishonourable or unprofessional

It is further alleged, that with respect to the complaint of Lucille Turner, you have committed acts of professional misconduct as defined in section 51(c) of the Code and paragraphs 5, 26, and 28 of Regulation 828/93, as amended, promulgated pursuant to the Act in that you:

- (a) Permitted, counselled or assisted persons who are not registered under the act to perform an act that should be performed by a member, namely, prescribing and/or dispensing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers and
- (b) Engaged in conduct in the course of practicing opticianry, that, having regard to all the circumstances, would reasonably be regarded by members of the College of Opticians as disgraceful, dishonourable or unprofessional

THE PARTICULARS of these allegations are that you committed the above stated acts of professional misconduct:

With respect to both complaints:

1. On or about November 16, 2006, your certificate of registration with the College of Opticians was suspended and continued to be suspended at all material times

With respect to the complaint of Deb Hammond:

2. On or about March 28, 2007 through November 8, 2007, you permitted, counselled and assisted persons at the Great Glasses store located at 1025 Plains Road East, Burlington, Ontario, to prescribe and dispense eyeglasses and contact lenses for vision or eye problems even though those persons were not authorized to do so,
3. On or about November 29, 2007, you identified yourself to Deb Hammond, who had purchased eyeglasses and contact lenses from the Great Glasses store, as a registered optician, even though your certificate of registration with the College of Opticians had been suspended;
4. On or about November 29, 2007, you were verbally abusive to Deb Hammond, when you called her "white trash" and when you said to her "if [she] intended on taking this further, [she] would be sorry; and

With respect to the complaint of Ms Lucille Turner:

5. On or about November 26, 2007 through January 20, 2008, you permitted counselled and assisted persons at the Great Glasses store located at 565 Woodlawn Road, Unit 3, Guelph, Ontario, to prescribe and dispense eyeglasses and contact lenses for vision or eye problems even though those persons were not authorized to do so.

The Member's Plea:

Mr. Bergez denied the allegations set out in the Amended Notice of Hearing

Overview

Mr. Bruce Bergez is a suspended optician who it is alleged operates a chain of optical stores known as Great Glasses 3 for 1. As part of his marketing strategy, he offers free eye tests to consumers and provides them with three pairs of glasses for the price of one. As explained below, the panel accepted the judicial findings of fact presented from Justice Crane's decision of November 24, 2006 and the Court of Appeal decision of October 10, 2008 that Mr. Bergez is the "directing mind and ultimate owner of the undertaking trading under the name Great Glasses" (Para 2)

It was alleged, with respect to Deb Hammond, that the Member permitted staff to dispense to her both contact lenses and eye glasses even though the staff were not qualified to do so. It is further alleged that he held himself out to be a licensed optician. It was further alleged that he verbally abused her.

The College presented no evidence with regard to the allegations against Mr. Bergez with respect to Lucille Turner and thus this panel has made no findings based on those allegations.

The issue before the panel was whether the Member contravened the Act, engaged in professional misconduct and in so doing conducted himself in the course of practicing opticianry, that, having regard to all the circumstances, would reasonably be regarded by members of the College of Opticians as disgraceful, dishonourable or unprofessional?

The panel heard evidence from four witnesses and examined twenty-four exhibits.

The Evidence

The College called Deborah Anne Hammond, the complainant, to testify with respect to her dealings with the Great Glasses store at 1025 Plains Rd. E in Burlington, Ontario. As part of her evidence, the following exhibits were admitted:

- (1) Great Glasses receipt dated March 28, 2007
- (2) Contact lenses prescription from Dr. Jeffrey C. Mungar dated January 8, 2007
- (3) Eye glasses prescription from Dr Jeffrey C. Mungar dated February 27, 2006
- (4) Great Glasses receipt dated July 3, 2007
- (5) Photocopy of the tab from the contact lens box
- (6) E-mail from Deborah Hammond to Scott dated November 27, 2007
- (7) Photocopy of Biz Hamilton Magazine front cover

She described her experiences on five visits to the store beginning with March 28, 2007 when she took prescriptions for both contact lenses and eye glasses into the store. She testified that she was initially served by a gentleman called Donnie. She purchased two sets of frames and a three month supply of contact lenses. She testified that she noticed a discrepancy between the prescription that she had been given by her optometrist and the description on the box of contacts just purchased. The contacts she

was given were not the same brand as prescribed and she was told that that brand was no longer available.

She testified that she began experiencing headaches and called the store and her optometrist's office a number of times. On a number of occasions, she called the store and/or visited to seek answers. Ms Hammond stated that she finally requested that she be allowed to speak with a licensed optician and was told that a licensed optician would be at the store on November 20, 2007. When she went to the store, she met with "an older gentleman" who told her that there was no licensed optician at the store and that they do not have a licensed optician.

She then spoke on the phone with a woman who identified herself as Carla, whom she believed to be the franchise owner, and Carla assured Ms Hammond that she would be put in touch with a licensed optician. Carla's husband, Scott, called the next day and offered her several appointments to meet with a licensed optician. She was given the e-mail address for Bruce Bergez and told to address her complaints to him. Scott then arranged for her to meet with a licensed optician at the store on November 29, 2007.

On November 29, 2007, Ms Hammond called the store to say that she would be running late and the phone was answered by a man who identified himself as Bruce Bergez. The man on the phone indicated that he was the licensed optician that she would be meeting with him. Ms Hammond testified that she told the man on the phone that it was her understanding that he (Mr. Bergez) had a suspended license and that she instead wanted to meet with a licensed optician. Ms Hammond testified that the man on the phone complained to her that she was causing his staff and his employees "trouble and that it was human error, mistakes happen and that I (Ms Hammond) should be more accepting".

Ms Hammond testified that she would be seeking legal counsel and in response, the man on the phone told her "that I could be sorry for my actions" Ms Hammond testified that she "felt like it was a personal attack" Further, she testified that she believed the man on the phone to be Mr. Bergez.

During cross examination, Ms Hammond testified that she is convinced that the man on the phone was Mr. Bergez. She testified that she recognized his voice in court as the man she spoke to on the phone.

The College called Marc Raymond as an expert witness to provide his opinion with respect to whether or not dispensing had taken place in the filling of the prescriptions for Ms. Hammond. Mr. Raymond also gave his opinion with respect to the consequences of receiving an improperly dispensed prescription.

Mr. Raymond has been an optician since 1965. In 1992, he was a consultant to the Board of Ophthalmic Dispensers developing regulations to the Regulated Health Professions Act that was proclaimed on January 1, 1994. He has been a consultant to the Ministry of Health, was on a working group with Optometrists that clarified dispensing and has qualified as an expert witness in over ten court cases since 1996.

As part of his evidence, the following exhibits were supplied:

- (1) Expert witness report dated April 15, 2009
- (2) Black glasses case and glasses
- (3) Silver glasses case and glasses
- (4) Contact lens box marked with an "R"
- (5) Contact lens box marked with an "L"

(6) Great Glasses bag

(7) Documents provided to Mr. Raymond as referenced in his report

Mr. Raymond concluded that prescription eyeglasses and prescription contact lenses were dispensed. In addition, he opined that where a patient received improperly dispensed corrective lens, there is a risk of a reduction in visual acuity below the safety level required for driving and other activities and distortion of vision as well as other problems. Headache, fatigue, frustration and discomfort about the face and head are also minor problems that can be experienced when eyeglasses are not dispensed properly.

In addition to Ms. Hammond and Mr. Raymond, College counsel called two witnesses from the College: Brandi Park and Caroline MacIsaac-Power.

Ms. Park is the co-ordinator of professional programs at the College. She testified that in or around June 13, 2008 she received a package from Ms. Hammond containing two pair of glasses and two boxes of contact lens. Ms. Park explained that she placed all of these items in an evidence bag, which remained with her until March 31, 2009 when she shipped the bag to Mr. Raymond

As part of her testimony, the evidence bag and the Fed Ex delivery confirmation were placed into evidence.

Ms. MacIsaac-Power, is the College's Registrar. She testified that Mr. Bergez is a suspended member of the College of Opticians of Ontario. During Ms. MacIsaac-Power's testimony, the panel admitted into evidence an Interim Order of the Executive of the College suspending the Member as of the date of the Order - November 16, 2006. Ms MacIsaac-Power also provided the panel with registration renewal applications for 2005 and 2006 from Mr. Bergez (exhibits 10 and 11) in which Mr. Bergez indicated that he practices at any and all current and future Great Glasses locations.

She further testified that there are no licensed opticians at Great Glasses and that there are no opticians at the store in question called Donnie, Carla or Scott.

Finally, the College filed as evidence findings of fact made in previous legal proceedings in the Ontario Superior Court of Justice. Mr. Bergez objected to the inclusion of these findings as evidence, but following a voir dire on the issue the panel concluded that the findings of fact from the previous legal proceedings could be entered as evidence in this hearing (*Del Core v Ontario College of Pharmacists, Ontario Court of Appeal*). Given the panel's decision to rely on the previous judicial findings, we accept the following as fact:

- That Mr. Bergez created and operates the three optical stores including the one at 1025 Plains Rd in Burlington all known as Great Glasses stores and that he franchised a further 14 stores as found by Justice Crane on November 24, 2006.
- The findings from Justice Crane were appealed by Mr. Bergez and Justice Harris upheld the decision by Justice Crane on October 10, 2008
- On October 10, 2007, Justice Fedak found that Mr. Bergez and the Great Glasses chain had not purged the contempt of the order by Mr. Justice Crane. Mr. Bergez and the Great Glasses chain continued to dispense corrective eye wear without prescriptions and continued to allow staff who were not registered opticians to dispense.

- On January 13, 2009, the Court of Appeal for Ontario rejected the appeal by Mr. Bergez.
- The findings of fact indicate that Mr. Bergez is the controlling and directing mind of Great Glasses and ultimately, the owner of the entire business (Crane J decision paragraph 2).

Decision

The College bears the onus of proving the allegations in accordance with the standard of proof as set out in *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977) 15 O.R. 2(d) 447. The standard of proof applied by the panel, in accordance with the *Bernstein* decision was a balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the panel.

Having considered the evidence and the onus and standard of proof, the panel finds that the Member committed acts of professional misconduct as alleged in the Notice of Hearing. In particular, the Member engaged in professional misconduct that would reasonably be regarded by members of the profession as dishonourable and unprofessional by (a) permitting persons who are not registered under the act to perform an act that should be performed by a member, namely, prescribing and/or dispensing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers; (b) verbally abusing a client; (c) contravening a provision of the Act by holding himself out as an optician while his certificate of registration was suspended; (d) contravening a provision of the Act by using the title "optician" while his certificate of registration was suspended; and (e) engaging in conduct in the course of practicing opticianry, that, having regard to all the circumstances, would reasonably be regarded by members of the College of Opticians as dishonourable and unprofessional.

Reasons for Decision

The panel accepted Mr. Raymond's expert evidence that dispensing had taken place and that the person who did dispense was Donny. Evidence was presented that Mr. Bergez was a suspended member. From the findings of fact from previous trials at which Mr. Bergez was an active participant, it was established that he was the controlling mind and ultimate owner of the Great Glasses store. In fact, Mr. Bergez told the complainant that it was "my staff and employees". During his cross-examination of the complainant, Mr. Bergez did not challenge that portion of her testimony.

The Registrar of the College testified that Donny, who dispensed, was not a registered optician and that there were no registered opticians at Great Glasses called Don, Donny, Carla or Scott. She testified that Mr. Bergez was listed as practicing at all locations. There was no evidence that there were any opticians, optometrists or physicians at the Great Glasses stores.

The panel finds that Mr. Bergez was the controlling mind of the store in which the complainant received her corrective lens; that the dispensing to the complainant took place while Mr. Bergez was suspended; and that there were no other personnel at the Great Glasses allowed to dispense. As such, the panel finds that Mr. Bergez did permit persons who are not registered under the Act to perform an act that should be performed by a member, namely, prescribing and/or dispensing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers

The panel found Ms Hammond, the complainant, to be a credible witness. We found that she answered questions in a clear and concise manner and that she was consistent in her recollection of facts. She did not waiver under cross examination but answered all questions directly and to the best of her memory. The person who answered the phone on the day she claimed to be verbally abused identified himself as Mr.

Bergez. Further, Mr. Bergez was supposed to be in the store at that time to meet with Ms. Hammond. She recognized his voice at the hearing as the man that she spoke with on the phone that day. No evidence was provided that anyone else was in the store and answered the phone pretending to be Mr. Bergez.

Mr. Bergez stated that as he had never met Ms. Hammond, how could he know that she was white to call her "white trash". Ms Hammond had been in his store many times meeting his staff so it is not unrealistic to assume that she had been described to him.

The panel finds that Mr. Bergez did verbally abuse Ms Hammond.

Ms Hammond testified that she insisted that she meet with a licensed optician at Great Glasses who could help her with her concerns. She testified that she had been assured by Scott that she would be meeting with a licensed optician at the store and that was confirmed by e-mail. When she called the store on the day of the meeting, the phone was answered by Mr. Bergez. He informed her that he was the licensed optician that she would be meeting with.

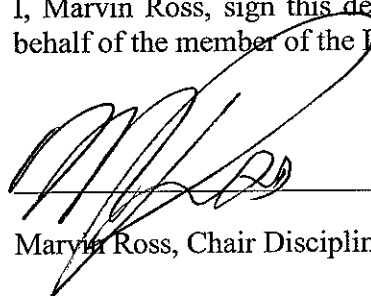
As it had been established that at the time this event took place that Mr. Bergez was a suspended member of the College, the panel is satisfied that he contravened a provision of the Act by holding himself out as an optician while his certificate of registration was suspended.

By referring to himself as an optician during his telephone conversation with Ms. Hammond, Mr. Bergez contravened a provision of the Act by using the title "optician" while his certificate of registration was suspended.

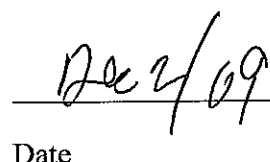
As the panel is satisfied that the College proved that these acts were committed by Mr. Bergez, we therefore find that Mr. Bergez is guilty of dishonourable and unprofessional conduct.

The parties are hereby directed to arrange a date for the panel to hear the parties' submissions on penalty.

I, Marvin Ross, sign this decision and reasons for the decision as Chair of this Discipline panel and on behalf of the member of the Discipline panel as listed below:



Marvin Ross, Chair Discipline Panel



Date

Peggy Dreyer

Eve Hoch

Stephen Sanger

Mike Smart