NO. 92283-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DR. ROBERT EMERICK, M.D.,

Appellant/Cross Appellant,

v.

CARDIAC STUDY CENTER, INC., P.S.,

Respondent/Cross Appellant.

AMICUS CURIAE MEMORANDUM
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association ("WELA") has approximately 150 members who are admitted to practice law in the State of Washington and who primarily represent employees in employment law matters. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA is a chapter of the National Employment Lawyers Association.

In *Emerick v. Cardiac Study Center*, ___WnApp.___, 357 P.3d 696 (2015), the trial court concluded that a noncompete agreement applied to a physician was unenforceable. The lower court then reformed the agreement, reduced the temporal and geographical restraints, and awarded fees and costs to the Defendant as the substantially prevailing party. The court of appeals affirmed, and the plaintiff petitioned the Court for review.

II. SUMMARY OF ARGUMENT

The legal architecture regarding noncompete agreements has remained essentially the same for the past fifty years. But the realties of the workplace have changed significantly since that time, and the legal evolution of noncompete agreements has not kept pace with workplace realities. Historically, noncompete agreements focused almost exclusively on specialized professionals. They now routinely operate to include a broad cross section of employees, including low income and non-

professional workers, such as grocery workers, warehouse workers, hair stylists, and fast food restaurant employees. Not only are individual employees adversely and unfairly affected by diminished employment opportunities, society is deprived of their economic contribution.

The Court should grant review for three reasons. First, this case involves substantial issues of public importance regarding the enforcement of noncompete clauses, the role of equitable reformation (the process of revising an unenforceable noncompete provision to make it enforceable), and the award of attorney fees when the noncompete clause is not enforced as written. *See* RAP 13.4(b)(4). Second, this case provides an opportunity for the Court to clarify how an employee noncompete clause should be analyzed under a higher level of scrutiny than a noncompete clause between partners or after a business sale. *See* RAP 13.4(b)(4). Third, the appellate court's reasoning conflicts with that of prior decisions by the Court, other Washington appellate courts, and decisions by the Washington federal district court. *See* RAP 13.4(b)(1)-(2)

Noncompete cases rarely come before the Court because the dispute is often moot by the time that the matter reaches Washington's highest court, and employees often do not have the necessary resources to litigate the matter through multiple appeals. Accordingly, there is a dearth of law on noncompete provisions from the Court, and, consequently, there

is confusion regarding when noncompete agreements are enforceable, and how to apply equitable reformation, if at all. The little noncompete law that does exist is, for the most part, decades old, and decided in a world very different than the one employers and employees currently reside.

III. ARGUMENT

A. This Court Should Provide Guidance on Equitable Reformation, When It is Appropriate, and Who is the Prevailing Party When It is Used.

In this case, the trial court found the noncompete provision that precluded Dr. Emerick from competing anywhere in Pierce County or Federal Way for five years was unenforceable. Then relying on the direction of the Court in *Wood v. May*, proceeded to "equitably reform" the contract to preclude Dr. Emerick from opening a competing office within two miles from a Cardiac Study Center office and reduced the temporal restriction to four years.

In *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968), a case that involved a master horseshoer and his apprentice, the Court rejected the red-pencil or blue-pencil approach to restrictive covenants, and held that a trial court could "equitably reform" a restrictive covenant — that is, to reform, revise, and rewrite an otherwise unenforceable restrictive covenant

in time and duration (or in any other way) to make it enforceable.[1]

Although equitable reformation may have made sense in 1968 in a case involving horseshoers, it does not make sense today. In 1968, the Court could not have known that Washington would shift to a technology-focused economy where employee mobility between jobs is now common. At the time, the Court probably did not understand how "equitable reformation" could incentivize employers to create overbroad restrictive covenants because, in the unlikely event an employee spends the resources to challenge it, a court will merely rewrite the noncompete to make it enforceable. The *Wood v. May* court likely did not realize the *in terrorem* (by way of threat) effect of overbroad noncompete provisions and the problems caused by equitable reformation.[2] And in 1968, the Court

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[1] The "red-pencil" approach means that if a noncompete was unenforceable, the trial court could not rewrite it or modify it to make it enforceable. *See, e.g., Allied Informatics, Inc. v. Yeruva,* 554 S.E.2d 550, 553 (Ga. Ct. App. 2001) (applying "red pencil" approach: restrictive covenant is enforced if reasonable, but voided entirely if *any* part is unenforceable). The "blue pencil" method is where a court severs unreasonable clauses if they are divisible from other terms, and enforces remaining terms to the extent they are reasonable and remain grammatically coherent after excising unreasonable provisions. *See, e.g., Licocci v. Cardinal Assocs.*, 445 N.E.2d 556, 561 (Ind. 1983) (if covenant is clearly separated into parts and some are reasonable and others are not, contract may be held divisible). Under the "blue pencil" approach, a court may not modify unreasonable terms so as to render them reasonable, and thus enforceable. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999). The "equitable reformation" approach, by contrast, allows the court to simply re-write the agreement regardless of grammatical considerations.

[2] As one scholar has noted:

> Even a manifestly invalid noncompete may have in terrorem value against an employee without counsel. Some employers insert noncompete covenants as near-boilerplate in employment agreements

almost surely did not realize that employers would fail to limit noncompete agreements to a small subset of highly specialized industries or individuals, but instead would include non-negotiable noncompete provisions in form boilerplate employment agreements, compelling thousands of employees to sign them as a condition of employment.

By granting review, this Court can provide needed guidance on equitable reformation, and under what considerations the courts should apply it. Jurisdictions that utilize either the "blue pencil" or "reformation" methods recognize that revision is not necessarily required, and that a court should look to the good faith of the employer and/or the overall fairness of the restraint as drafted before deciding whether to enforce on a limited basis an otherwise unreasonable restrictive covenant. *See, e.g.*,

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> for a wide variety of positions, with little regard to the particulars of the position or to whether employees are privy to protectable information. As far as the law is concerned, employers risk nothing with that sort of overreaching (though the market might sometimes exact a price), and they might succeed in keeping employees from leaving and moving to competitors when they are entitled to do so.

Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Noncompete Covenants As A Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 423 (2006). Courts have also noted the problem of overbroad noncompetes. *See, e.g., Reddy v. Cmty. Health Found. of Man.*, 298 S.E.2d 906, 916 (W.Va. 1982) (decrying use of overly broad provisions "where savage covenants are included in employment contracts so that their overbreadth operates, by *interrorem* effect, to subjugate employees unaware of the tentative nature of such a covenant"); *Valley Med. Specialists*, 982 P.2d at 1280, 1286 ("[E]mployers may therefore create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable. . . . For every agreement that makes its way to court, many more do not. Thus, the words of the covenant have an *in terrorem* effect on departing employees.").

Klick v. Crosstown State Bank of Ham Lake, Inc., 372 N.W.2d 85, 88-89. (Minn. Ct. App. 1985) (holding that court had discretion to "blue pencil" a restrictive covenant or not)); *Arpac Corp. v. Murray*, 589 N.E.2d 640 (Ill. Ct. App. 1992) (holding that fairness of restraint initially imposed is a factor in deciding whether to modify restraining provision). Other jurisdictions also consider whether modifying an agreement may actually discourage "the narrow and precise draftsmanship which should be reflected" in such agreements. *Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141, 1149 (Ill. 1999) (court should not modify covenant if degree of unreasonableness renders it unfair and requires drastic modifications tantamount to fashioning new agreement). Clarification on these issues will assist lower courts, employers, and employees.

In addition, the Court should grant review to provide guidance on which party "prevails" when a court reforms a restrictive covenant. Even before the appellate court's decision, it was prohibitively expensive for most employees to obtain a court modification of an unreasonable noncompete. But now, after *Emerick*, even if employees can show that the their noncompetes are unenforceable as written, they ***still*** may have to pay the employers' attorney fees after a revision of the noncompete clause. The probability of having to pay the employers' attorney fees creates a

powerful disincentive for employees to challenge even the most unenforceable and overreaching noncompete, and the Court should provide guidance on who is the "prevailing party" for attorney fee purposes when reformation occurs.

B. The Court Should Provide Guidance on How the Level of Scrutiny of a Noncompete Agreement Depends Upon the Relationship Between the Parties.

Dr. Emerick entered into two noncompete agreements; one as an employee and a second one when he became a shareholder. *See* Answer to Pet. For Review, at 6. The Court of Appeals, however, makes no distinction between employee noncompete agreements and noncompete clauses between partners or owners. In several jurisdictions, the level of scrutiny applicable to noncompete agreements depends upon the nature of the relationship betweens the parties. Specifically, noncompete clauses involving employees are often viewed with higher scrutiny than those provided to partners/owners,[3] or after the sale of a business.[4] The Court

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[3] *See, e.g., West Coast Cambridge, Inc. v. Rice*, 262 Ga. App. 106, 1008 (Ga. App. 2003) (noting how noncompete agreements ancillary to professional partnership agreements receive less scrutiny than noncompetes involving employees). Indeed, the idea that noncompetes between professional partners are given less scrutiny was suggested by the Court in *Ashley*, 75 Wn.2d at 475 ("Partnership agreements which restrict future competition appears to be a common avenue of professional advancement. A young professional man may be willing to trade his future right to compete in a given community for an immediate and lucrative share in an established practice.") (internal citations omitted).

[4] The scope of permissible and enforceable restraints "is more limited between employer and employee than between seller and buyer." *Richardson v. Paxton Co.*, 203 Va. 790,

should grant review to clarify that *Emerick* is limited to partner or shareholder agreements, or to provide direction on how the scrutiny level for noncompete clauses will vary depending on the relationship between the parties.

C. The Appellate Court's Reasoning Is in Apparent Conflict with Other Washington Courts on Employee Noncompete Agreements.

The appellate court failed to distinguish between shareholder and employee noncompete agreements, and analyzed Dr. Emerick's noncompete provision under the standard and level of scrutiny that courts apply to employees. Indeed, several of the cases cited by and relied upon by the appellate court involved restrictive covenants *against employees*. This was error; one size does not fit all. If the same standard does apply to both shareholders and employees, the appellate court's decision conflicts with virtually every other Washington court to consider true noncompete agreements involving traditional employees.

A true noncompete agreement is one that precludes an employee from competing with the former employer during a certain time in a

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795, 127 S.E.2d 113, 117 (1962). Other courts "recognize that this difference in standards is justified by the fact that employees often have comparatively little bargaining power and less leverage for negotiating a fair deal, while the sale of a business more typically involves sophisticated parties coming to an agreement after an arms-length negotiation process." *McLain and Co., Inc. v. Carucci*, 2011 WL 1706810, at *5 (W.D. Va. May 4, 2011). Restrictions on an "employee's means of procuring a livelihood for himself and his family are more likely to threaten public policy interests than restrictions on a seller, who usually receives ample consideration for the sale of the good will of his business." *Id.* (internal citations omitted).

particular geographical area *regardless* of whether the former employee improperly uses the former employer's confidential information or solicits the former employer's clients. Washington Courts have upheld true noncompete agreements against partners and shareholders or between a buyer and seller of a business. *Ashley v. Lance*, 75 Wn.2d 471, 475, 451 P.2d 916 (1969) (partnership); *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. 538, 541, 635 P.2d 1114 (1981) (sale of franchise); *Rippe v. Doran*, 4 Wn. App. 952, 956, 486 P.2d 107 (1971) (sale of business).

However, no Washington reported appellate case or Washington federal reported case had ***ever*** upheld a true noncompete against a traditional employee. To the contrary, Washington courts have frequently refused to enforce true noncompete provisions against employees. *Columbia College of Music & School of Dramatic Art v. Tunberg*, 64 Wash. 19, 22-23 (1911); *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 687-88, 578 P.2d 530 (1978); *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 772, 887 P.2d 991 (1995); *A Place for Mom v. Leonhardt*, 2006 WL 2263337, at *3 (W.D. Wa. 2006); *Amazon.com Inc. v. Powers*, 2012 WL 6726538 at *8-9 (W.D. Wa. 2012); *Genex Co-Op, Inc. v. Contreras*, 2014 WL 4959404 at *6 (E.D. Wa. 2014).[5]

[5] In *A Place for Mom*, the court refused to enforce the noncompete and relied heavily on Justice Madsen's concurrence in *Labriola v. Pollard*, 152 Wn.2d 828, 100 P.3d 791 (2004). In *Labriola*, Justice Madsen stated that employers "may not unreasonably restrict

Applying the legal standard applicable to employees, the appellate court's analysis and conclusions conflicts with other reported Washington appellate or federal court decisions to consider true noncompete clauses against former employees. If the noncompete provisions in *Columbia College*, *Alexander and Alexander*, *Copier Specialists*, *A Place for Mom's*, *Amazon.com*, and *Genex* were unenforceable, the two-mile and four-year noncompete dictated by the trial court, and upheld by the appellate court, should also have been unenforceable. There is no evidence that the legitimate interests of the Cardiac Study Center were more compelling than those of the employers in *Columbia College*, *Alexander and Alexander*, *Copier Specialists*, *A Place for Mom's*, *Amazon.com*, and *Genex*. And there is no evidence that less restrictive means than a noncompete (a non-solicitation clause and/or confidentiality clause) were somehow sufficient in those others cases, but not in *Emerick*.

IV. Conclusion

The petition for review should be GRANTED.

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the freedom of current or former employees to earn a living" and that "[t]he agreement at issue here is unreasonable because it bars Labriola from working in his field of expertise even where he takes no unfair advantage of his former employer." 152 Wn.2d at 847. Justice Madsen concluded that by "prohibiting Labriola from gaining lawful post termination employment in such broad-sweeping terms, the agreement represents an unfair attempt to . . . secure its business against legitimate competition." *Id.*

Dated this 24th day of November, 2015.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

BY, _____
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Dan Kalish, WSBA #35815

DECLARATION OF SERVICE

I, Lonnie Lopez, hereby declare that on the 24th day of November, 2015, I caused to be sent and filed via email to the Clerk of the Supreme Court of the State of Washington and to be delivered via email a true and accurate copy of the attached document to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 24th day of November, 2015.

Lonnie Lopez

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I, Lonnie Lopez, hereby declare that on the 24th day of November, 2015, I caused to be sent and filed via email to the Clerk of the Supreme Court of the State of Washington and to be delivered via email a true and accurate copy of the attached document to the following:

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DATED THIS 24th day of November, 2015.

Lonnie Lopez

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Dear Clerk:

Attached hereto for filing please find copies of a Motion to Appear as Amicus Curiae and an Amicus Curiae Memorandum filed in Emerick v. Cardiac Study Center by the Washington Employment Lawyers Association. All attorneys of record are copied on this email. Please acknowledge receipt.

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