Court of Appeals No. 72834-2-I
Supreme Court No. 92283-7

SUPREME COURT OF THE STATE OF WASHINGTON

DR. ROBERT EMERICK, M.D,

Appellant/Cross Respondent,

v.

CARDIAC STUDY CENTER, INC., P.S., a Washington Corporation,

Respondent/Cross Appellant

DR. EMERICK'S ANSWER TO AMICUS CURIAE MEMORANDUM WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

STUART C. MORGAN, WSBA #26368
CHRYSTINA R. SOLUM, WSBA #41108
Attorneys for Petitioner/Cross Respondent,
Robert Emerick, M.D.

Ledger Square Law, P.S.
710 Market Street
Tacoma, Washington 98402
(253) 327-1900

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Alexander & Alexander, Inc. v. Wohlman,
19 Wn. App. 670, 578 P.2d 530,
rev. denied, 91 Wn.2d 1016 (1978) 4, 5

Econ. Lab., Inc. v. Donnolo,
612 F.2d 405 (9th Cir. 1979) 4

Labriola v. Pollard Group, Inc.,
152 Wn.2d 828, 100 P.3d 791 (2004) 5, 6

Nat'l Sch. Studios, Inc. v. Superior Sch. Photo Svc.,
40 Wn.2d 756, 242 P.2d 756 (1952) 4

Salewski v. Pilchuck Veterinary Hosp., Inc.,
189 Wn. App. 898, 359 P.3d 884 (2015),
Petition for Rev. filed, Supreme Court Cause No. 92317-5 5

Rules

RAP 8.1 5

I. INTRODUCTION

Petitioner Dr. Robert Emerick joins in the Amicus Curiae Memorandum filed by the Washington Employment Lawyers Association ("WELA"), particularly as to the issues of prevailing party attorney fees and the conflict in law created by the Court of Appeal's decision in this matter. However, Dr. Emerick respectfully disagrees with WELA that he had any more bargaining position when he became a shareholder at CSC than a traditional employee or that a separate standard should apply to either category.

II. ARGUMENT

WELA correctly notes that the Court of Appeal's decision on attorney fees in this matter is unfairly burdensome to employees who must go to Court to reform an overbroad noncompetition agreement.[1] Although Dr. Emerick at one time had some resources to try to fight CSC's overbroad and unfairly burdensome noncompete agreement, the fight has pushed him into bankruptcy.[2] The first trial court decision completely invalidated the non-compete. On remand from a CSC appeal, Dr. Emerick was ultimately able to have the geographic area of the Non-Compete reduced by more than 97 percent, based on 2008 census data,[3] and obtained a reduction in the temporal scope as well. Despite this success, somehow CSC was still found

---

[1] *Amicus Curiae Memorandum* at 3 – 5.
[2] *See Motion for Relief from Stay.*
[3] VI CP at 727 – 28.

to be a substantially prevailing party. CSC's Non-Compete was gutted twice, and yet it still received an award of attorney fees. Allowing employers to draft overbroad noncompetes and then still recover their attorney fees once a trial court reforms the agreement places an unfair burden on and provides no predictability for employees. Such an arrangement forces an employee to spend potentially hundreds of thousands of dollars to fight for her right to earn a paycheck and support her family. When employers are increasingly putting restrictive covenants on all manner of employees, including fast food workers and dog groomers, forcing an employee to pay her employer's legal fees to obtain relief from the courts from an intentionally overbroad non-compete agreement is inequitable.

However, Dr. Emerick disagrees with WELA that as a shareholder when he entered into the Non-Compete at issue in this matter, he had any better bargaining power than a traditional employee.[4] In reality, an employee beginning new employment has more freedom and bargaining position than did Dr. Emerick because such employee is free to reject the job offer if the noncompete agreement is too onerous. At the time, Dr. Emerick was subject to another non-compete agreement that would have severely restricted his ability to practice medicine in his community. Dr. Emerick did not enter into negotiations with CSC on equal footing and

[4] *Amicus Curiae Memorandum* at 8 – 9.

took the deal that was offered to him because he had no choice. The various non-competes have given CSC the stronger bargaining position throughout Dr. Emerick's employment, and whether he was an employee or a shareholder is immaterial. Moreover, Dr. Emerick was terminated by CSC no differently than a "regular" employee.

Additionally, Dr. Emerick joins in WELA's arguments regarding the conflicts between the Court of Appeal's opinion in this case and prior law.[5] Traditionally, Washington Courts have held noncompetes to a high scrutiny. Despite the typical burden in noncompete cases, CSC offered no evidence that its Non-Compete protected a legitimate business interest or served any function other than stifling legitimate competition. CSC did not provide Dr. Emerick with any of the skills that he obtained or needed to serve his patients, nor did CSC present any evidence that Dr. Emerick solicited CSC's patients. To the extent that Dr. Emerick is a highly skilled cardiologist, that is the result of his own doing, not because of anything CSC provided that should now be protected. CSC provided Dr. Emerick with nothing of value and had no interests to protect, other than preventing another cardiologist from practicing in Pierce County. As cardiologists, CSC's Non-Compete has the additional effect of denying vulnerable patients the right to the doctor of their choosing. Lawyers cannot be forced to enter into non-compete agreements in Washington because it might deny

[5] *Amicus Curiae Memorandum* at 9 – 10.

clients their choice of attorney, yet the Court of Appeal's opinion treats cardiologists, the doctor tasked with keeping a patient's heart working, as interchangeable as a blacksmith. CSC has never offered any justification for why its five year Non-Compete, now being enforced six years after Dr. Emerick's employment terminated, was necessary to protect a legitimate interest or why a less restrictive option was insufficient.

The Court of Appeals' decision also deviates from prior decisions to the extent that it refused to find that the issues were mooted by the expiration of the Non-Compete. Washington case law on noncompetition agreements tend to be sparse in part because many expire before finishing the appellate process. Traditionally, the Courts have held that noncompetition agreements are not tolled by a former employee's alleged breach and attempts to enforce the noncompetition agreement past the expiration of that period are moot.[6] Dr. Emerick was terminated from CSC in September 2009. CSC did not seek any injunctive relief tolling the non-compete during any of the court proceedings, including the period after Dr. Emerick prevailed on summary judgment in 2010 and before the Court

[6] *Nat'l Sch. Studios, Inc. v. Superior Sch. Photo Svc.*, 40 Wn.2d 756, 242 P.2d 756 (1952); *See also Econ. Lab., Inc. v. Donnolo*, 612 F.2d 405, 408 (9th Cir. 1979) (holding that there is substantial support among the federal courts of appeals for the proposition that it is inappropriate "to grant an injunction to enforce an agreement not to compete after the period during which the employee agreed not to compete" has expired); *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 688, 578 P.2d 530, *rev. denied*, 91 Wn.2d 1016 (1978) (holding that injunctive relief after the expiration of the noncompetition period would be "inappropriate and manifestly unfair" to former employees even though former employees competed throughout the noncompetition period).

of Appeals issued its first decision in this matter in 2012.[7] But the trial court excluded the period in which Dr. Emerick reasonably relied on the trial court's order invalidating the Non-Compete even though CSC took no steps to obtain an injunction. Neither CSC, the trial court, nor the Court of Appeals offered any authority for the trial court excluding from the Non-Compete's period the time in which Dr. Emerick prevailed in invalidating the Non-Compete and during which CSC did not seek any injunctive relief. That is, the trial court retroactively tolled the Non-Compete despite authority that doing so is "inappropriate and manifestly unfair."[8]

WELA is correct that this decision is part of a trend in which courts are increasingly likely to rubber stamp whatever contract a company required without regard for how it impacts the defendant's life or the community.[9] Division I's decision in this matter is part of a trend weakening the protections offered by this Court in prior decisions such as *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004). In addition to the changes in law created in this case, Division I has recently held essentially that continued employment and "mutual promises" by a shareholder is sufficient consideration for a non-competition agreement.[10]

---

[7] *See* RAP 8.1.
[8] *Alexander & Alexander,* 19 Wn. App. at 688.
[9] *Amicus Curiae Memorandum* at 3 – 5.
[10] *Salewski v. Pilchuck Veterinary Hosp., Inc.*, 189 Wn. App. 898, 905 – 06, 359 P.3d 884 (2015), *Petition for Rev. filed*, Supreme Court Cause No. 92317-5.

This is a marked deviation from the "significant" consideration required by *Labriola*. Corporations are ever more successful at restricting lawful competition with little or no consideration offered and without having to justify the reasonableness of the restrictions they impose on their employees and surrounding communities.

III. CONCLUSION

Dr. Emerick respectfully requests this Court grant Discretionary Review of the Appellate Court's decision to not only correct the errors of the Appellate Court's opinion as applied to Dr. Emerick but, more importantly, create an understandable framework for the citizens of Washington and counsel in matters of noncompetition covenants among physicians.

SUBMITTED this 1st day of February, 2016.

LEDGER SQUARE LAW, P.S.

By: _____

Stuart C. Morgan, WSBA #26368
Chrystina R. Solum, WSBA #41108
Attorneys for Dr. Emerick

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Stephanie Bloomfield Valarie Zeeck Shelly Andrew Gordon Thomas Honeywell, LLP 1201 Pacific Ave., Suite 2100 Tacoma, WA 98402	☑ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile
Jeffrey Needle Washington Employment Lawyers Association 119 First Ave. S, Suite 200 Seattle, WA 98104-3450	☑ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 18th day of February 2016 at Tacoma, Washington.

Amy Jean Shackelford

Amy Jean Shackelford, PLS
Legal Assistant to Stuart C. Morgan

OFFICE RECEPTIONIST, CLERK

To: Amy Shackelford
Cc: sbloomfield@gth-law.com; vzeeck@gth-law.com; sandrew@gth-law.com; jneedlel@wolfenet.com; Stu Morgan; Chrystina Solum
Subject: RE: Emerick v. CSC / No. 92283-7

Rec'd 2/1/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Amy Shackelford [mailto:amy@ledgersquarelaw.com]
Sent: Monday, February 01, 2016 3:51 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: sbloomfield@gth-law.com; vzeeck@gth-law.com; sandrew@gth-law.com; jneedlel@wolfenet.com; Stu Morgan <stu@ledgersquarelaw.com>; Chrystina Solum <chrystina@ledgersquarelaw.com>
Subject: Emerick v. CSC / No. 92283-7

Attached for filing in the above matter is Dr. Emerick's Answer to Amicus Curiae Memorandum Washington Employment Lawyers Association. Hard copies to counsel follow via first-class mail. If you have any questions, please do not hesitate to contact us.

Amy Jean Shackelford, PLS
Legal Assistant to Stuart C. Morgan, L. Clay Selby and Chrystina R. Solum
Ledger Square Law, P.S. | www.ledgersquarelaw.com
710 Market St., Tacoma, WA 98402
Direct: (253) 327-1712
Main: (253) 327-1900
Fax: (253) 327-1700