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

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT EMERICK

Respondent,

v.

CARDIAC STUDY CENTER, INC., a Washington corporation,

Appellant.

CARDIAC STUDY CENTER, INC.'S RESPONSE TO AMICUS CURIAE MEMORANDUM OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION

At the time of his termination Robert Emerick was a shareholder of Cardiac Study Center, subject to a shareholder non-compete. The extent to which that non-compete was enforceable under Washington law has already been decided, twice. Washington Employment Lawyers Association ("WELA") now urges the Court to accept discretionary review under the misplaced argument that no Washington court has ever enforced a "true employee" non-compete, and proposes a new standard for determining which party prevails when a non-compete is revised and enforced.

The analysis for employee and shareholder-employee non-competes is well settled. Even if the Court was inclined to change the analysis applicable to a "true employee" non-compete as WELA urges, this is not the case for such a determination, because Emerick was a shareholder, not a mere employee. Nor is this the appropriate case to revisit the prevailing party analysis. After his termination, Emerick sued to invalidate his shareholder non-compete in its entirety. Emerick did not prevail in obtaining any of his requested relief, but Cardiac did prevail. The Court of Appeals has twice held that Cardiac has protectable business interests justifying enforcement of a reasonable non-compete. Under these circumstances, none of the changes WELA urges this Court to adopt are

implicated. The Court should deny Emerick's Petition for Discretionary Review.

II. ARGUMENT

A. *Emerick II* Is Consistent with Washington Caselaw and There Is No Need to Establish a Different Level of Scrutiny for a a Shareholder Like Emerick.

WELA asserts that review is needed under to RAP 13.4(b)(4) to establish a higher level of scrutiny for "true employee" non-competes than for shareholder non-competes, review is also appropriate under RAP 13.4(b)(1)-(2) and because *Emerick II* is in conflict with existing caselaw. Neither argument has merit.

First, Washington does not make a bright-line distinction between shareholder and "true employee" non-competes, instead applying an analysis that allows the court to consider the status of the restrained employee. For instance, to be enforceable, the non-compete must be reasonable, which requires the court to consider: (1) whether the restraint is necessary for the protection of the business or goodwill of the employer; (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant non-enforcement of the covenant. *Perry v. Moran*, 109 Wn.2d 691, 698, 748 P.2d 224 (1987), *modified on*

reconsideration, 111 Wn.2d 885, 766 P.2d 1096 (1989) (citing *Racine v. Bender*, 141 Wash. 606, 252 P. 115 (1927)). By its very nature, this balancing encourages consideration of the relative interests of the parties, and the nature of the employment relationship between the parties.

Even if the analysis should be changed, with a different standard applied to "true employees" as WELA suggests, this is not the appropriate case to make such a change. Emerick was not just an employee, he was a shareholder, so any change to reduce the scrutiny applicable to "true employee" non-competes has no place here. WELA's requested clarification is completely hypothetical in nature and this Court will generally not render advisory opinions on speculative or hypothetical facts. *Walker v Munro,* 124 Wn.2d 402, 418, 879 P.2d 920 (1994).

Second, WELA contends that *Emerick II (Emerick v Cardiac Study Center,* 189 Wn. App 711, 357 P.3d 696 (2015)) conflicts with existing caselaw and that "no Washington reported appellate case or Washington federal reported case had **ever** upheld a true noncompete against a traditional employee." WELA Mem. at 9 (emphasis original). This is incorrect. *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 680 P.2d 448 (1984), did just that. In *Knight, Vale & Gregory*, the Court of Appeals upheld summary judgment and an award of liquidated damages against two former employees – not shareholders or owners – who were

found in breach of a binding three-year non-compete. *Id.* at 367. *Knight, Vale & Gregory* is not cited by WELA, although it is cited by a number of other cases WELA included in its brief.[1]

The remaining cases WELA cites in support of the contention that Washington courts refuse to enforce true employee non-competes do not support its position. The *Columbia College of Music & School of Dramatic Arts v. Tunberg*, 64 Wash. 19, 19-21, 116 P. 280 (1911), case dealt with a breach of two-year personal service contract requiring exclusive efforts of the employee for benefit of the employer during the term of the contract – but not preventing competition at the end of the contract term. The Court refused to enjoin competition when the employee resigned after just one year. The employer sought only injunctive relief, and the Court noted that personal service contracts were rarely susceptible to enforcement by injunction.

Similarly, *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 687-88, 578 P.2d 530 (1978), held that employee non-competes were reasonable and enforceable within a revised temporal and geographic scope, and that the "trial court erred in concluding that the covenants were

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[1] *See, e.g., Amazon, Inc. v. Powers*, 2012 WL 6726538, *8 (W.D. Wa. 2012); *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 774, 887 P.2d 991 (1995); *Genex Cooperative, Inc. v. Contreras*, 2014 WL 4959404, *7 (E.D. Wa. 2014).

totally unenforceable." The case was remanded for calculation of money damages to the employer.

Copier Specialists, Inc. v. Gillen, 76 Wn. App. 771, 772, 887 P.2d 991 (1995), found the non-compete was unenforceable, but only after concluding that the employer had failed to demonstrate any protectable business interest in the training that the employee/defendant received during his brief six months of employment.

In *Genex Cooperative, Inc. v. Contreras*, 2014 WL 4959404, *5 (E.D. Wa. 2014) the court applied Wisconsin law to one employee non-compete and found the contract unenforceable, while applying Washington law to the remaining two. The court concluded that the employer was seeking to restrain the future employment of two at-will employees, one of whom "cannot read or write in English [and] was a low-level agricultural worker." *Id.* at *7. Because the plaintiff-employer failed to "show how any reformation of the covenant would be reasonable" or to "identify any protectable interests" the court denied equitable revision. *Id.* at *6-7. Central to the court's analysis, it appears, was the fact that the employee-defendants did not have any unique or specialized skills, and the recognition under Washington law that "restrictive covenants are less reasonable when applied to lesser-skilled or non-professional employees." *Id.* at *8 (citing *Sheppard v. Blackstock*

Lumber Co., 85 Wn.2d 929, 933, 540 P.2d 1373 (1975)). Had these employees been highly skilled cardiac surgeons and shareholders of their business, like Emerick, the court's analysis would very likely have been different.

The remaining decisions cited by WELA are trial court orders dealing with an employer's motion for preliminary injunction, not, as WELA's brief suggests, ruling on the ultimate enforceability of the non-competes. And, in both cases the court granted partial relief to the employer. *See, e.g.*, *A Place for Mom, Inc. v. Leonhardt*, 2006 WL 2263337 (W.D. Wa. 2006) (partially granting plaintiff-employer's motion for preliminary injunction); *Amazon, Inc. v. Powers*, 2012 WL 6726538 (W.D. Wa. 2012) (granting limited preliminary injunction, and enjoining defendant-employee from providing services to "any current, former, or prospective customer of Amazon about whom he learned confidential information while working at Amazon.").

There is no conflict between the Court of Appeals decision in *Emerick II* and any of the cases cited or relied upon by WELA urging review. Washington law provides a flexible framework to determine the enforceability of employee non-competes based on the facts of each case. Here, Emerick was a highly-educated professional who entered into a non-compete in conjunction with obtaining shareholder status. The Superior

Court and the Court of Appeals properly applied the existing Washington framework and found his non-compete enforceable.

B. There Was No Error in Determining that Cardiac Was the Prevailing Party.

Emerick began this lawsuit seeking to invalidate his shareholder non-compete in its entirety on the basis that non-competes should not be enforced against physicians as a matter of public policy. CP 1-22; 1236-39. Emerick sought complete invalidation of his non-compete, while Cardiac sought reasonable enforcement. After the Court of Appeals rejected Emerick's proposed ban on physician non-competes, Cardiac succeeded in having its non-compete enforced and obtaining injunctive relief, the only measure of relief ever sought by Cardiac throughout its now six years as a defendant in Emerick's lawsuit.

Under Washington law, a prevailing party is "one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *see also Pipekorn v. Adams*, 102 Wn. App. 673, 686–87, 10 P.3d 428 (2000). Even in a case where only partial relief is secured, a party may still have "substantially prevailed" for the purposes of awarding attorneys' fees. *See, e.g.*, *Pipekorn*, 102 Wn. App. at 686–87; *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 773–74, 677 P.2d 773 (1984). WELA urges the Court to accept review

and announce a new, different standard in employee non-compete cases involving equitable reformation. This is not the case where such a standard should be imposed.

Emerick, not Cardiac, began this action after his shareholder status was terminated. Emerick sought a complete invalidation of the non-compete portions of his shareholder agreement, an agreement he understood perfectly well would provide an award of attorneys' fees to the prevailing party. Cardiac defended this action, seeking enforcement of the shareholder non-compete to the extent reasonable, consistent with Washington law.

WELA's outcry at the potential inequity of employers drafting overbroad employee non-competes and then recovering attorneys' fees against former employees in actions where revision is ordered, simply does not reflect the circumstances involved here. Emerick, a highly compensated shareholder and professional, demanded complete invalidation of his shareholder non-compete. He refused to agree to any reasonably modified non-compete and opened a competing practice a few hundred yards from Cardiac's door. Cardiac sought reasonable enforcement and won. This case does not provide the "substantial issues of public importance" that WELA suggests and review should be denied.

III. CONCLUSION

WELA has not shown any basis justifying discretionary review under RAP 13.4. Cardiac, therefore, respectfully continues to request that this Court deny review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 28th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I filed electronically one copy of the foregoing document with the Clerk of the Supreme Court and delivered a copy of the document via electronic mail on this date and placed and United States Mail to:

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Greetings, attached for filing with the Court is Cardiac Study Center, Inc.'s Response to Amicus Curiae memorandum of the Washington Employment Lawyers Association. This response is being filed by Stephanie Bloomfield on behalf of Appellant. All parties have been served via email and hard copies. Thank you.

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