NO. 45462-9-II

---

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

---

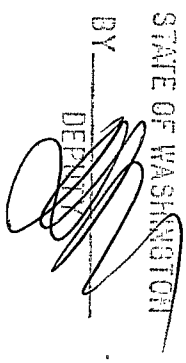
ROBERT EMERICK,

Appellant,

v.

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

Respondent.




---

# APPELLANT'S BRIEF

---

EISENHOWER CARLSON, PLLC
By: Stuart C. Morgan, WSBA #26368
Chrystina R. Solum, WSBA #41108
Attorneys for Appellant

**EISENHOWER CARLSON, PLLC**
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 572-4500

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Court Rules**

## Secondary Sources

## I. STATEMENT OF THE CASE

This case pits one of the largest medical corporations in Pierce County against a single doctor who did not set up a competing institution, but who provides a medical practice that brings to the doctor–patient relationship something that insurance–driven medicine cannot offer – a comprehensive, caring partnership devoted to maintaining the health of the very organ that keeps us alive. The corporation seeks to punish and bankrupt the doctor, whom it long ago discharged even though it cannot point to a single patient it lost or the doctor gained by his having a nearby office.

Even though Washington and numerous jurisdictions prohibit lawyers from requiring or entering into non-competition agreements because doing so would adversely impact client choices, Cardiac Study Center, P.S., Inc. ("CSC") would have this Court accept that doctors with whom we trust are lives should be subject to non-competition agreements. It is not hyperbolic or dramatic to point out that a cardiologist is trusted with his patient's life, with his or her patient's heart. A non-competition agreement limiting a physician's right to treat his or her patient restricts patient choice at least as much, if not more, than a non-competition agreement restricts a client's choice of lawyer. Surely a patient has a more vested interest in the right to choose who literally holds her heart than who sues her neighbor. Such restrictions are void as a matter of public policy.

After years of litigation, CSC failed to provide a scintilla of evidence that any actual competition exists (let alone unfair competition)

between its practice and Dr. Emerick's practice, and CSC has the burden of making that showing. What the evidence does show is that there are people in Pierce County who live full lives today, who were told by the institutional doctors at CSC that their days were numbered and that they should get their affairs in order. They ascribe their survival to being able to come under the watchful care of Dr. Emerick. CSC cannot credibly claim that those patients would have chosen its version of medicine.

The trial court erred in granting CSC summary judgment when (1) CSC failed to meet its burden to show that its anti-competition covenant was reasonable or necessary to protect its legitimate business interests and (2) Dr. Emerick demonstrated genuine issues of material fact. The trial court erroneously enforced CSC's anti-competition covenant for four years, which no Washington appellate court has ever sanctioned. The trial court gave Dr. Emerick time served for the 20 months between his termination from CSC and the time he established his practice in 2011. In effect, the trial court is imposing a staggering ***seven-year*** non-compete. On its own initiative, the trial court further required Dr. Emerick to move his practice outside the two-mile radius by May 9, 2014. Only once Dr. Emerick relocates his practice does the remaining 28-month period begin to run. No Washington court ever tolled the running of a restrictive covenant. Finally, the trial court also erred in determining that CSC was the substantially prevailing party when Dr. Emerick succeeded in having the covenant declared unreasonable and unenforceable. No Washington

decision has determined that an employer is the prevailing party when a court blue pencils the employer's restrictive covenant.

This Court should reverse, holding that non-competition agreements involving doctors violate public policy as a matter of law. In the alternative, this Court should hold that CSC's Non-Compete (1) violates public policy and (2) is overbroad and unreasonable. This Court should also hold that the trial court erred in finding that CSC was the substantially prevailing party and that Dr. Emerick is entitled to his attorney fees on appeal.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that CSC's Non-Compete was necessary to protect its business interests, including its interests in individual patients, business goodwill, reputation, business locations, referral sources, and established relationships because disputed issues of fact exist as to this issue (Conclusion of Law No. 1).

2. The trial court erred in finding that Dr. Emerick and CSC are striving for the same customers or market and that he is therefore in competition with CSC because disputed issues of fact exist as to this issue (Conclusion of Law No. 2).

3. The trial court erred in finding that in order to reasonably protect CSC's interests, the Non-Compete must be revised to restrain Dr. Emerick's practice within a two-mile radius of CSC's current offices and for four years, less the 20 months between September 2009 and June 2011 (Conclusion of Law No. 4, Order and Injunctive Relief No. 1, 2).

4. The trial court erred in requiring Dr. Emerick to relocate his practice to a location more than two miles from CSC's offices (Conclusion of Law No. 5, Order and Injunctive Relief No. 1).

5. The trial court erred in finding that CSC obtained substantial enforcement of the Non-Compete and substantially prevailed (Conclusion of Law No. 6, Finding of Fact Nos. 5 & 8).

6. The trial court abused its discretion in finding that the time spent and fees and costs CSC sought were reasonable and that no further reductions were required (Findings of Fact Nos. 9, 10, 11, 12, 13, 14; Conclusion of Law 18).

7. The trial court abused its discretion in awarding CSC $204,251.39 in attorney fees and costs (Finding of Fact No. 15, Judgment).

## III. FACTS

Dr. Robert Emerick is a board certified physician in cardiovascular disease, interventional cardiology, and internal medicine. I Clerk's Papers (CP) at 60. Dr. Emerick obtained his education and performed several prestigious residencies long before moving to Washington State. I CP at 60. Dr. Emerick practiced interventional and consultative cardiology in Memphis, Tennessee until 2002. I CP at 60.

When Dr. Emerick joined CSC, he was a board eligible interventional cardiologist. I CP at 61. Dr. Emerick fulfilled all prerequisites to sit for the interventional cardiology exam while practicing

medicine in Memphis, Tennessee. I CP at 61. Dr. Emerick passed the interventional cardiology board in November 2008. I CP at 61. To do so, Dr. Emerick paid for all preparation courses himself, studied on his own time, and used personal vacation time to prepare for the exam. I CP at 61. Dr. Emerick also paid his own examination fee. I CP at 61. CSC did not contribute anything toward Dr. Emerick's certification as an interventional cardiologist. I CP at 61.

### A. Dr. Emerick's Employment at CSC and Subsequent Termination.

Beginning in 2002, Dr. Emerick served as a loyal and hardworking CSC employee. I CP at 61. Dr. Emerick was one of CSC's most successful and profitable physicians; so much so that CSC offered to make him a shareholder in February 2004, less than two years after he started. I CP at 61. CSC required Dr. Emerick to sign a breathtakingly broad Non-Compete that purports to restrict Dr. Emerick's ability to practice cardiac medicine for *five years after the termination of his employment*:

> The Employee . . . agrees and covenants that during the Employee's employment by the Corporation and for sixty (60) full months after termination of such employment for any reason, the Employee will not, directly or indirectly, (i) anywhere within Pierce County and Federal Way, Washington ("Restricted Area"), engage in the practice of cardiac medicine in any manner which is directly competitive with any aspect of the business of the Corporation...whether or not using any *Confidential Information*; (ii) anywhere in the Restricted Area, have any business dealings or contracts, except those which demonstrably do not relate to or

> compete with the business or interests of the corporation, with any then existing patient, customer or client (or party with whom the Corporation contracts) of the Corporation or any person or firm which has been contacted or identified by the Corporation as a potential customer or client of the Corporation; or (iii) be an employee, employer, consultant, agent, officer, director, partner, trustee, or shareholder of any person or entity that does any of the activities just listed. Provided, however, nothing herein shall preclude a patient from selecting a provider of their [sic] choice.

I CP at 33. When CSC presented Dr. Emerick with the Non-Compete, he was not allowed to negotiate over any terms. I CP at 61. CSC simply handed him a pre-printed form and instructed him to sign. I CP at 61. The Non-Compete was not tailored to Dr. Emerick's situation. I CP at 61.

CSC forced Dr. Emerick out of the partnership effective September 30, 2009, more than four years ago. I CP at 61. CSC then attempted to enforce a five-year non-competition provision that would have denied Pierce County cardiac patients from seeing the doctor of their choice. I CP at 61. Such efforts clearly violate the American Medical Association Code of Ethics 9.02, which provides:

> Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment, partnership, or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician.

CSC has shown complete disregard for the AMA's directives throughout this litigation by attempting to enforce an unreasonable, excessive restrictive covenant that would deny cardiac patients their physician of choice.

Since his termination more than four years ago, Dr. Emerick has not received any referrals from CSC's referral sources. I CP at 61. He has not contacted any of CSC's referral sources. I CP at 61.

### B. Dr. Emerick Filed Suit to Enjoin CSC from Enforcing its Non-Compete, is Granted Summary Judgment, and Subsequently Opens his Practice.

After his termination in September 2009, Dr. Emerick did not open a practice or obtain employment in any other medical practice. I CP at 128. Instead, Dr. Emerick filed this action seeking to enjoin CSC from enforcing its Non-Compete. V CP at 634 – 55. Dr. Emerick intentionally and specifically waited for the resolution of his case at the trial court to see whether he would be able to continue to serve his patients and his community. I CP at 128. In December 2010, the trial court granted Dr. Emerick's motion for summary judgment, finding that CSC's Non-Compete violated public policy and was unenforceable. *Emerick v. Cardiac Study Center, Inc., P.S.*, 170 Wn. App. 248, 253, 286 P.3d 689,

*rev. denied*, 175 Wn.2d 1028 (2012). The trial court also found that CSC had no real protectable business interest. *Id.*

CSC never sought a stay of the trial court's order allowing Dr. Emerick to serve cardiac patients in Pierce County. In reliance on the trial court's order, Dr. Emerick executed a lease, built out the space, and opened his practice in Gig Harbor, Washington in June 2011. I CP C at 61, 128. Dr. Emerick's practice is based on a radically different model of patient care than CSC's practice and enjoys no competitive benefit from his time at CSC. I CP at 61, 128.

Dr. Emerick (1) operates a new practice wholly unique from any other cardiology practice in Washington State, (2) derives no benefit from his employment history with CSC, (3) has not used any of CSC's referral sources, (4) hired independent consultants to help him develop the concierge practice he runs, (5) has an office that bears no relationship to CSC's Gig Harbor practice, and (6) invested considerable funds to the development of his office location.

When Dr. Emerick founded Choice Cardiovascular, he developed a practice wholly unique from CSC's traditional cardiovascular medicine practice. I CP at 128. In order to create his unique, direct-payment practice, Dr. Emerick opted out of the government Medicare program as a healthcare provider. I CP at 128. This allows him the flexibility and

## I. STATEMENT OF THE CASE

This case pits one of the largest medical corporations in Pierce County against a single doctor who did not set up a competing institution, but who provides a medical practice that brings to the doctor–patient relationship something that insurance–driven medicine cannot offer – a comprehensive, caring partnership devoted to maintaining the health of the very organ that keeps us alive. The corporation seeks to punish and bankrupt the doctor, whom it long ago discharged even though it cannot point to a single patient it lost or the doctor gained by his having a nearby office.

Even though Washington and numerous jurisdictions prohibit lawyers from requiring or entering into non-competition agreements because doing so would adversely impact client choices, Cardiac Study Center, P.S., Inc. ("CSC") would have this Court accept that doctors with whom we trust are lives should be subject to non-competition agreements. It is not hyperbolic or dramatic to point out that a cardiologist is trusted with his patient's life, with his or her patient's heart. A non-competition agreement limiting a physician's right to treat his or her patient restricts patient choice at least as much, if not more, than a non-competition agreement restricts a client's choice of lawyer. Surely a patient has a more vested interest in the right to choose who literally holds her heart than who sues her neighbor. Such restrictions are void as a matter of public policy.

After years of litigation, CSC failed to provide a scintilla of evidence that any actual competition exists (let alone unfair competition)

between its practice and Dr. Emerick's practice, and CSC has the burden of making that showing. What the evidence does show is that there are people in Pierce County who live full lives today, who were told by the institutional doctors at CSC that their days were numbered and that they should get their affairs in order. They ascribe their survival to being able to come under the watchful care of Dr. Emerick. CSC cannot credibly claim that those patients would have chosen its version of medicine.

The trial court erred in granting CSC summary judgment when (1) CSC failed to meet its burden to show that its anti-competition covenant was reasonable or necessary to protect its legitimate business interests and (2) Dr. Emerick demonstrated genuine issues of material fact. The trial court erroneously enforced CSC's anti-competition covenant for four years, which no Washington appellate court has ever sanctioned. The trial court gave Dr. Emerick time served for the 20 months between his termination from CSC and the time he established his practice in 2011. In effect, the trial court is imposing a staggering ***seven-year*** non-compete. On its own initiative, the trial court further required Dr. Emerick to move his practice outside the two-mile radius by May 9, 2014. Only once Dr. Emerick relocates his practice does the remaining 28-month period begin to run. No Washington court ever tolled the running of a restrictive covenant. Finally, the trial court also erred in determining that CSC was the substantially prevailing party when Dr. Emerick succeeded in having the covenant declared unreasonable and unenforceable. No Washington

decision has determined that an employer is the prevailing party when a court blue pencils the employer's restrictive covenant.

This Court should reverse, holding that non-competition agreements involving doctors violate public policy as a matter of law. In the alternative, this Court should hold that CSC's Non-Compete (1) violates public policy and (2) is overbroad and unreasonable. This Court should also hold that the trial court erred in finding that CSC was the substantially prevailing party and that Dr. Emerick is entitled to his attorney fees on appeal.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that CSC's Non-Compete was necessary to protect its business interests, including its interests in individual patients, business goodwill, reputation, business locations, referral sources, and established relationships because disputed issues of fact exist as to this issue (Conclusion of Law No. 1).

2. The trial court erred in finding that Dr. Emerick and CSC are striving for the same customers or market and that he is therefore in competition with CSC because disputed issues of fact exist as to this issue (Conclusion of Law No. 2).

3. The trial court erred in finding that in order to reasonably protect CSC's interests, the Non-Compete must be revised to restrain Dr. Emerick's practice within a two-mile radius of CSC's current offices and for four years, less the 20 months between September 2009 and June 2011 (Conclusion of Law No. 4, Order and Injunctive Relief No. 1, 2).

4. The trial court erred in requiring Dr. Emerick to relocate his practice to a location more than two miles from CSC's offices (Conclusion of Law No. 5, Order and Injunctive Relief No. 1).

5. The trial court erred in finding that CSC obtained substantial enforcement of the Non-Compete and substantially prevailed (Conclusion of Law No. 6, Finding of Fact Nos. 5 & 8).

6. The trial court abused its discretion in finding that the time spent and fees and costs CSC sought were reasonable and that no further reductions were required (Findings of Fact Nos. 9, 10, 11, 12, 13, 14; Conclusion of Law 18).

7. The trial court abused its discretion in awarding CSC $204,251.39 in attorney fees and costs (Finding of Fact No. 15, Judgment).

## III. FACTS

Dr. Robert Emerick is a board certified physician in cardiovascular disease, interventional cardiology, and internal medicine. I Clerk's Papers (CP) at 60. Dr. Emerick obtained his education and performed several prestigious residencies long before moving to Washington State. I CP at 60. Dr. Emerick practiced interventional and consultative cardiology in Memphis, Tennessee until 2002. I CP at 60.

When Dr. Emerick joined CSC, he was a board eligible interventional cardiologist. I CP at 61. Dr. Emerick fulfilled all prerequisites to sit for the interventional cardiology exam while practicing

medicine in Memphis, Tennessee. I CP at 61. Dr. Emerick passed the interventional cardiology board in November 2008. I CP at 61. To do so, Dr. Emerick paid for all preparation courses himself, studied on his own time, and used personal vacation time to prepare for the exam. I CP at 61. Dr. Emerick also paid his own examination fee. I CP at 61. CSC did not contribute anything toward Dr. Emerick's certification as an interventional cardiologist. I CP at 61.

### A. Dr. Emerick's Employment at CSC and Subsequent Termination.

Beginning in 2002, Dr. Emerick served as a loyal and hardworking CSC employee. I CP at 61. Dr. Emerick was one of CSC's most successful and profitable physicians; so much so that CSC offered to make him a shareholder in February 2004, less than two years after he started. I CP at 61. CSC required Dr. Emerick to sign a breathtakingly broad Non-Compete that purports to restrict Dr. Emerick's ability to practice cardiac medicine for *five years after the termination of his employment*:

> The Employee . . . agrees and covenants that during the Employee's employment by the Corporation and for sixty (60) full months after termination of such employment for any reason, the Employee will not, directly or indirectly, (i) anywhere within Pierce County and Federal Way, Washington ("Restricted Area"), engage in the practice of cardiac medicine in any manner which is directly competitive with any aspect of the business of the Corporation...whether or not using any *Confidential Information*; (ii) anywhere in the Restricted Area, have any business dealings or contracts, except those which demonstrably do not relate to or

> compete with the business or interests of the corporation, with any then existing patient, customer or client (or party with whom the Corporation contracts) of the Corporation or any person or firm which has been contacted or identified by the Corporation as a potential customer or client of the Corporation; or (iii) be an employee, employer, consultant, agent, officer, director, partner, trustee, or shareholder of any person or entity that does any of the activities just listed. Provided, however, nothing herein shall preclude a patient from selecting a provider of their [sic] choice.

I CP at 33. When CSC presented Dr. Emerick with the Non-Compete, he was not allowed to negotiate over any terms. I CP at 61. CSC simply handed him a pre-printed form and instructed him to sign. I CP at 61. The Non-Compete was not tailored to Dr. Emerick's situation. I CP at 61.

CSC forced Dr. Emerick out of the partnership effective September 30, 2009, more than four years ago. I CP at 61. CSC then attempted to enforce a five-year non-competition provision that would have denied Pierce County cardiac patients from seeing the doctor of their choice. I CP at 61. Such efforts clearly violate the American Medical Association Code of Ethics 9.02, which provides:

> Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment, partnership, or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician.

CSC has shown complete disregard for the AMA's directives throughout this litigation by attempting to enforce an unreasonable, excessive restrictive covenant that would deny cardiac patients their physician of choice.

Since his termination more than four years ago, Dr. Emerick has not received any referrals from CSC's referral sources. I CP at 61. He has not contacted any of CSC's referral sources. I CP at 61.

### B. Dr. Emerick Filed Suit to Enjoin CSC from Enforcing its Non-Compete, is Granted Summary Judgment, and Subsequently Opens his Practice.

After his termination in September 2009, Dr. Emerick did not open a practice or obtain employment in any other medical practice. I CP at 128. Instead, Dr. Emerick filed this action seeking to enjoin CSC from enforcing its Non-Compete. V CP at 634 – 55. Dr. Emerick intentionally and specifically waited for the resolution of his case at the trial court to see whether he would be able to continue to serve his patients and his community. I CP at 128. In December 2010, the trial court granted Dr. Emerick's motion for summary judgment, finding that CSC's Non-Compete violated public policy and was unenforceable. *Emerick v. Cardiac Study Center, Inc., P.S.*, 170 Wn. App. 248, 253, 286 P.3d 689,

*rev. denied*, 175 Wn.2d 1028 (2012). The trial court also found that CSC had no real protectable business interest. *Id.*

CSC never sought a stay of the trial court's order allowing Dr. Emerick to serve cardiac patients in Pierce County. In reliance on the trial court's order, Dr. Emerick executed a lease, built out the space, and opened his practice in Gig Harbor, Washington in June 2011. I CP C at 61, 128. Dr. Emerick's practice is based on a radically different model of patient care than CSC's practice and enjoys no competitive benefit from his time at CSC. I CP at 61, 128.

Dr. Emerick (1) operates a new practice wholly unique from any other cardiology practice in Washington State, (2) derives no benefit from his employment history with CSC, (3) has not used any of CSC's referral sources, (4) hired independent consultants to help him develop the concierge practice he runs, (5) has an office that bears no relationship to CSC's Gig Harbor practice, and (6) invested considerable funds to the development of his office location.

When Dr. Emerick founded Choice Cardiovascular, he developed a practice wholly unique from CSC's traditional cardiovascular medicine practice. I CP at 128. In order to create his unique, direct-payment practice, Dr. Emerick opted out of the government Medicare program as a healthcare provider. I CP at 128. This allows him the flexibility and

discretion to set his professional healthcare service and membership fees in a manner that he can specifically tailor to each patient, including pro bono services. I CP at 128. The differences between Dr. Emerick's practice and CSC with regard to scale and volume are striking. I CP at 128. Dr. Emerick's concierge practice was designed to serve a maximum of only 150 patients, as it is a personalized service with no time limitations for appointments, unlimited access to him and truly state-of-the-art care that is not currently provided by any other cardiology practice in the country, including CSC. I CP at 128.

By way of contrast, when Dr. Emerick was affiliated with CSC, CSC's shareholders and employees routinely saw 30 to 40 patients per day, allowing, at best, only 10 – 15 minutes per patient. I CP at 128. If he were truly attempting to trade on CSC's reputation and goodwill, as alleged by CSC, Dr. Emerick would do his best to maintain his association and connection with CSC, and he would have done his best to recreate their business model in his new practice. I CP at 128.

In reality, Dr. Emerick has done everything reasonably possible to dissociate himself from CSC and their conventional approach. I CP at 128 –29. The patients that have enrolled in Dr. Emerick's practice are all unique and different individuals with diverse medical histories and risks, but they all share one absolutely key characteristic: they are all seeking a

restored doctor-patient relationship and an enhanced, more personalized and proactive healthcare experience. I CP at 129.

Dr. Emerick has taken no steps to trade on or benefit from CSC's reputation. For example, for the years 2012 and 2013, he was voted "Best Doctor" in *South Sound Magazine's* "Best of the South Sound" issues. I CP at 129, 137 – 39. Noticeably absent from the *South Sound Magazine* article is any reference by Dr. Emerick to his previous association with CSC. I CP at 147 – 39. Additionally, reviewing online websites listing doctors demonstrates that Dr. Emerick has made no mention of his previous affiliation with CSC. I CP at 129, 140 – 48. Dr. Emerick's professional reputation was achieved through personal sacrifice and the high professional standards and practices that he alone provides and guarantees. I CP at 134.

Moreover, Dr. Emerick's patients, referral sources, and other goodwill are derived exclusive of CSC. Dr. Emerick's patients are patients that CSC either specifically chose not to treat or treated so poorly that they chose never to return. I CP at 130, 157 – 58, 168 – 69, 174 – 75. In at least one instance, a patient came to Dr. Emerick after CSC told him to go home and put his affairs in order. I CP at 180. Under the care of Dr. Emerick, that patient is alive and substantially improved. I CP at 180 – 82. Perhaps even more importantly, Dr. Emerick has never received a

referral from any of CSC's referral sources. I CP at 131. CSC provided no declaration or any other evidence that any of its referral sources have actually referred existing CSC patients to Dr. Emerick. I CP at 131. In contrast, several patients of Dr. Emerick signed sworn declarations stating that they found him through word of mouth or by personal contact with Dr. Emerick. I CP at 152, 158, 163, 168, 174, 181.

Dr. Emerick even developed the nature of his practice independent of any information he ever learned from CSC. After his termination, Dr. Emerick attended several conferences and seminars and engaged, at significant personal expense, *Private Medical Marketing Group*, to assist him in the design and creation of the Northwest's first and only concierge cardiovascular medical practice. I CP at 130. This group helped Dr. Emerick to create his practice's initial website, and helped him to further develop his public speaking skills. I CP at 130 – 31. Because CSC failed to comply with the trial court's order to notify all of his former patients of his new practice and its location, Dr. Emerick was compelled to give talks and presentations to different local private business and professional groups to make people aware of his new practice. I CP at 131.

Dr. Emerick's office location also has no relationship to CSC's Gig Harbor location and he draws no advantage from CSC's presence. I CP at 132. When Dr. Emerick searched for office space, he looked at

several locations and buildings throughout the South Sound. I CP at 132. The choice that he ultimately made had nothing to do with CSC or its office locations. I CP at 132. He chose the space that was the most affordable and suitable to the design plans that he had for his new concierge medical practice. I CP at 132. The characteristics of the building, its other tenants, its office floor plans, overall ambience and the space's suitability to planned build out were all taken into consideration prior to his signing a lease. I CP at 132. Dr. Emerick's practice has no signage on the building announcing his practice. I CP at 132. In fact, no one can even see Dr. Emerick's building from CSC's Gig Harbor office and no one can see CSC's Gig Harbor building from Dr. Emerick's office due to the distance between the locations and the massive trees and shrubs that exist between that distance. I CP at 132. It is not as though a CSC patient, on the way into CSC's Gig Harbor building, might notice Dr. Emerick's practice and decide to see Dr. Emerick instead. I CP at 132.

Dr. Emerick did not resign from CSC, but was forced out for political reasons. I CP at 133. When CSC forced him out, the economy was at its nadir. I CP at 133. His family home in Tacoma would likely have sat unsold on the market for many months. I CP at 133. His wife and children had formed strong relationships in the area, his mother resides in Vancouver, BC, and his brother and family live in San

Francisco. I CP at 133. Of greatest importance though, his son was still recovering from pediatric anorexia nervosa. I CP at 133. A move at that time and under those circumstances would have separated his son from his friends and the school that he loved, and could well have led to a relapse of his life-threatening condition. I CP at 133. This was all done at a time when Dr. Emerick had a court order invalidating the Non-Compete.

The development of a unique concierge practice required significant personal investment from Dr. Emerick. The design, development and launch of his concierge cardiovascular medical practice required that Dr. Emerick invest several hundred thousand dollars of his own personal savings. I CP at 134. Dr. Emerick also had to secure a bank loan for an additional several hundred thousand dollars. I CP at 134 – 35. The creation of this unique concierge cardiovascular medical practice, from inception to reality, was accomplished at great personal and family sacrifice. I CP at 135.

### C. Division II Reverses for a Full Analysis on the Non-Compete's Reasonableness, CSC Moves for Summary Judgment, and the Trial Court Finds CSC's Geographic and Temporal Restrictions Unreasonable.

On February 28, 2012, this court reversed, holding that the trial court "erred in evaluating CSC's protectable business interest. In part due to this initial error, the [trial] court failed to property analyze the scope and

public policy factors included in the test for enforceability, and the court failed to address whether the covenant could be saved to some extent." *Emerick*, 170 Wn. App. at 259.

After mandate issued, CSC moved for summary judgment before a new trial court judge. I CP at 1 – 33. Recognizing the overbroad nature of the Non-Compete, CSC stipulated to allowing Dr. Emerick to continue treating the patients he had seen while employed by CSC. CSC has also admitted the overbroad nature of the geographic limits of the Non-Compete. In reply to Dr. Emerick's opposition to CSC's motion for summary judgment, CSC attempted to resuscitate its Non-Compete by suggesting a limitation of the geographic restrictions to within five miles of CSC's four Pierce County locations in Lakewood, Gig Harbor, Tacoma, and Puyallup, Washington. I CP at 72. CSC made this proposal only four days before the trial court ruled on CSC's motion for summary judgment and Dr. Emerick had no ability to provide a response. *See* I CP at 65.

Similar to the trial court in 2010, the new trial court judge also found that CSC's Non-Compete was unreasonable as to both the temporal and geographic restrictions. II CP at 321. The trial court then fashioned its own agreement and reduced the Non-Compete's geographic restriction from all of Pierce County to within a two-mile radius of CSC's existing practice locations. II CP at 321. Additionally, the trial court reduced the

Non-Compete's temporal restrictions from 60 months to 48 months, with 20 months "credit" for the time between Dr. Emerick's termination from CSC and the time he opened his practice. II CP at 321 – 22. Without explanation or authority, the court tolled the Non-Compete during the time Dr. Emerick operated his practice in compliance with the trial court's earlier order, and imposed an additional 28 months. II CP at 321 – 22. The trial court also ordered Dr. Emerick to relocate his practice to a location outside of that radius by May 9, 2014. II CP at 322.

However, there are many practical impediments to transferring office locations so quickly, including a lack of suitable space. 2 CP at 229 – 31. Additionally, there is a significant financial cost associated with complying with the trial court's Order. Assuming Dr. Emerick can find suitable space, he may be required to assume hundreds of thousands of dollars in tenant improvements, equipment purchases, and other relocation costs. I CP at 134 – 35. These costs are not feasible for a small office like Dr. Emerick's, particularly after spending the initial costs he did to start his practice. If forced to move, Dr. Emerick will likely need to close his doors. Such a move will deny Pierce County patients their physician of choice and will allow CSC the victory they have wanted all along – to shut down what they perceive as competition (but not unfair competition, which is what is protectable under the law). This result will be especially

tragic for the patients of Pierce County who will be left without access to the doctor of his or her choice.

### D. The Trial Court Erroneously Found that CSC is the Substantially Prevailing Party and Awards Excessive Attorney Fees.

After the trial court found that CSC's Non-Compete was unreasonable and unenforceable as to both geographic and temporal scope, CSC requested an award of attorney fees as the prevailing party. *See* II CP at 214 – 18, 227 – 75, 296 – 303. Dr. Emerick opposed the motion, arguing that because the trial court found CSC's Non-Compete unreasonable and unenforceable, and because the trial court fashioned an order not requested by either party, neither party substantially prevailed. II CP at 219 – 26, 286 – 95. In fact, no Washington opinion has ever awarded attorney fees to an employer whose non-compete was found unreasonable and overbroad.

The trial court found that CSC substantially prevailed and awarded CSC its attorney fees. II CP at 322. CSC then moved for an award of attorney fees of $286,790.76. II CP at 326 – 34. Dr. Emerick opposed the motion, pointing out that CSC sought fees to which it was not entitled, such as fees previously denied by this Court, for unsuccessful theories and motions, and unsupported non-lawyer work. III CP at 467 – 601. The trial court properly refused to award CSC attorney fees previously denied by this court after CSC failed to properly request attorney fees on appeal.

IV CP at 622. However, the trial court failed to otherwise reduce CSC's attorney fees and awarded CSC $204,251.39. CP at 624, 627.

Dr. Emerick timely appealed. V CP at 664 – 672, 673 – 93. CSC cross-appealed. V CP at 694 – 709.

## IV. ANALYSIS

This appeal presents an opportunity to rectify errors in the trial court's rulings which have resulted in manifest injustice, and which involve issues including whether (1) CSC's Non-Compete violates public policy, (2) the temporal and geographic restrictions imposed by the trial court are reasonable or even necessary to effectuate a legitimate business purpose of CSC, and (3) the trial court had authority to grant CSC injunctive relief beyond the term of the Non-Compete. Additionally, the trial court erred in finding that CSC substantially prevailed when neither party obtained the relief they sought and the trial court found that CSC's Non-Compete was unenforceable and unreasonable.

### A. The Trial Court Erred Granting CSC's Motion for Summary Judgment because (1) Non-Competition Agreements Involving Physicians Violate Public Policy as a Matter of Law, (2) CSC's Non-Compete Violates Public Policy, and (3) Dr. Emerick Raised Several Unrebutted Material Issues of Fact as to whether CSC's Non-Compete is Reasonable or Necessary.

Given the intimate and important relationship between doctors and patients, non-competition agreements between physicians violate public policy as a matter of law. In the alternative, this Court should hold that CSC's Non-Compete violates public policy. In addition, several genuine

issues of material fact exist that preclude summary judgment, including whether (1) Dr. Emerick traded on CSC's goodwill in establishing his new practice; (2) Dr. Emerick is in competition with CSC; (3) CSC has any goodwill to protect given Dr. Emerick's unique practice, different patient pool, and ability to continue seeing patients that he treated while working for CSC; (4) and the location of Dr. Emerick's new practice unreasonably competes with CSC's Gig Harbor location given the fact that Dr. Emerick has no signage and cannot be seen from CSC's Gig Harbor office. Dr. Emerick raised several genuine issues of material fact sufficient to defeat CSC's motion for summary judgment. CSC failed to rebut these issues of fact and relied instead on conclusory statements. The trial court erred in granting CSC's motion for summary judgment.

*1. Standard of Review.*

Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g.*, *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). A material fact is one upon which the outcome of the case depends. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). When a motion for summary judgment is before the court, it may decide questions of fact as a matter of law when reasonable minds could reach but one conclusion. *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995).

Once the moving party demonstrates that there is no genuine issue of material fact present and that the party is entitled to judgment as a

matter of law, the opposing party may not rest on the pleadings, but must instead demonstrate that a triable issue remains. CR 56(e); *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

In this case, the trial court claims to have made "findings of fact and conclusions of law" in finding in favor of CSC, yet on the next page, all "findings" are designated as "conclusions of law." II CP at 320 – 21. Regardless of designation, the trial court's findings or conclusions do not impact this Court's review. The function of a summary judgment proceeding is to determine whether a genuine issue of fact exists, not to determine issues of fact. *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 715 n.23, 197 P.3d 686 (2008). The Washington Supreme Court has held "on numerous occasions that findings of fact and conclusions of law are superfluous in both summary judgment and judgment on the pleadings proceedings." *Davenport*, 147 Wn. App. at 715 n.23. An appellant need not assign error to a trial court's findings of fact or conclusions of law on a summary judgment order. *Wash. Optometric Ass'n v. Pierce Cnty.*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968).

*2. Washington Employs an Exacting Scrutiny to Non-Competes.*

Washington Courts will not enforce a non-competition clause unless it meets an exacting three-part reasonableness test: (1) whether 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). In order to be valid, a non-competition agreement must last for only a reasonable time, encompass only a reasonable territory, and be necessary to protect the employer's interests without imposing undue hardship on the employee. *Perry*, 109 Wn.2d at 700. Only once a court finds a restraint unreasonable can it modify the agreement by enforcing it only "to the extent reasonably possible to accomplish the contract's purpose." *Emerick,* 170 Wn. App. 248, 255. The court can reduce the duration of an unreasonably long anticompetitive restriction. *Perry,* 109 Wn.2d at 704.

Summary judgment on a non-compete clause is inappropriate when disputed facts exist. *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 368, 680 P.2d 448 (1984); *see also Proudfoot Consulting Co v. Gordon*, 576 F.3d 1223, 1237 (11th Cir. 2009) (whether a non-compete is reasonable or overly broad is a question of fact); *Affinion Benefits Grp., LLC v. Econ-O-Check Corp.*, 784 F. Supp. 2d 855, 865 (M.D.Tenn. 2011) (Determining whether an agreement in restraint of trade is reasonable, and therefore enforceable, is a question of law only when the material facts are undisputed).

*3. CSC's Non-Compete Creates Substantial Risk of Injury to the Public and is Void.*

CSC's Non-Compete creates a substantial risk of injury to the public by drastically reducing patient choice and access to care. For

cardiac patients, in particular, the idea of a long distance between the patient and his or her physician is dangerous.[1] Under CSC's position, even though lawyers cannot be bound to non-competition agreements because doing so would restrict client choice,[2] public policy would allow an employer to restrict patient access to the person who cuts into the patient's chest and saves his / her life. This Court should hold that restrictive covenants as against doctors violate public policy as a matter of law. In the alternative, this Court should hold that CSC's Non-Compete is void as overbroad and creates a substantial risk to the public.

A court may find public injury if the relationship between the profession and the public is highly personal. *Alexander & Alexander*, 19 Wn. App. at 687. In *Alexander & Alexander*, the court held that "the relationship between broker and insured is often highly personal." 19 Wn. App. at 687. The court went on to hold that the former employer's restrictive covenant was only reasonable if it prevented solicitation of the former employer's current clients. *Id.*

Unlike *Alexander & Alexander*, over four years of litigation has never produced a scintilla of evidence that Dr. Emerick ever solicited CSC's patients. In fact, CSC has consented to Dr. Emerick treating the same patients he treated while he was a shareholder at CSC. Dr. Emerick

---

[1] It is expected that CSC will argue that this Court has already found that the Non-Compete does not violate public policy. However, this Court has made no such finding. This Court instead found that the previous trial court judge erred in relying on authority from other jurisdictions to invalidate CSC's Non-Compete on public policy grounds and did not balance the public policy concerns against CSC's business interests. *Emerick*, 170 Wn. App. at 258 – 59.

[2] Restatement (Third) of Law Governing Law § 14, cmt. b (1998).

has also more than demonstrated that he has taken no steps to solicit CSC's patients. CSC's real objection is that Dr. Emerick "focus[es] on those wealthy patients who do not require him to accept Medicare or other reduced reimbursement rates." I CP at 73. CSC wants to prohibit "the practice of cardiac medicine in any manner that competes with [CSC]." I CP at 73. CSC's argument ignores that it is entitled to prevent only *unfair* competition, not all competition in general.

Additionally, there can be no doubt that the relationship between a physician and patient is highly personal, and certainly more personal than the relationship between the public and an insurance broker. In fact, the law so highly regards the physician-patient relationship that it makes all communications between them privileged. RCW 5.60.060(4); ER 501(j). There is no similar privilege for insurance brokers, yet the relationship between an insurance broker and client was so important that an employer could prevent only active solicitation of existing clients. *Alexander & Alexander*, 19 Wn. App. at 687. Here, the trial court's ruling prohibits Dr. Emerick from treating any patient, regardless of whether that patient had any relationship with CSC, within the restricted geographic area. The trial court's ruling gives substantially less deference to the highly personal, codified relationship between patients and physicians than the *Alexander & Alexander* court gave to insurance brokers.

Moreover, CSC's Non-Compete endangers the public in a larger way: it seeks to limit patient access based on their physician of choice. CSC relies heavily on the idea that Pierce County may be oversaturated

with cardiologists,[3] yet this approach pretends that one doctor is as good as another to a patient. Patients are not widgets and their choice of medical provider in time of a health crisis should not be limited or put at risk because of human resources or internal politics within a private company. If the lawyer-client relationship is so sacred that clients must be given the freedom to choose, the physician-patient relationship is that much more sacred.

Dr. Emerick's unique practice serves to underscore the importance of providing adequate public choice. Although CSC claims there are many cardiologists in Pierce County, and therefore no danger to the public, there are no cardiologists with Dr. Emerick's practice model, let alone any interventional cardiologists with his practice model. No other cardiologist provides the hands-on, one-on-one concierge service provided by Dr. Emerick. The unique nature and success of his practice model is borne out by the fact he has not had to admit a cardiac patient to the emergency room in the last **two years**. If CSC succeeds in shutting down Dr. Emerick's unique practice, it will eliminate Pierce County residents' only choice for unique, personalized interventional cardiac services.

Non-competition agreements restricting a patient's access to a physician are void as a matter of law on the basis of public policy. Patients, more so than legal clients, have a vested interest in the physician

[3] Notably, CSC combines interventional cardiologists with standard cardiologists in its cardiologist to patient ratio. There is no evidence that the number of interventional cardiologists exceeds the need in Pierce County.

of his or her choice. Doctors are not robots and patients should not be treated as widgets coming off an assembly line. Moreover, CSC's Non-Compete violates the public interest because it prevents the treatment of any patient within the restricted area for an excessively long period of time. CSC's Non-Compete is not tailored to prevent unfair competition or protect an existing client base. It is designed solely to prevent any competition, however legitimate.

*4. CSC's Non-Compete is not Reasonable or Necessary to Protect CSC's Legitimate Business Interests or Goodwill.*

The trial court also erred in granting CSC summary judgment because CSC failed to demonstrate that the Non-Compete was necessary to protect its legitimate business interests from Dr. Emerick. As such, the burden never passed to Dr. Emerick. However, even if the burden did shift to Dr. Emerick, he presented admissible evidence showing genuine issues of material fact as to the unreasonableness of CSC's Non-Compete. Both the geographic and temporal restrictions are unreasonable and unnecessary to protect CSC's legitimate business interests and goodwill. CSC seeks to stifle legitimate competition even though Dr. Emerick has already demonstrated that he does not use or receive benefits from CSC's referral sources, does not target CSC's patients, and does not trade on CSC's goodwill.

A geographic restriction is reasonable if it restricts the employee only in the geographic area necessary to protect the employee's business. *Alexander & Alexander*, 19 Wn. App. at 686-87. An employer is limited

to protecting its existing client base from depletion by a former employee. *Perry*, 109 Wn.2d at 700. A covenant prohibiting a former employee from providing services to a firm's clients for a reasonable time is a fair means of protecting that client base. *Id.*

Although Washington Courts have extended some deference to employers to restrict a former employee's ability to work with the employer's clients, Washington Courts have been "less deferential to general restrictions on competition that are not tied to specific customers." *Amazon.com, Inc. v. Powers*, 2012 WL 6726538, *9 (W.D. Wash. 2012).[4] Washington Courts "will readily shorten the duration or limit the geographic scope, especially when the employer cannot offer reasons that a longer or more expansive competitive restriction is necessary." *Id.*

In *Amazon.com*, the former employee signed a non-competition agreement that, *inter alia*, banned him, for a period of 18 months after his employment ended, from (1) doing business with Amazon's customers or prospective customers and (2) working in any capacity that competes with Amazon. *Id.* at 1 – 2. The district court declined to enforce the non-compete, finding that Amazon failed to produce any evidence that the former employee maintained relationships with Amazon's customers after leaving his employment with Amazon.

[4] A party may cite to an unpublished case from a jurisdiction other than a Washington State court if that jurisdiction allows citation to an unpublished case. GR 14.1(b). A court may not prohibit or restrict the citation of federal judicial opinions designated as "unpublished" if issued after January 1, 2007. Fed. R. App. P. 32.1(a).

The Court also declined to enforce the Agreement's "general non-competition clause" because it was "not reasonable." *Id.* at 10. The Court found that regardless of the geographic scope of the Agreement, the Court could not accept Amazon's implicit argument that it is impossible for the former employee to compete fairly with Amazon in the marketplace. *Id.* at 10. In addressing the anti-competitive nature of Amazon's non-competition agreement, the Court held that:

> A general ban on Mr. Powers' competing against Amazon for other cloud computing customers is not a ban on *unfair* competition, it is a ban on competition generally. Amazon cannot eliminate skilled employees from future competition by the simple expedient of hiring them. To rule otherwise would give Amazon far greater power than necessary to protect its legitimate business interest.

*Id.* at 10 ( emphasis added). The Court concluded that "[g]eneralized claims that a former employee cannot compete fairly are insufficient." *Id.* at 11 (citing *Copier Specialists, Inc. v. Gillen,* 76 Wn. App. 771, 887 P.2d 919, 920 (1995) (finding that the "training [an employee] acquired during his employment, without more," did not warrant enforcement of a geographically limited covenant not to compete)); *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 370 (1999) ("Dr. Farber was a pulmonologist. He did not learn his skills from VMS. Restrictive covenants are designed to protect an employer's customer base by preventing a skilled employee from leaving an employer and, based on his skill acquired from that employment, luring away the employer's clients or business while the employer is vulnerable – that is – before the employer has had a chance to

replace the employee with someone qualified to do the job") (quotations omitted).

Like Amazon, CSC has failed to demonstrate that Dr. Emerick's practice unfairly jeopardizes goodwill, an existing client base, or other legitimate interest or that the Non-Compete is necessary to protect against unfair competition. CSC relied on generalized statements that it has these interests and therefore the trial court should have enforced the Non-Compete. CSC did not show, however, that this particular Non-Compete was needed to protect its legitimate business interests. As such, the burden never shifted to Dr. Emerick.

Even if the burden had shifted to Dr. Emerick, he presented substantial evidence to demonstrate genuine issues of material fact as to whether CSC's Non-Compete was necessary to protect its legitimate business interests. Dr. Emerick hired independent consultants to develop a new patient care model that is unique to the State of Washington. Dr. Emerick did not rely on any of CSC's referral sources in setting up his practice, instead acquiring his patients through presentations he made after leaving CSC. When giving his professional presentations, placing advertisements, receiving recognitions, and providing high quality service to his own patients, Dr. Emerick does not trade on his prior employment at CSC. He leaves CSC off his list of professional experiences. Dr. Emerick presented evidence that his patients had either been turned away by CSC, had already left CSC, or had never heard of CSC. CSC presented no evidence that Dr. Emerick's practice cost CSC a single patient or that Dr.

Emerick received any value from his time at CSC that enabled him to be especially competitive with his former employer. In short, CSC provided no evidence that it lost one penny as a result of Dr. Emerick's practice.

Moreover, CSC's generic claim that it is attempting to protect a client base is undermined by the fact that CSC acknowledged that Dr. Emerick can continuing seeing the patients he treated while employed by CSC and by agreeing that Dr. Emerick should be allowed to treat cardiac patients within Pierce County. Moreover, Dr. Emerick has not attempted to go after CSC's existing customer base and does not have any list of CSC patients. CSC's attempts to enforce its Non-Compete have no basis in protecting an existing customer base.

CSC also failed to explain why a five-year non-compete was necessary to protect its legitimate business interests.

In *Amazon*, the Western District of Washington declined to enforce the 18-month restrictive period because Amazon failed to "explain[ ] why it selected an 18-month period, nor has it disputed [the former employee's] suggestion that the Agreement he signed is a 'form' agreement that Amazon requires virtually every employee to sign." 2012 WL 6726538, *10. Because Amazon failed to "tailor the duration of its competitive restrictions to individual employees, the court is not inclined to defer to its one-size-fits-all contractual choices." *Id.* The Court declined to enforce the non-compete for longer than nine months from the last date on which the former employee had access to Amazon's protectable information. *Id.*

Similarly, CSC failed to tailor the duration of its Non-Compete to what might be necessary to protect legitimate business interests. The five-year period is automatically included in each non-compete CSC enters into. The period is not tailored to individual employees and is, instead, a one-size-fits-all period.

Finally, CSC failed to demonstrate that the Non-Compete was necessary to protect its legitimate interests in "advancing [Dr. Emerick's] practice." I CP at 15 – 16. Dr. Emerick acquired his skills before joining CSC and paid for and obtained his board certification in intervention cardiology all on his own. I CP at 60 – 61. CSC presented no evidence to the contrary. Even if CSC had provided Dr. Emerick with training during his employment, which it did not, such training, "without more, does not warrant enforcement of the covenant not to compete." *Copier Specialists,* 76 Wn. App. at 774.

CSC failed to demonstrate that the Non-Compete was necessary to protect its legitimate business interests. Dr. Emerick raised several genuine issues of material fact demonstrating that he does not trade on CSC's referral sources, goodwill, or patient lists.

*5. The Geographic and Temporal Restrictions are Excessive.*

CSC's five-year restriction is excessively unreasonable as is the trial court's four-year ruling and no Washington appellate court has ever upheld such a lengthy restrictive covenant. CSC presented no evidence demonstrating why a lengthy non-compete period was needed to protect its business interests.

No Washington appellate court has ever found that a four- or five-year restrictive covenant is reasonable. *Amazon.com*, 2012 WL 6726538, *1 – 2 (W.D. Wash. 2012) (18-month restrictive period unreasonable when Amazon failed to "explain[ ] why it selected an 18-month period," and imposed the same restrictive period in each contract regardless of individual circumstances); *Seabury & Smith, Inc. v. Payne Fin. Grp., Inc.*, 393 F. Supp. 2d 1057, 1063 (E.D. Wash. 2005) (one-year restriction on working with former clients to be reasonable as a matter of law); *Pac. Aerospace & Elecs., v. Taylor*, 295 F. Supp. 2d 1205, 1218 (E.D. Wash. 2003) (two-year restriction on solicitation of former customers to be reasonable); *Perry*, 109 Wn.2d at 703 – 04 ("[i]t may be that a clause forbidding service [to former clients] for a 5 year period is unreasonable as a matter of law..."); *Knight, Vale & Gregory*, 37 Wn. App. at 371 (three-year non-compete restricting accountants' ability to perform accounting services for former employer's clients reasonable); *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. 538, 635 P.2d 1114 (1981) (two and one-half years); *Alexander & Alexander*, 19 Wn. App. at 688 (finding reasonable a two-year restrictive covenant); *Cent. Credit Collection Control Corp. v. Grayson*, 7 Wn. App. 56, 60, 499 P.2d 57 (1972) (two years).

In fact, Washington Courts have repeatedly refused to enforce a five year non-competition agreement. In *Perry*, the court opined that "[i]t may be that a clause forbidding service [to former clients] for a 5 year

period is unreasonable as a matter of law..." 109 Wn.2d at 703-04.[5] In *Armstrong*, the Court affirmed the trial court's decision to reduce a five-year restriction down to two and a half years. 30 Wn. App. 538. Moreover, contrary to CSC's expected argument, *Ashley*[6] did not hold that the 10-year restrictive covenant was reasonable or enforceable. I CP at 16 – 17. In *Ashley*, the defendant physicians did not challenge the reasonableness of the covenant's restrictive period; rather, they challenged the reasonableness of the covenant's liquidated damages provision. 80 Wn.2d at 279-80. The *Ashley* court offered no guidance or opinion on the reasonableness of the 10-year restrictive period and is inapplicable to this case. Rather, Washington Courts typically enforce restrictive periods of only "one to two years [and m]any judges disfavor going beyond one year." James M. Shore, "Using Physician Noncompete Agreements in Washington." Washington Health Care News (Nov. 10, 2010).

CSC has offered no reasons to justify why a five-year restrictive period is necessary to protect its referral sources. CSC has given no rationale to explain why it will take five years to protect its referral sources, particularly given the fact that Dr. Emerick allegedly endangered those referral sources during his employment with CSC. According to CSC, it had to terminate Dr. Emerick's employment because, *inter alia*, of complaints from referral sources. I CP at 4 – 5. However, CSC also

[5] Because the employer in *Perry* did not seek damages beyond a 17 month period following the employee's termination, the Court did not reach the reasonableness of the five-year period.

[6] *Ashley v. Lance*, 80 Wn.2d 274, 493 P.2d 1242 (1972).

argues that Dr. Emerick poses a threat to those same referral sources for five years after his employment ended. CSC's arguments cannot be reconciled. If Dr. Emerick's performance was so concerning that referral sources dropped off and CSC had to terminate Dr. Emerick's employment, surely Dr. Emerick poses no threat to CSC's referral sources. Moreover, referrals from Pierce County's hospitals are available to any physician with whom the hospitals want to do business. CSC is attempting to impermissibly restrict the actions of Pierce County's hospitals by the use of its Non-Compete.[7]

Moreover, CSC's Non-Compete exceeds what could reasonably be necessary to protect a legitimate business interest by stifling legitimate competition in general, rather than unfair competition.

In *Labriola*,[8] the non-competition covenant prohibited Labriola "both 'during and after termination of employment' from 'performing any work in competition with the services, sales and products of Employer' or 'becoming employed by any business competing with Employer.'" Justice Madsen in her concurrence held that "[b]y prohibiting Labriola from gaining lawful posttermination employment in such broad-sweeping terms, the agreement represents an unfair attempt to stabilize [Employer's]

---

[7] Cardiac's reliance below on out-of-state cases is especially peculiar given this court's admonishment that "to the extent the trial court relied on authority from other jurisdictions, it erred in invalidating the covenant on public policy grounds." *Emerick*, 170 Wn. App. at 259. Washington law provides sufficient guidance that a 5-year non-compete, let alone a seven-year non-compete, is not reasonable. There is no need to look at authority from other jurisdictions that may hold otherwise.

[8] *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 847, 100 P.3d 791 (2004) (Madsen, J., concurring).

workforce and secure its business against legitimate competition. *Postemployment restraints of this nature are never reasonable.*" *Labriola*, 152 Wn.2d at 847 (Madsen, J., concurring). Justice Madsen explained that the Employer had the right "to prevent Defendant from making use of any proprietary information he learned during his employment, but the agreement goes far beyond that to prohibit work on 'any...services that are competitive' with Plaintiff's services." *Labriola*, 152 Wn.2d at 847 (Madsen, J., concurring).

Similarly, CSC's non-competition provision seeks to stifle competition without securing any legitimate business interest by preventing "the practice of cardiac medicine in any manner."

> The Employee...agrees and covenants that during the Employee's employment by the Corporation and for sixty (60) full months after termination of such employment for any reason, the Employee will not, directly or indirectly, (i) anywhere within Pierce County and Federal Way, Washington...engage in the practice of cardiac medicine in any manner which is directly competitive with any aspect of the business of the Corporation...whether or not using any *Confidential Information.*

*Morgan Decl.*, ¶ 4, Exhibit C at 13.

CSC's Non-Compete prohibits Dr. Emerick from gaining lawful post-termination employment based solely on the fear that such employment would compete with CSC. Tellingly, like the provision in *Labriola*, this restriction applies whether or not Dr. Emerick uses any confidential information he may have obtained during his employment with CSC. This provision is but one piece of evidence showing that CSC

is less worried about protecting legitimate business interests than stifling legitimate competition. As the *Amazon* court held, it is improper to use a restrictive covenant to stamp out competition simply because an employer had hired the former employee. *See also Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9 A.D.3d 805, 806 (N.Y. 2004) (A former employer's interest in goodwill is not legitimate if the employer seeks to bar the former employee from soliciting or providing services to clients with whom the former employee never acquired a relationship through his or her employment or if the covenant extends to personal clients recruited through the employee's independent efforts).

CSC's Non-Compete is not reasonable in geographic or temporal scope and is not reasonably necessary to protect its business interests.

*6. The Trial Court Erred in Tolling the Non-Compete.*

Finally, the trial court erred by creating a new remedy of staying the counting of a restrictive period during litigation. This is a remedy never before given to an employer in Washington and contrary to Washington law.

Injunctive relief is not available after a noncompetition covenant expires. *Alexander & Alexander*, 19 Wn. App. at 688 (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); *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).

Here, there is no basis to toll the covenant's running and doing so constituted error. CSC never sought injunctive relief from this Court or the trial court tolling the noncompetition period during this litigation. Additionally, there is no language in CSC's noncompetition covenants that would allow for tolling during any alleged violation of the covenant. CSC did not, for example, bargain for the right to toll the covenant in the event of a breach. Rather, CSC's covenant states simply that it applies for "sixty (60) full months after termination of...employment." Despite the absence of any facts or law that would permit tolling, the trial court effectively tolled the noncompetition covenant's passage from June 2011 through September 2013. As such, CSC's covenant, originally scheduled to expire in September 2014, will not expire until at least 2016 by the trial court's order. The effect of this is to essentially grant CSC a **seven-year** restrictive covenant – far in excess of its own covenant or what is reasonable. CSC has offered no authority in which a Washington court actually used its blue-line authority to *increase* a restrictive period. The Court's order grants CSC injunctive relief far beyond the point in time when CSC's already overbroad, unreasonable covenant would expire on its own. This Court should hold that more than four years has passed and CSC's Non-Compete has expired, rendering these proceedings moot.

### B. The Trial Court Erred in Finding that CSC was the Substantially Prevailing Party.

Because the trial court rejected the relief sought by both parties and instead granted relief neutral to each party's requests, neither party is the prevailing party. Because the Court found the non-competition covenant unenforceable before "blue penciling" the provision, Dr. Emerick has grounds to argue that he is the substantially prevailing party. However, as noted herein, Dr. Emerick believes the necessary and equitable result of the Court's oral ruling is that neither party is the prevailing party.

Washington State follows the American Rule for attorney fees in which each party generally bears the cost of their attorney fees unless an exception applies. Attorney fees are not awarded unless expressly authorized by contract, statute, or recognized equitable exception. *Pierce Cnty. v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006). The general rule in determining who is the "prevailing party" for the purpose of awarding attorney fees is the "substantially prevailing" or "net affirmative judgment" rule, meaning that the prevailing party is the one who receives an affirmative judgment in his favor. *Riss v. Angel,* 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If neither party wholly prevails, then the party who *substantially* prevails is the prevailing party. *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 8, 970 P.2d 343 (1999). "Whether a party is a 'prevailing party' is a mixed question of law and fact that [this court] reviews under an error of law standard." *Wright v. Dave Johnson Ins.,*

*Inc.*, 167 Wn. App. 758, 782, 275 P.3d 339, *rev. denied*, 175 Wn.2d 1008 (2012); *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000).

As a result of Dr. Emerick's filing of this action, two courts have found CSC's Non-Compete unreasonable and unenforceable and has resulted in a covenant that is significantly less restrictive than the one CSC drafted and sought to enforce. The filing of the suit itself forced CSC to concede that the geographic restraint it had sought to impose should at least be reduced to a five-mile radius. *See* Verbatim Report of Proceedings (VRP) (Aug. 9, 2013) at 10 – 11. Dr. Emerick managed to reduce the restricted area by more than 97 percent based on 2008 census data. VI CP at 727 – 28. CSC has also, and rightly, conceded, that it would be unreasonable to attempt to bar Dr. Emerick from practicing medicine in Pierce County hospitals.

Even with those concessions, though, the trial court found that the "modified" covenant urged by CSC would be unreasonable and unenforceable. For example, the Court noted that CSC's suggested five-mile radius "would exclude nearly all incorporated areas of Pierce County and all business zones within Pierce County. The five-mile zones would overlap and would leave essentially a very small area for Dr. Emerick to put an office. I feel that effectively a five-mile radius would push Dr. Emerick out of Pierce County just like the original language of the

noncompete agreement would do." VRP (Aug. 9, 2013) at 11 – 12. Additionally, the Court found that "a noncompete that attempts to remove hospital privileges is unreasonable. That will not be permitted." VRP (Aug. 9, 2013) at 12.

In rejecting the covenant, the Court granted relief that Dr. Emerick has sought from the outset: a declaration that CSC's covenant is unreasonable and unenforceable. There can be no doubt that the Court rejected the covenant CSC wrote and then modified by its concessions. Indeed a finding that a covenant is unreasonable and unenforceable is a necessary predicate to the use of the Court's "blue pencil."[9]

In rewriting the covenant, the Court substantially limited its geographic restrictions, reducing them from all of Pierce County to "within a two-mile geographic area surrounding each of CSC's four Pierce County offices." VRP (Aug. 9, 2013) at 11. And, the Court limited the temporal restrictions to an additional 28 months from the time Dr. Emerick relocates his office outside of the two-mile radius, rather than the additional five years from the time of the Court's order, as requested by CSC. VRP (Aug. 9, 2013) at 17.

In comparing Dr. Emerick's circumstances before he filed suit and his position now, one could very reasonably conclude that he has significantly improved his position by litigating this case and therefore has

[9] In order for the Court to "blue pencil" Defendant's anti-competition covenant, it had to first determine that it was unreasonable and, therefore unenforceable. *Perry*, 109 Wn.2d at 705 (holding that "such a modification is proper only where the original covenant is unenforceable.").

substantially prevailed. One could also reasonably conclude, as have other courts in similar circumstances, that neither party has prevailed, because the outcome lies somewhere in the middle of the spectrum between enforcement of the covenant as originally written by CSC (and even as urged by it most recently) and complete invalidation. In an equitable proceeding such as this, a ruling that neither party prevailed is the one that best fits how the court's ruling squares with the relief each party has sought. The alternative urged by CSC – an award of attorney fees to a party whose anti-competition covenant was rejected and rewritten – would be unprecedented in Washington and contrary to persuasive authorities from other jurisdictions. It also encourages employers to draft overbroad restrictive covenants and force employees to litigate their rights because the trial court is likely to retain some portion of the covenant.

There are two non-competition agreement cases that discuss awards of attorney fees and costs. In *Perry v. Moran*, *supra*, the court held that an employer is entitled to attorney fees in a non-competition agreement case when the court finds that the restrictive covenant is reasonable and enforceable. *Perry*, 109 Wn.2d at 705 (awarding attorney fees to a former employer after finding that restrictive covenant was reasonable and enforceable and thus not subject to modification). In *Labriola*, the court awarded attorney fees and costs to the former employee after determining that the entire restrictive covenant failed for lack of consideration. 152 Wn.2d at 838 – 39.

There is no reported Washington decision addressing whether there is a "prevailing party" for purposes of an attorney fee provision when the court rejects a covenant as written and rewrites it. In other jurisdictions, courts have held that when a noncompetition agreement is blue penciled, neither party substantially prevails. *Zambelli Fireworks Mfg. Co. v. Wood*, 2010 WL 4672357, *9 (W.D. Penn. 2010); *Paradise v. Midwest Asphalt Coatings, Inc.*, 316 S.W.3d 327 (Mo. Ct. App. 2010); *see also Profit Wize Marketing v. Wiest*, 812 A.2d 1270 (Penn. 2002) (holding that employer was not entitled to attorney fees as prevailing party when the parties entered into a settlement and stipulated to entry of a permanent injunction that blue penciled the noncompetition agreement because the permanent injunction constituted a compromise and neither party emerged as the "clear-cut winner").

In *Zambelli*, the employer sued its former employee to enforce restrictive covenants. Initially, the trial court granted the employer a preliminary injunction. On later motions, the Court also found that the restrictive covenants were enforceable and the employee had breached the restrictive covenants. However, the Court also found that the non-compete provisions were overbroad and blue penciled the agreement. *Zambelli*, 2010 WL 4672357, at * 1 – 2. The employer then sought attorney fees, arguing that it had prevailed. *Id.* at * 7. The Court rejected the employer's argument, holding that the relief granted "represented a middle ground." *Id.* at * 9. "In sum...there was no 'clear cut winner' in

this case." *Id.* at * 10. The Court held that neither party was a prevailing party entitled to attorney fees. *Id.* at * 10.

In *Paradise*, the employee sought declaratory judgment to void the noncompetition agreement he had signed with his former employer, damages for unpaid sales commissions, and attorney fees. 316 S.W.3d at 328. The employer counterclaimed seeking a ruling that the noncompetition agreement was valid, an injunction, and an award of attorney fees. *Paradise*, 316 S.W.3d at 328. After a bench trial, the Court ruled against the employee for his unpaid sales commissions claim and refused to void the noncompetition agreement. However, the Court also found that the temporal restriction and attorney fee provisions were unreasonable and revised them. The trial court then enforced the rewritten agreement, but denied the employer an injunction. Instead, the Court stated that the employee would not violate the noncompetition in any manner. 316 S.W.3d at 328 – 29. The trial court denied the employer's request for attorney fees.

On appeal, the court of appeals held that the employer was not the prevailing party. Although the appellate court reversed the trial court's denial of an injunction, the court held that the employer had not prevailed. Specifically, the Court relied on the fact that it was enforcing the modified agreement "rather than the agreement the parties signed. Consequently, [the employer] did not prevail on its main issue (i.e. the validity of the original non-compete agreement) and is not entitled to attorney fees." *Paradise*, 316 S.W.3d at 330.

As in *Paradise* and *Zambelli*, no party prevailed here. Dr. Emerick sought a finding that the non-competition agreement was either unenforceable in its entirety or was unenforceable and should be limited in time and geographic scope from five years and all of Pierce County to one year and within 500 feet of CSC's offices. CSC originally sought enforcement of the covenant as written. Later, and almost immediately before a hearing, CSC conceded that its geographic scope was unreasonable, but insisted that the non-competition agreement be enforced over essentially the same geographic area for an additional five years from the date of the trial court's order. The trial court granted hybrid relief.

The trial court agreed with an argument that Dr. Emerick has made since the inception of this case – that the geographic scope of the non-competition agreement was overly broad and that the five-year period was unreasonable. It was not until sometime after the litigation commenced that CSC finally acknowledged its own geographic restriction was unreasonable. Even then, the Court rejected the modified restriction proposed by CSC as really a distinction without a difference. CSC never conceded that the temporal restriction in the covenant was overbroad and, in fact, lobbied for an *extension* of the five-year period to start from the date of the current Order. Ultimately, the trial court did not give either party the relief sought on either issue. The trial court rewrote the non-competition agreement to dramatically reduce the Agreement's geographic restrictions to within two miles of a CSC location and for two years following Dr. Emerick's forced relocation. Neither party obtained the

relief sought and the trial court must have found the non-competition agreement unenforceable before it could revise the agreement. *Perry*, 109 Wn.2d at 703 (holding that "such a modification is proper only where the original covenant is unenforceable").

The trial court enforced a substantially revised noncompetition provision only after finding that the original terms were overbroad and unenforceable. As such, neither party substantially prevailed and instead received equal relief. Accordingly, there was no prevailing party or substantially prevailing party and the trial court erred.

Lastly, CSC did not prevail simply because the trial court agreed to enter an injunction. This argument misapprehends prevailing on an issue versus receiving a remedy. The granting of an injunction is only a remedy. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) ("An injunction is distinctly an equitable remedy..."); *Paradise*, 316 S.W.3d at 330. An injunction cannot be granted without first finding that the non-compete agreement is valid. Consequently, an injunction is not the main issue but the remedy. *Paradise*, 316 S.W.3d. at 330. In *Paradise*, although the Court held that the employer was entitled to an injunction, the Court also held that the employer did not prevail because the injunction enforced a modified noncompetition agreement. *Paradise*, 316 S.W.3d. at 330. That is exactly what happened here.

If any party has substantially prevailed, it is actually Dr. Emerick. In his Complaint for Injunctive and Declaratory Relief, Dr. Emerick requested "Judgment declaring that Paragraph 13 of the Agreement is

unenforceable." V CP at 639. As stated above, the trial court must have found, and did in fact find, that covenant unenforceable before it could blue pencil the covenant to a substantially reduced geographic restriction and a reduced temporal restriction. Dr. Emerick has thus obtained the relief he sought. If any party prevailed or substantially prevailed, it was Dr. Emerick. *See Head v. Morris Veterinary Cntr., Inc.,* 2005 WL 1620328 (Minn. 2005) (holding that employee was the prevailing party entitled to attorney fees when the trial court found the noncompetition clause unreasonable and modified the temporal scope).[10] This Court should hold that the trial court erred in determining that CSC was the substantially prevailing party and reverse. If this Court reverses, it should hold that Dr. Emerick is the prevailing party below.

### C. The Trial Court Abused its Discretion in Awarding CSC $204,251.39 in Attorney Fees and Costs.

If this Court does not reverse the trial court's decision that CSC was the substantially prevailing party, this Court should hold that the trial court abused its discretion in calculating the amount of fees award to CSC. CSC's fees are unreasonable given the inclusion of matters on which it did not prevail and matters unrelated to this litigation. In addition, CSC used at least **15** attorneys and failed to exercise billing discretion.

[10] A party may cite to an unpublished case from a jurisdiction other than a Washington State court if that jurisdiction allows citation to an unpublished case. GR 14.1. Minn. Stat. 480A.08(3)(c) permits citations to unpublished opinions when "the party citing the unpublished opinion provides a full and correct copy to all other counsel...at the time the brief or memorandum is served..." Dr. Emerick provided a copy of Head to the trial court and opposing counsel.

"In determining reasonable attorney fees, the trial court must first calculate the 'lodestar' figure," which "represents the number of hours reasonably expended (discounting hours spent on unsuccessful claims, duplicated effort, and otherwise unproductive time) multiplied by the attorney's reasonable hourly rate." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 341, 54 P.3d 665 (2002). "Necessarily [then, the lodestar method] requires the court to exclude from the requested hours...any hours pertaining to unsuccessful theories or claims." *Mahler v. Szucs,* 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998), *overruled on other grounds*, *Matsyuk v. State Farm Fire & Cas. Ins.*, 173 Wn.2d 643, 272 P.3d 802 (2012). Courts should not simply accept unquestioningly fee affidavits from counsel. *Mahler*, 135 Wn.2d at 434-35 (citing *Nordstrom, Inc. v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987)).

CSC is entitled to attorney fees only on those issues for which it is the substantially prevailing party. The trial court found that CSC prevailed on its motion for summary judgment as to the enforceability of the substantially revised Non-Compete and CSC's fees should be limited to that amount: **$30,823.50**. These are the fees incurred by CSC for its motion for summary judgment, arguments regarding prevailing party, and post-judgment pleadings. As explained below, this amount does not include **$2,430.00** expended by CSC for its unsuccessful attempts to hasten the date on which Dr. Emerick must relocate his practice.

Additionally, CSC is not entitled to attorney fees for administrative tasks performed by attorneys. *N. Coast Elec. Co. v. Selig*, 136 Wn. App.

636, 644-45, 151 P.3d 211 (2007). Here, CSC billed **$3,275.00** in attorney time for administrative tasks, such as billing work and filing. III CP at 479 – 597. Such time is inappropriate and should be excluded.

Additionally, CSC's Motion included several requests for claims on which it was unsuccessful, including without limitation the 2009 and 2010 motions for summary judgment, opposition to Dr. Emerick's motion to strike, and motion for a protective order. CSC did not prevail on these issues. Moreover, CSC did not appeal the trial court's denial or granting of the non-summary judgment motions and those rulings stand. Additionally, this court denied CSC's motion for attorney fees on the summary judgment rulings and did not rule that the trial court could consider fees for CSC on those motions. Finally, CSC seeks fees for its attempts to restrict the amount of time that Dr. Emerick has to relocate his office. These attempts were unsuccessful. As such, **$79,675.00** in fees for matters on which CSC was unsuccessful should be excluded.

CSC has requested considerable attorney fees for matters unrelated to this litigation. For example, CSC requests attorney fees for its efforts to terminate Dr. Emerick; CSC's counsel's potential conflict of interest; corporate work for CSC; legal action CSC considered against non-parties, such as Franciscan; its work on malpractice coverage; accounting issues;[11] and other non-litigation matters. III CP at 482 – 88. In fact, CSC previously requested that the trial court grant it an offset for its attorney

[11] CSC acknowledged in its 2010 opposition to Dr. Emerick's request for attorney fees that Dr. Emerick did not seek fees for the accounting issues. *Response to Motion for Attorneys' Fees and Costs* at 2, filed December 1, 2010.

fees related to accounting issues, which the trial court denied. CSC did not appeal this issue. Additionally, as Dr. Emerick pointed out to the trial court, "CSC previously took the position that Dr. Emerick should recover 'only...those directly attributable to the non-competition issue.'" III CP at 475. CSC's unreasonable request for fees unrelated to this litigation, fees CSC itself argued were unreasonable in 2010, total **$22,588.50**.

Finally, the trial court abused its discretion in awarding CSC unreasonable attorney fees. Fee applicants must exercise what the Supreme Court has termed "billing judgment." *Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S. Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983). That means they must exclude from their fee applications "excessive, redundant, or otherwise unnecessary [hours]," which are hours "that would be unreasonable to bill to a client and therefore to one's adversary *irrespective of the skill, reputation or experience of counsel.*" *Am. Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999).

> If fee applicants do not exercise billing judgment, courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are "excessive, redundant, or otherwise unnecessary." Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded.

*Am. Civil Liberties Union of Ga.*, 168 F.3d at 428.

The fees and costs incurred by the Appellant are unreasonable in that a total of **fifteen** attorneys (seven partners and eight associates) worked on the briefing of this matter constituting massive amounts of

duplicative work. CSC does not provide education or experience histories for the majority of the many attorneys who have assisted on their case. CSC's many attorneys performed duplicative work that drove up the cost of CSC's services. For example, the trial court originally determined that Dr. Emerick was entitled to $41,296.75 in fees through the date of the judgment Dr. Emerick originally obtained on December 9, 2010. Through the same date, CSC had incurred a staggering **$167,889.00** in fees, or **405 percent greater** than the amount of fees that the trial court found reasonable for Dr. Emerick. Now Dr. Emerick is forced to incur his own attorney's fees and costs to address Appellant's unauthorized filing of an Affidavit for Attorney's Fees and Cost Bill.

CSC did not exercise billing discretion in this case and is attempting to foist onto Dr. Emerick its excessive bill of nearly a third of a million dollars. This Court should hold that the trial court abused its discretion by awarding CSC attorney unreasonable attorney fees.

Finally, CSC's cost request includes unreasonable costs for which Dr. Emerick should not be held responsible. CSC requests **$7,400.00** for "Community need physician supply and demand analysis by Sandra Champion" performed on February 3, 2010. III CP at 489 – 597. This is a matter on which CSC was unsuccessful. It is also excessive given the market. Additionally, CSC attempts to recover the costs of its appellate costs in the amount of **$1,368.87**. These costs include CSC's filing fees and costs for briefs, Clerk's Papers, Statement of Arrangements, and Verbatim Reports of Proceedings.

**D. Dr. Emerick Requests Attorney Fees and Costs on Appeal.**

Attorney's fees and expenses incurred on appeal can be awarded if applicable law, a contract, or equity permits an award of such fees and expenses. RAP 18.1(a). The party requesting an award of fees and expenses must devote a section of its opening brief to the request for the fees or expenses. RAP 18.1(b).

Assuming that an applicable provision in a contract provides that attorney fees will be paid in a suit to enforce the instrument, the court has no authority to disregard it. 14A K. Teglund, WASHINGTON PRACTICE: CIVIL PROCEDURE, § 37.6, at 549 (1st ed. 2003) (citing several cases, including *Seattle First Nat. Bank v. Mitchell*, 87 Wn. App. 448, 942 P.2d 1022 (1997)).

The Non-Compete grants attorney fees to the prevailing party. As such, this Court should award Dr. Emerick his attorney fees and expenses incurred on appeal in the event that Dr. Emerick is the prevailing party before this Court and remand to the superior court for an award of prevailing party attorney fees.

## V. CONCLUSION

For these reasons, Dr. Emerick requests that this Court hold that non-competition agreements involving doctors are void as a matter of public policy. In the alternative, this Court should hold that CSC's Non-Compete is overbroad and violates public policy. This Court should also hold that the trial court erred in imposing an unreasonable temporal and

geographic restriction on Dr. Emerick. This Court should also hold that the trial court erred in finding that CSC was the substantially prevailing party when neither party obtained the relief they sought and Dr. Emerick obtained substantially more relief than CSC by reducing the restricted area by 97 percent. Finally, Dr. Emerick requests that this Court hold that the trial court abused its discretion in awarding CSC's excessive fees and costs. This Court should grant Dr. Emerick an award of attorney fees and remand this case to the superior court for an award in Dr. Emerick's favor of his attorneys fees, as prevailing party.

RESPECTFULLY SUBMITTED this 20th day of February, 2014.

EISENHOWER CARLSON, PLLC

By: _____

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

## 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<br>Valarie Zeeck<br>Gordon Thomas Honeywell, LLP<br>1201 Pacific Ave., Suite 2100<br>Tacoma, WA 98402 | ☐ U.S. First Class Mail, postage prepaid<br>☐ Via Legal Messenger<br>☐ Overnight Courier<br>☑ Electronically via email<br>☐ Facsimile<br>☑ Hand Delivery |

DATED this 20th day of February, 2014 at Tacoma, Washington.

Cindy C. Rochelle
Legal Assistant to Chrystina Solum