No. 45462-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT EMERICK

Appellant/Cross-Respondent,

v.

CARDIAC STUDY CENTER, INC., P.S.

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER CASES

STATUTES

COURT RULES

I. SUMMARY OF ARGUMENT

Noncompetition agreements with employees are enforceable in Washington if they are reasonable under an established three-part analysis. The trial court received this case on remand with clear instructions from this Court on how to properly analyze the noncompete in Emerick's agreement. The analysis was set forth in detail in *Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. 248, 286 P.3d 689, *rev. denied*, 175 Wn.2d 1028 (2012) (*Emerick I*). The trial court, after conducting the proper legal analysis, found the noncompete enforceable throughout a two-mile geographic radius surrounding each Cardiac location for a four year period. Because Emerick was actively breaching the noncompete by practicing a short distance from Cardiac's Gig Harbor office, the trial court ordered injunctive relief requiring Emerick to move his office to comply with the geographic restrictions, and ruled that the remaining 28 months of the noncompete would run after Emerick moved his office to a location in compliance with the noncompete. However, the trial court erred in denying Cardiac its fees related to earlier successful appeal.

Emerick assigns error to nearly every ruling the trial court made on remand. On appeal, he also renews his previously rejected argument that noncompetition agreements among physicians are void as a matter of

public policy. They are not. This Court had the opportunity to consider that novel proposition, as did the Washington Supreme Court when Emerick petitioned for review, and both rejected the position Emerick advocates. Having once persuaded the trial court to follow him down the rabbit hole of public policy, on remand Emerick was unable to duplicate the same Pied Piper effect. Emerick now contends that the trial court's proper application of Washington law constitutes reversible error. It does not. The trial court's determination on summary judgment should be affirmed, as should its rulings enforcing the noncompete through an injunction. This Court should also affirm the trial court's order finding that Cardiac is the prevailing party and that Cardiac's fees were reasonable, but the trial court's denial of Cardiac's attorneys' fees for work performed on the first appeal should be reversed.

II. ASSIGNMENT OF ERROR

The trial court erred when, after finding Cardiac was the prevailing party and determining that Cardiac's attorneys' fees were reasonable, it denied Cardiac's request for its attorneys' fees for work relating to its successful initial appeal.

III. STATEMENT OF THE CASE

A. Facts Underlying the Dispute.

Cardiac is a professional services corporation founded in 1966 and engaged in the practice of cardiology. Clerk's Papers ("CP") 1158. Cardiac has four Pierce County offices, each located near one or more of the county's main hospitals, and each hospital serves as a major referral source for Cardiac's practice. CP 1159. Cardiac located its offices in close proximity to area hospitals intentionally because these hospitals act as a valuable referral source for Cardiac and the close proximity of Cardiac to each hospital was a strategic decision that has helped foster these referral relationships. CP 1187-88.

Cardiac is composed of approximately 15 practicing cardiologists. CP 1158. There is no shortage of cardiologists in Pierce County, and relevant data indicates that there are approximately 4.4 cardiologists for every 100,000 people In the Pierce County and South Puget Sound Area. CP 1278-80. This number is well in excess of the standard market demand of 2.6 cardiologists per 100,000 people as calculated by Merritt Hawkins Associates, authorities on these issues. CP 1280. In short, the Pierce County area is saturated with cardiologists, and the ratio of cardiologists per capita far exceeds national norms. CP 1280-81, 1314-17.

Emerick joined Cardiac in 2002, after spending approximately three years as a cardiologist in Memphis, Tennessee. CP 635. Before joining Cardiac and its well-established cardiology practice, Emerick had never privately practiced as a cardiologist anywhere in the State of Washington and he had absolutely no patient base in Pierce County. CP 807. Rather than start his own practice, building his own goodwill, referral sources, and patient base, Emerick chose to join Cardiac, a long-standing practice with significant business goodwill and an established patient base and referral base built over decades. CP 79-80, 1187-880. Because Cardiac believed it was important to protect its business goodwill, and referral and patient base, it required Emerick to sign an Employment Agreement that included a noncompete. CP 834-46.

In February 2004, after practicing with Cardiac for two years as an employee, Cardiac offered Emerick the opportunity to become a shareholder in the practice. CP 817, 635-36. During this time, Emerick sat for the interventional cardiology board as a shareholder of Cardiac. CP 61, Br. of App. 5. As was required of all shareholders, Emerick executed a Shareholder Employment Agreement (the "Agreement"), which also included a noncompete similar to the one in his Employment Agreement. CP 641-55, 817, 848. In the event of Emerick's separation from Cardiac, paragraph 13(e), of the Agreement, restricts his ability to

compete, and paragraph 13(f) expressly acknowledges Cardiac's need for this protection and includes related savings provisions. CP 652-53.

Along with specifically acknowledging the value of Cardiac's confidential information and business goodwill, along with its other protectable interests, Emerick agreed that "for sixty (60) full months after termination of such employment for any reason," he would 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 ... ." CP 652-53.

In August 2005, Cardiac began to receive complaints about Emerick's conduct from patients and other medical practitioners. CP 817-19. Over the next three and a half years Cardiac continued to receive dozens of complaints about Emerick's behavior.[1] CP 816-27. These complaints began to impact Cardiac's practice, with some members of important referral sources and at least one other individual physician reducing their referrals to Cardiac. CP 818, 825. Between August 2005 and February 2009, the other shareholders undertook extensive efforts to

[1] Generally speaking, the complaints allege that Emerick is verbally abusive to patients and other medical providers. The specific complaints and Cardiac's efforts to resolve them are set forth in the Declaration of Eugene Lapin, M.D. (CP 816-27) and its attached exhibits. While Emerick contests these complaints, they are not hearsay under 801(c). *See Emerick I*, 170 Wn. App at 253 n.3.

counsel Emerick and correct this behavior. CP 816-27. Despite these efforts, Emerick remained unwilling or unable to conform his professional conduct to Cardiac's expectations, leading to its Professional Conduct Committee's February 2009 recommendation that Cardiac terminate Emerick. CP 826.

Cardiac's shareholders formally voted to terminate Emerick on May 6, 2009. CP 826. After the vote, Cardiac repeatedly offered Emerick the opportunity to resign from the practice rather than be fired, but he refused to resign. CP 826. Cardiac sent Emerick a Notice of Termination on September 9, 2009, effective September 30, 2009. CP 816, 1159.

B. Initial Litigation and First Appeal.

On September 24, 2009, just days before his termination became effective, Emerick filed this lawsuit seeking injunctive and declaratory relief to invalidate the noncompete provision in the Agreement. CP 634-55. Emerick unsuccessfully sought a TRO to prevent Cardiac from enforcing the noncompete. CP 616. Cardiac then filed a motion for summary judgment seeking to enforce the noncompete; Emerick cross-moved and the motions were eventually argued on March 5, 2010. *See* CP 1324-50 (Verbatim Transcript of Proceedings ("VTP") 3/5/10).

As the primary basis for summary judgment, Emerick argued that the noncompete was unenforceable as a matter of public policy, relying

heavily on the assertion that the noncompete would impermissibly restrict patient choice. CP 1332-34. In contrast, Cardiac focused on its legitimate business interests and the reasonableness of the geographic and temporal scope of the noncompete. CP 1328.

On summary judgment, Cardiac demonstrated that when Emerick joined its practice he was instantly given access to an established client base and referral sources due to Cardiac's good will in the medical community in Pierce County and Federal Way. CP 1159, 1187-88. Cardiac also demonstrated that the scope of the restriction was reasonable, even agreeing to eliminate any possibility of geographic over-breadth by seeking to enforce the noncompetition restriction only within a five-mile radius of Cardiac's Pierce County clinics. CP 1295, 1349. This would permit Emerick to practice in Federal Way, anywhere outside of Pierce County, or within Pierce County so long as he was not within five miles of a Cardiac office. Cardiac also agreed that Emerick would not be restricted from treating any of his former patients from Cardiac if those patients preferred to be seen by Emerick at his new location. CP 1331.

The trial court refused to enforce the noncompete concluding that it was unenforceable as a violation of public policy, but then ruling that Emerick "shall not solicit any CSC patients." CP 1319. On December 3, 2010, the trial court entered final judgment. CP 1375-80. The judgment

included conclusions of law that Cardiac's interests in enforcing the noncompete were "minimal," that the noncompete had "public policy implications that must be considered" that patients have "significant interests worthy of substantial protection," and that the noncompete was overly broad. CP 1378-79. After granting Emerick's motion, the trial court found that Emerick was the prevailing party entitled to judgment against Cardiac for his reasonable attorneys' fees under the Agreement. CP 1375-80.

Cardiac timely appealed, and in an initially-unpublished decision, this Court reversed the trial court's grant of summary judgment to Emerick, vacated the award of prevailing party attorneys', and remanded the case to the trial court for additional proceedings. CP 1381-91. The Court also awarded Cardiac its "statutory attorney fees on appeal." CP 1391. Following a motion by Cardiac for clarification of the fee award, the court issued an Order Amending Opinion on July 10, 2012, stating that Cardiac was awarded its statutory attorney's fees but was denied fees under RAP 18.1. CP 1392-93. On August 8, 2012, the Court of Appeals issued a second order amending the opinion and granting Cardiac's and non-party UW Physicians motions to publish the opinion. CP 1394-95. The amendment to the Court's unpublished opinion contained in this second order removed mention of RAP 18.1, and

included only the Court's original statement that Cardiac was awarded its statutory attorney's fees. CP 1395. The Court of Appeals filed its Mandate with the trial court on January 9, 2013 returning the case to the trial court for further proceedings. CP 1396-1425.[2]

In *Emerick I*, this Court rejected Emerick's assertion that noncompetes were not enforceable against physicians, pointing to longstanding Washington Supreme Court precedent that Cardiac relied upon that the trial court disregarded. *Emerick I*, 170 Wn. App. at 259. This Court identified several errors with the trial court's ruling, including the fact that the trial court "did not discuss Cardiac's protected interests in its client base or its investment in Emerick," and the trial court's determination that "Cardiac had only minimal interests to protect." *Id.* at 256. This error, "allowed the court to dispose of the scope analysis without balancing Cardiac's actual protectable business against the time and geographic restrictions" in the Agreement. *Id.* This Court also found that the trial court gave undue weight to public policy concerns, "erred in invalidating the covenant on public policy grounds," and also erred when it "failed to address whether the covenant could be saved to some extent"

[2] The court then filed an identical Mandate, with the same date as the previously-filed Mandate, on January 22, 2013, which appears to have simply removed duplicate copies of attachments that were included in the first filing. CP 1426-42.

if found to be overbroad after a proper analysis. *Id.* at 258-59. Emerick unsuccessfully petitioned the Washington Supreme Court for review.

While Cardiac's appeal was pending, Emerick made the decision to open a new medical practice located approximately 1,000 feet from Cardiac's Gig Harbor location. CP 34. At the time he opened this practice in June 2011, less than two years had passed since he was terminated from Cardiac (CP 973) and Cardiac's appeal of the trial court's decision refusing to enforce Emerick's noncompete was already pending. Emerick took a calculated risk in opening his new practice in such close proximity to Cardiac while the enforceability of the noncompete was unsettled.

C. Procedural History Following Remand.

Following remand, Cardiac once again moved the trial court for summary judgment on essentially the same record as Emerick's and Cardiac's previous motions. CP 1-33. Emerick, despite having prevailed in his efforts at summary judgment on the same record, opposed summary judgment on remand, contending that there were now issues of fact precluding determination of the enforceability of the parties' Agreement. CP 42-59. Emerick then moved for a continuance, claiming that additional discovery was needed for the trial court to evaluate whether Emerick's cardiology practice was in "competition" with Cardiac's

cardiology practice. CP 86-90. The trial court granted a continuance, and Emerick marshalled a slew of declarations from his current patients. *See* CP 151-83. Cardiac lodged specific objections to the content of these declarations (CP 1351-56) to which Emerick responded (CP 1357-71).

On August 9, 2013, the trial court heard oral argument on Cardiac's motion for summary judgment, and made several oral rulings and findings in connection with granting Cardiac's motion. VTP 8/9/13. As a preliminary finding, the trial court noted that the question of whether Emerick's current practice was "competition" with Cardiac did not preclude or affect the court's legal determination as to whether the noncompete was enforceable. VTP 8/9/13 at 5:19-22. The trial court found that, just as was true in 2010 when Emerick sought summary judgment, there were no questions of material fact regarding the reasonableness and enforceability of the noncompete. Id. at 6:1-4.

The trial court then made several specific findings with regard to enforceability. The court concluded that the noncompete was "necessary to protect Cardiac's business interest[s]," including Cardiac's individual patients, goodwill, reputation, business location, referral sources, and reputation with the medical community. VTP 8/9/13 at 8:16-23. The trial court next considered the extent to which the noncompete as originally drafted affected Emerick's interests, and concluded that the noncompete

was overbroad as written, but that it could reasonably and lawfully be enforced within the geographic scope of a two-mile radius around each of Cardiac's existing offices, for a period of four years. *Id.* at 9:19-22, 12:3-13:4. The trial court also considered the effect of the noncompete on the public and concluded that, as revised, the noncompete did not injure the public. *Id.* at 9:24-10:14.

The trial court then addressed enforcement, finding Emerick in breach of the parties' Agreement at the time of the order based on his cardiology practice operating within approximately 1,000 feet of Cardiac's Gig Harbor location. *Id.* at 14:24-15:18. The trial court determined that Emerick would be enjoined from competition for the term of the noncompete as revised, and that the remaining term would begin to run only after Emerick relocated his medical practice to a location outside the restricted area. *Id* at 16:19-17:1.

During the August 9, 2013 hearing, the trial court did not reach a decision regarding the period of time within which Emerick could relocate his existing practice consistent with the revised noncompete. Instead, the trial court noted that the parties should present additional authority on that point. 8/9/13 VTP at 17:2-7. Between August 23, 2013 and September 11, 2013, the parties provided the trial court with extensive materials on a reasonable calculation of the time within which Emerick could relocate his

practice, as well as legal authority regarding which party was "prevailing" in the action. *See* CP 184-316. On September 11, 2013, the parties appeared before the trial court for entry of the court's order on summary judgment; during this hearing the trial court again made detailed findings, now reflected in the Order Granting Summary Judgment. CP 319-324.

Following the trial court's entry of summary judgment in Cardiac's favor, and determination that Cardiac was the substantially prevailing party in this case, Cardiac moved for an award of attorney's fees under Paragraph 13 of the Agreement and RCW 4.84.330. CP 326-34. Emerick opposed Cardiac's motion for an award of attorney's fees on several grounds, including the argument that Cardiac was not entitled to its prevailing party attorney's fees for work performed on appeal because the Court of Appeals had declined to award Cardiac its prevailing party fees on appeal and instead awarded only Cardiac's statutory attorney's fees. CP 470-71. Emerick argued to the trial court that Cardiac was precluded from recovering these fees because the Court of Appeals had denied Cardiac's request and that denial had not been appealed. Emerick's counsel stated: "And the mandate says – this is a direct quote from the mandate – 'We deny Cardiac an award of attorney's fees under RAP 18.1 because it did not devote a section of its opening brief to the request for

fees.' ... That's done." Verbatim Transcript of Proceedings, October 18, 2013 ("10/18/13 VTP") at 11:9-13.

That quote, however, was read from the Court of Appeal's first order amending its decision, which was then replaced and superseded by the Court of Appeal's second order amending and publishing its opinion. *See* CP 1392-93 (first Order); CP 1394-95 (second Order). The effect of the Court of Appeal's second order amending and publishing its decision was to remove mention of RAP 18.1 and instead the opinion now simply states "We also award Cardiac its statutory attorney fees." *See* CP 1395; and *Emerick I*, 170 Wn. App. at 259. Based on the misunderstanding caused by Emerick's erroneous representation, the trial court concluded that the Court of Appeals had issued a binding decision regarding Cardiac's appellate fees. The trial court then concluded that it lacked any discretion or authority to change that binding decision and award Cardiac its prevailing party attorney's fees incurred on appeal.

Emerick identified over $83,000 in fees that he contended were not recoverable by Cardiac due to the Court of Appeal's prior ruling. CP 470-71, CP 483-597. This calculation included all work performed by Cardiac's attorneys while the case was on appeal, including, for example, fees incurred in responding to Emerick's motion for reconsideration of the Court of Appeals' decision, and those incurred successfully opposing

Emerick's petition for discretionary review to the Supreme Court. *See, e.g.*, CP 558-61, 568-71. This amount was far in excess of the fees Emerick contended had already been denied to Cardiac by the Court of Appeals, but the trial court excluded this full amount from the fees awarded.

In briefing and during oral argument before the trial court, Cardiac articulated the basis for an award of prevailing party attorney's fees under the parties' Agreement and RCW 4.84.330. CP 326-34, 602-12; 10/18/13 VTP. Specifically, Cardiac explained that while the Agreement expressly provided for prevailing party attorney's fees incurred in "any suit or action against the other [party] for any type of relief, declaratory or otherwise, including any appeal thereof, arising out of this Agreement" (CP 327), before prevailing on summary judgment on September 11, 2013, Cardiac was not yet the "prevailing party" entitled to recover under this clause. CP 607-11; 10/18/13 VTP at 13:13-14:21.

After hearing argument the trial court ruled that the attorney's fees incurred by Cardiac were reasonable "in terms of the amount of time expended and ... the rates for the time spent by both attorneys, the paralegals, the assistants, all as appropriately documented." VTP 10/18/13 at 18:8-12. Despite these conclusions, however, the trial court denied Cardiac's request for any attorney's fees incurred on appeal. *Id.* at 18:14-

15. The trial court's Findings of Fact and Conclusions of Law state: "the Court finds that fees on the appeal were denied by the Court of Appeals and declines to award $83,169.50 in fees incurred on the appeal an[d] $1,368.87 in costs on appeal." CP 623. The trial court awarded Cardiac judgment for its reasonable attorney's fees in the amount of $182,674.90 plus an award of costs in the amount of $21,577.49. Emerick filed a Notice of Appeal, and Supplemental Notice of Appeal (CP 664-672, 673-693), and Cardiac timely filed its Notice of Cross Appeal (CP 694-709).

IV. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment and Revised the Noncompete Provision.

A trial court's decision to grant summary judgment is reviewed by this Court *de novo*. *Emerick I*, 170 Wn. App. at 254 (citing *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)). Under Washington law, covenants not to compete are enforceable if they are "reasonable and lawful." *Id.* (citing *Wood v. May*, 73 Wn.2d 307, 312, 438 P.2d 587 (1968)). As this Court instructed in *Emerick I*:

> We test the reasonableness by asking (1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether enforcing the covenant would injure the public through

> loss of the employee's service and skill to the extent that the court should not enforce the covenant, *i.e.*, whether it violates public policy.

Id. (citing *Perry v. Moran*, 109 Wn.2d 691, 698, 748 P.2d 224 (1987)). The determination of whether a covenant is reasonable, "is a question of law." *Id.* (citing *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 684, 578 P.2d 530 (1978)); *see also Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 367, 680 P.2d 448 (1984) (finding summary judgment determination appropriate where the "facts surrounding the entering into the agreement and the acts constituting violation of the covenant are undisputed" even if facts relating to the enforceability and the reasonableness of the covenant remain in controversy). To the extent Emerick relies on *Knight, Vale & Gregory*, or any other foreign authority, for the proposition that the reasonableness of a noncompete is a factual determination under Washington law, he is wrong. The trial court properly determined the extent to which the noncompete was enforceable as a matter of law.

1. Noncompetes among doctors do not violate public policy and are enforceable under Washington law in the same manner as any other noncompete.

This Court has already heard, and rejected Emerick's argument that noncompetes applied to physicians are *per se* invalid as a violation of

public policy. *See Emerick I*, 170 Wn. App. at 258-59. Ignoring the law of this case and Washington precedent, Emerick again contends that physician noncompetes are void, and suggests that public policy should be the overriding concern in evaluating physician noncompetes. Br. of App. at 21-24. This reasoning is contrary to the clear language of *Emerick I* stating, "Washington courts have not yet held that restrictive covenants between physicians are unenforceable. ... Thus, to the extent the trial court relied on authority from other jurisdictions, it erred in invalidating the covenant on public policy grounds." *Id.* at 259. Emerick now asserts that this language does not preclude a finding that physician noncompetes are void as a matter of public policy, ignoring the fact that this Court had ample opportunity to consider -- and reconsider -- whether such a blanket ban was appropriate under Washington law. That argument has already been rejected and the law in Washington remains unchanged.

Emerick's fundamental argument from the beginning of this case has been that physician noncompetes are unenforceable because they violate public policy. That argument failed before this Court, and it also failed on remand to the trial court. Relying in part on the Washington Supreme Court's enforcement of a noncompete agreement among physicians in *Ashley v. Lance*, 80 Wn.2d 274, 473, 476, 493 P.2d 1242 (1972) (*Ashley II*), this Court instructed the trial court to undertake the

same three-prong analysis that would apply to any Washington noncompete. *Emerick I*, 170 Wn. App. at 259. That is precisely what the trial court did in this case on remand. Instead of the repeating previous flawed analysis highlighted in *Emerick I,* the trial court, closely following this Court's direction, engaged in the proper analysis on remand, and found the noncompete valid and enforceable. Emerick cannot demonstrate any error with the trial court's analysis, and is similarly unable to demonstrate a legal basis for his renewed contention that physician noncompetes violate public policy. This argument should again be rejected.

2. The trial court properly determined that the restrictive covenant was necessary to protect Cardiac's business interests and goodwill.

On remand, the trial court also analyzed Cardiac's protectable business interests consistent with *Emerick I.* Specifically, Cardiac demonstrated that it had protectable interests in business goodwill, referral sources, patient relationships, and the time, energy and expense Cardiac expended to establish its medical practice in Pierce County. CP 12-16. As this Court previously recognized, "Cardiac provided Emerick with an immediate client base and established referral sources when he moved to the area. ... Emerick had access to Cardiac's business model and goodwill." *Emerick I*, 170 Wn. App. at 256.

Recognizing these aspects of a medical practice as protectable business interests is wholly consistent with Washington law. *See In re Marriage of Zeigler*, 69 Wn. App. 602, 607(1993) (defining goodwill of a medical practice); *Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969) (*Ashely I*) (investment incurred in providing space and equipment, access to existing patients were all business interests of a medical practice); *Lehrer v. Dep't of Soc. & Health Servs.*, 101 Wn. App. 509, 514, 5 P.3d 722 (2000) (recognizing patients as a protectable interest). This is also consistent with law from other jurisdictions. *See, e.g.*, *Intermountain Eye & Laser Ctrs., PLLC v. Miller*, 127 P.3d 121, 128 (Idaho 2005); *Valley Med. Specialists v. Farber*, 982 P.2d 1377, 1284 (Ariz. 1999) (citing *Med. Specialists, Inc. v. Sleweon*, 652 N.E.2d 517, 523 (Ind. Ct. App. 1995)); *Weber v. Tillman*, 913 P.2d 84, 91 (Kan. 1996); *Ballesteros v. Johnson*, 812 S.W.2d 217, 223 (Mo. Ct. App. 1991); *Lovelace Clinic v. Murphy*, 417 P.2d. 450 (N.M. 1966).

When Emerick chose to relocate and join Cardiac, he was given the benefit of decades of goodwill and the established reputation and client base amassed by Cardiac over the past 40 years. CP 1158-59. Emerick was also provided access to established referral sources cultivated by Cardiac, knowledgeable staff and a fully operational medical facility. CP 81; 1158-59. Emerick could have made a substantial investment to

open his own medical practice, but instead chose to take advantage of Cardiac's reputation and business model. Cardiac clearly established that the noncompete was executed by Cardiac and its physicians in order to protect these business interests. CP 78-82.

The trial court, consistent with this Court's direction in *Emerick*, evaluated Cardiac's "protectable business interests" as follows:

> There are a number of interests that would be protected, at least to some extent, by the noncompete agreement such as Cardiac's individual patients, its goodwill, its good reputation build up over approximately 40 years, its business location, its referral sources, and its established relationships in the medical community.

VTP 8/9/13 at 8:15-23. Cardiac clearly made the required showing that it had protectable business interests and the trial court properly concluded that the noncompete was necessary to protect those interests.

Emerick contends that the noncompete was not necessary to protect these interests, claiming that he receives no benefits from Cardiac's referral sources, does not target its patients, and does not "trade on" Cardiac's goodwill. Br. of App. at 24. These statements are belied by the record in this case, which shows that Emerick represents his affiliation with Cardiac in advertising his new practice. CP 84 (listing Emerick as a "Partner Physician" of Cardiac). He also cites to the fact that Cardiac has

agreed to waive the noncompete with respect to Emerick's existing patients as an indication that the noncompete is unnecessary in its entirety. Br. of App. at 28. Emerick cannot have this argument both ways. On the one hand, he argues that a restriction on patient choice violates public policy and must be eliminated, and on the other he argues that a recognition by Cardiac that the noncompete allows him to treat existing patients demonstrates that the noncompete is completely unnecessary.

The noncompete expressly states that it does not prevent any patient from selecting a cardiologist of their choice, the restraint is only on the location of Emerick's medical practice for a period of time. CP 652-53. The restriction was intended to prevent a situation where Emerick left Cardiac and opened a practice just across the street, which is exactly what he did. CP 79. This is precisely the type of noncompete that is enforceable in Washington. *See Ashley I*, 75 Wn.2d 471.

Emerick relies on to *Amazon.com, Inc. v. Powers*, 2012 WL 6726538 (W.D. Wash. 2012) in an attempt to demonstrate that Cardiac's noncompete is invalid under the first prong of the *Perry v. Moran* analysis. However, *Amazon.com* is an unpublished order of a trial court, without any precedential value, addressing an employer's motion for preliminary injunction. *Id.* at *1. Even if this Court is persuaded to consider the

court's order in *Amazon.com*, the employment relationship and the details of the noncompete in that case are readily distinguishable from Emerick's.

First, Powers worked for Amazon for approximately two years as a sales person for Amazon's cloud-based computing services, and the noncompetition agreement at issue included an eighteen-month world-wide ban on doing business with any of Amazon's current or prospective customers, as well as a ban on Powers working "in any capacity that competes with Amazon." *Id.* at *1-2. As the trial court noted: "Taken literally, the ban has extraordinary reach: it would, for example, prevent Mr. Powers from working for a bookseller, even though he had nothing to do with Amazon's book sales while he worked there." *Id. The* court also referred to the restriction as a "worldwide ban" due to the fact that it contained no geographic bounds. *Id.* at *10. Even under these circumstances, however, the court found that the customer-based restrictions were reasonable and should be enforced for a period of nine months. *Id.* *10. The court declined to enforce a ban on Powers' ability to work "in a competitive capacity anywhere in the world," finding that Amazon had not demonstrated that such a ban was necessary to protect its business, although the court did note the ban on working with former customers "serves to protect the goodwill [Amazon] has built up with specific businesses." *Id.* at *10.

In stark contrast to *Amazon.com*, Emerick spent roughly seven years with Cardiac, first as an employee and then as a "Partner Physician." CP 84. Moreover, the scope of the noncompete here is far more narrowly tailored, defining competition as the practice of cardiology and restricting Emerick only in a limited geographic area where Cardiac had developed protectable business interests. After his termination, Emerick was not subject to the type of "worldwide" restriction present in *Amazon.com*. Just as the trial court found that the narrower ban on client competition was consistent with Washington law, the restrictions agreed to by Emerick and Cardiac similarly serve to protect Cardiac's goodwill. *See Amazon.com*, at *10.

Emerick acknowledged Cardiac's protectable business interests when he entered into the Agreement, and he received seven years of the benefit of those interests during his employment. Emerick attempts to interject a burden-shifting scheme into the *Perry v. Moran* analysis where none exists. Under any legal standard, Cardiac has demonstrated its protectable business interests and the trial court properly analyzed and considered those interests in accord with this Court's *Emerick I* decision.

3. The trial court made appropriate revisions to the temporal and geographic scope of the noncompete.

After determining the extent of Cardiac's protectable business interests, the trial court moved to the second prong of the *Perry v. Moran* analysis, concluding that the Agreement was broader than necessary and should be revised to apply for a shorter duration and within a more limited geographic scope. VTP 8/9/13 at 10:15-13:8; CP 321-22. The trial court determined as a matter of law that the revised noncompete was enforceable within a two-mile radius surrounding each of Cardiac's offices, and that the reasonable period of time within which Emerick should be restrained from competition was a period of four years. *Id.* On appeal, Emerick contends that enforcing the noncompete in this manner was legal error.

As this Court explained in *Emerick I*, "[t]he second reasonableness factor focuses on the extent to which the covenant adversely affects the employee's ability to earn a living." *Emerick I*, 170 Wn. App. at 256 (citing *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. at 370). Here, the trial court was provided with instruction to "balance[e] Cardiac's actual protectable business interest against the time and geographic restrictions on Emerick's ability to earn a living." *Id.* at 257. The trial court did just that. In its oral ruling the trial court specifically noted that

with regard to the revised geographic scope, "a two-mile area of protection will provide reasonable protection for Cardiac's business interests. And will, at the same time, permit Dr. Emerick a reasonable number of options to choose from for a location to practice medicine." VTP 8/9/13 at 12:3-7.

Emerick does not specifically address his contention that the trial court erred in enforcing the noncompete within the restricted area, however it is clear that such a geographic scope is consistent with Washington law. In evaluating a noncompete courts will typically limit the geographic area within which competition is restricted to a scope reasonable to protect the business interests at issue. *See, e.g., Ashley II*, 80 Wn.2d 274 (10-mile geographic restriction); *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. 538, 545, 635 P.2d 1114 (1981) (expanding trial court's 25-mile radius to include all areas covered by existing franchise agreements with which former franchisee would be competing); *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 687-88, 578 P.2d 530 (1978) (geographic limitation of "greater Seattle area" was reasonable).

Applying these same principles other jurisdictions have reached similar results. *E.g., Labor Ready Inc. v. Williams Staffing, LLC*, 149 F.Supp.2d 398 (N.D. Ill. 2001) (one year and ten-mile restriction upheld); *Gelder Med. Grp. v. Webber*, 363 N.E.2d 573, 41 N.Y.2d 680 (N.Y Ct. App. 1977) (five year and 30 mile restriction upheld); *Keeley v.*

Cardiovascular Surgical Assocs., P.C., 510 S.E.2d 880 (Ga. Ct. App. 1999) (75 mile geographic restriction upheld). The geographic scope evaluation depends upon the scope of the employer's business.

The trial court here elected to do the same. Cardiac's noncompete as originally written applied to competition within all of Pierce County and the city of Federal Way. CP 652. Through the course of litigation, Cardiac agreed that the geographic scope could be further limited and suggested a five-mile radius around each of Cardiac's facilities. CP 6, 19, 1343. Cardiac also acknowledged that Emerick should not be prevented from continuing to treat his existing patients. The trial court, having considered the area open to Emerick in Pierce County if a five-mile geographic scope was adopted, concluded that a geographic restriction on Emerick's competition was appropriate but only up to a two-mile radius surrounding each Cardiac facility. VTP 8/9/13 at 12:3-7; CP 321-22. Emerick cannot show that this limited geographic scope is unreasonable.

Turning to the temporal scope of the noncompete, the trial court determined that a four-year period was sufficient to protect Cardiac's business interests when balanced against Emerick's professional interests. VTP 8/9/13 at 12:23-13:4; CP 322. Emerick now claims this was error, relying in large part on cases that contained noncompete agreements that were either unrestrained geographically, or covered a much broader

geographic area than the two-mile restriction the trial court imposed here. *See, e.g., Amazon.com v. Powers*, 2012 WL 6726538 *10 (enforcing "worldwide" restriction on competition with current or prospective customers for nine months); *Seabury & Smith, Inc. v. Payne Fin. Grp. Inc.*, 393 F. Supp. 2d 1057, 1063 (E.D. Wash. 2005) (one-year restriction with unlimited geographic scope); *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. at 545 (2.5 years in more than a 25-mile area). However, in *Racine v. Bender*, 141 Wash. 606, 225 P. 115 (1927), the court upheld a three year noncompete with an unlimited geographic scope.[3]

Here, Emerick is able to continue to treat patients he acquired during his time at Cardiac, he can compete with Cardiac to serve the general public in Pierce County and all surrounding areas, as long as his practice is located outside the protected two-mile area. Based on the level of competition Emerick is able to engage in, his ability to treat former patients, and the narrowing of the geographic scope, the trial court properly concluded that the period of time within which he should be restricted was four years. Emerick hyperbolically asserts that Cardiac is

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[3] To the extent Emerick relies on a concurring option of Justice Madsen in *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), the Court will note that Justice Madsen specifically wrote on her own to address an "independent basis" for invalidating the noncompete there, which was not relied upon by the majority of the court. Moreover, the noncompete at issue in *Labriola* prevented the former employee from competing in in any way in any area with his former employer and was therefore unreasonable and unenforceable. *Id.* at 847. This is a far cry from the narrower restrictions the trial court enforced here.

attempting to enforce a noncompetition agreement for seven years (Br. of App. at 2), but this ignores the fact that Emerick has been in breach of his Agreement for the majority of the time since his termination. CP 321. The trial court's revision of the noncompete to a period of four years was proper, and consistent with Washington law.

4. The trial court properly considered injury to the public and tailored the noncompete accordingly.

Despite Emerick's insistence on asserting the same public policy argument regarding physician noncompetes, the trial court properly analyzed the impact to the public consistent with *Wood v. May* and *Emerick I.* The trial court found that there are ample cardiologists in Pierce County to serve the needs of the community, noted that Emerick is not restricted from using any hospital in the area, and is not restricted from making house calls within the restricted area. VTP 8/9/13 at 6:23-25, 9:24-10:14, 12:8-15; CP 323. The trial court properly considered and balanced "whether enforcing the covenant would injure the public ... to the extent that the court should not enforce the covenant," and found that as revised the noncompete did not injure the public.

On remand, the trial court followed the instructions of this Court from *Emerick I* and engaged in the proper analysis on each of the three *Perry v. Moran* factors. The trial court assessed Cardiac's business

interests, considered the extent to which Emerick was restrained, and evaluated the likely harm to the public that would result from the restraint. With each of these factors in mind, the trial court correctly concluded that the noncompete should be enforced for a period of four years and that Emerick should be restrained from competition within a two-mile radius of Cardiac's offices. The trial court did not err in its analysis or conclusions, and the trial court's determination of the reasonable scope of the noncompete on summary judgment should be affirmed.

B. The Trial Court Correctly Found Emerick was in Competition with Cardiac and Properly Enjoined this Competition for the Remaining Term of the Noncompete.

Emerick contends that the trial court erroneously found that Emerick was engaged in competition in violation of the noncompete and asserts that the trial court had no authority to enforce the noncompete during its remaining term. Br. of App. at 3 (Assignment of Error 2, 4), 34-35. Although Emerick does not fully explain his assignment of error with regard to the determination that Emerick was in competition, it is clear from the record that the trial court correctly determined that the practice of cardiology was competition as defined by the Agreement.

1. Emerick is in competition with Cardiac and is in breach of the parties' noncompete even as revised.

The trial court heard evidence indicating that Emerick is practicing cardiac medicine within approximately 1,000 feet of Cardiac's Gig Harbor location. CP 34-35. Emerick claims this is not competition because the cardiology services he provides to patients are provided under such a different business model from Cardiac's that it renders his activities non-competitive. CP 46-48. The trial court rejected this argument. VTP 8/9/13 at 15:7-16:13. The trial court did not err in making this determination. The noncompete itself defines the prohibited competition as "engag[ing] in the practice of cardiac medicine." CP 652. It was an appropriate conclusion in light of the language in the noncompete and the common understanding of the term "competition."

2. The trial court properly enforced the noncompete through injunctive relief, which was the remedy sought by Emerick and Cardiac throughout this litigation.

Emerick began this litigation before the effective date of his termination from Cardiac. At the time, he had not yet breached the Agreement, and the relief he sought was declaratory judgment and injunctive relief preventing Cardiac from enforcing the noncompete. CP 637-39. Cardiac answered and it too sought declaratory relief from the court. CP 662. After over four years of litigation, during the majority of

which Emerick was operating his new competing practice in breach of the Agreement, Emerick now asserts for the first time that Cardiac cannot obtain any measure of relief or any benefit of the bargain Cardiac made in the Agreement. Br. of App. 34-35. This result is unsupported.

Where a party has breached a noncompete agreement, an appropriate remedy is to ensure that the full term of the noncompete is enforced through an injunction. *Thermatool Corp. v. Borzym*, 575 N.W.2d 334, 337 (Mich. App. 1998) ("under appropriate circumstances, an agreement not to compete can be extended beyond its stated expiration date as a remedy for breach of the agreement."). In *Rogers v. Runfola & Assoc., Inc.*, 565 N.E.2d 540, 544 (Ohio 1991), a court reporter subject to a noncompete started a competing firm and eventually obtained an order from the trial court invalidating the noncompete. The employer's appeal was successful, and, like Cardiac, it returned to the trial court seeking enforcement and a remedy for the breach. Ultimately, the court held that the appropriate remedy was an injunction running from the date of the court's order enforcing the full term of the noncompete and shutting down the competing business. Similarly, in *Roanoake Eng'g Sales v. Rosenbaum*, 290 S.E.2d 882, 886 (Va. 1982), an employee who continued to compete during the years the case was on appeal was ultimately restrained prospectively from the date on which the employer prevailed.

The cases on which Emerick relies are distinguishable from the above authority because each of those involved a scenario where the term of parties' original noncompete had expired and the court found that money damages were adequate compensation. *See Alexander & Alexander v. Wohlman*, 19 Wn. App. at 688 (two year restriction was reasonable but the court found that monetary relief requested by plaintiff was an adequate remedy so no injunction was necessary); *Economic Lab., Inc. v. Donnolo*, 612 F.2d 405, 408 (9th Cir. 1979) (applying Nevada law and refusing to enter an injunction enforcing the one-year post employment restraint on former employees 1.5 years after termination where a jury awarded damages). As the court in *Economic Laboratory* explained: "Denial of injunctive relief was required because when the injunction was asked there were no promises of [the former employees] in effect which the District Court could properly enforce." *Id.* at 408. The opposite is true in this case; at the time the trial court entered an injunction enforcing Emerick's noncompete, the original term of the Agreement had not expired. Money damages will not protect Cardiac's interest and the injuries posed by a breach of the noncompete are irreparable as Emerick acknowledged when he signed the Agreement. CP 653 (Section 13(g) addressing injunctive relief). The trial court was therefore correct to

extend the period of enforcement to provide Cardiac with the benefit of the parties' bargain.

Emerick's argument that Cardiac is limited to monetary relief, and is required to show some specific monetary harm caused by his breach of the Agreement before Cardiac is ever entitled to enforce a noncompetition agreement with departing physicians is absurd and contrary to the plain language of the Agreement. Emerick should not be permitted to break the promises he made in the Agreement, engage in active competition, and then force Cardiac to demonstrate the Agreement would have prevented the specific harm Emerick set out to cause in violation of his promise. CP 653. Cardiac has shown that the restrictive covenant was necessary to protect is legitimate business interests, the trial court determined the reasonable scope of the restraint, and Cardiac is entitled to obtain the benefit of the bargain it made with Emerick. Here, there has never been an allegation of money damages for Emerick's breach (which took place only after the case reached the Court of Appeals for the first time), and Emerick has not demonstrated a legitimate basis to argue that Cardiac is prevented from obtaining the only relief ever sought in this case. Money damages are wholly inadequate to compensate the harm to Cardiac in this situation.

C. The Trial Court Properly Concluded that Cardiac Was the Substantially Prevailing Party in this Action.

Under Washington law, a prevailing party is "one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *see also Pipekorn v. Adams*, 102 Wn. App. 673, 686–87, 10 P.3d 428 (2000) (a party who is successful in obtaining injunctive relief was substantially prevailing party even when the court declined the same party's request for damages). The determination of which party prevails in an action is a mixed question of law and fact that this Court will review under an "error of law standard." *Eagle Point Condo. Owners, Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). The trial court correctly determined that Cardiac was the substantially prevailing party in this action after Cardiac was awarded affirmative relief, where Emerick was denied all relief he sought.

In 2009 Emerick filed his Complaint in this action seeking injunctive and declaratory relief invalidating, in its entirety, the non-competition agreement Emerick entered into with Cardiac, claiming it violated public policy. CP 638. After years of litigation and appeal, the trial court granted Cardiac's motion for summary judgment, enforced the noncompete as revised, and enjoined Emerick from practicing in violation of the agreement. CP 322. Comparing the relief afforded Emerick versus

that afforded Cardiac, there is no dispute that Cardiac is the substantially prevailing party here. The authority relied on by Emerick the does not change this result.

Emerick principally relies on three cases from other jurisdictions. The most readily distinguishable case is *Profit Wize Marketing v. Wiest*, 812 A.2d 1270 (Pa. 2002), in which the Pennsylvania Supreme Court upheld denial of an employer's request for prevailing party attorneys' fees after the dispute between employer and former employee was resolved by agreement between the parties. In reviewing the trial court's decision, the court explained that "[a]lthough a hearing commenced on the underlying issues, the lower court never reached the merits of the case or vindicated [the employer's] position." *Id.* at 1275. The court went on to reason that:

> [T]he noun, "prevailing party," is commonly defined as "a party in whose favor judgment is rendered, regardless of the amount of damages awarded." ... While this definition encompasses those situations where a party receives less relief than was sought or even nominal relief, its application is still limited to those circumstances where the fact finder declares a winner and the court enters judgment in that party's favor. Such a pronouncement does not accompany a compromise or settlement.

Id. at 1275-76. (internal citation omitted). In this case, there was no settlement between Cardiac and Emerick, and even under the reasoning of *Profit Wize*, Cardiac – the party receiving relief – is the prevailing party.

Building on the Pennsylvania Supreme Court's opinion in *Profit Wize*, a federal court in Pennsylvania determined that it lacked the authority to revise an attorneys' fee provision between an employer and employee, and because enforcing the one-sided agreement would have been inequitable, the court declined to award fees to either side. *Zambelli Fireworks Manufacturing Co. v. Wood*, 2010 WL 4672357 (W.D. Pa. 2010). In *Zambelli* the employer brought suit against its former employee asserting seven distinct causes of action, the court granted summary judgment dismissal of six of these claims in favor of the employee, but granted the employer affirmative relief on its non-competition claim. *Id.* at *6-7. The parties' agreement provided that if it became necessary for the employer to bring suit to enforce the agreement, and the employer prevailed, the employee agreed to "pay all legal fees, court costs and expenses." *Id.* at *7 (emphasis added). The court noted that the agreement was silent as to the effect of a partially-prevailing employer and noted that "it does not appear that modification of an attorney fee provision is available under Pennsylvania law." *Id.* at *8 (citing *Profit Wize*, 812 A.2d 1270). Without an applicable framework for determining

whether a party had "substantially prevailed" in the action, the court relied on the facts that no judgment would be entered in favor of the employer and the employee had prevailed on six of the seven claims asserted. The court then concluded that the employer could not be deemed the "prevailing party" under these circumstances and was thus not entitled to an award of all fees and costs incurred in the action. *Id.* at *10.

Under Washington law, unlike the situations presented by *Profit Wize* and *Zambelli*, the trial court had clear guidance to determine which party "substantially prevailed" for the purposes of awarding prevailing party attorneys' fees under a contract. *See, e.g.*, *Pipekorn v. Adams*, 102 Wn. App. at 686–87; *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 773–74, 677 P.2d 773 (1984).

Emerick also relies on *Paradise v. Midwest Asphalt Coatings, Inc.*, 316 S.W.3d 327 (Mo. Ct. App. 2010), which is also inconsistent with Washington law. In *Paradise*, the non-competition and attorneys' fee provisions of an employment agreement were unconscionable, and the court refused to grant an injunction or to award prevailing party attorneys' fees. *Id.* at 328. Under Missouri law, the court had the discretion to either invalidate an unreasonable agreement or revise it. *Id.* at 330 (citing *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 437 (Mo. Ct. App. 2008)). The court chose to revise the agreement to eliminate the

prevailing party attorneys' fees. On appeal, the Missouri Court of Appeals upheld the trial court's exercise of discretion. *Id.* at 330.

By contrast, under Washington law when a court is presented with an overbroad covenant not to compete, the entire covenant does not fail leaving the court to create a modified agreement in its discretion. Instead, the court is required to enforce so much of the agreement as is reasonable. *See, e.g., Wood v. May*, 73 Wn.2d at 312. Unlike the circumstances presented in *Paradise*, the trial court – consistent with Washington law – enforced the original agreement to the extent it was reasonable. Thus, Emerick's argument that the trial court erred by failing to follow the logic set out in *Paradise* must fail because the legal underpinnings of the trial court's action here and the result required under Missouri law in *Paradise* are fundamentally different than Washington law.

Emerick also includes, with little discussion, a citation to the unpublished decision of *Head v. Morris Veterinary Center*, 2005 WL 1620328 (Minn. App. 2005). It should be noted that under RAP 10.4(h) and GR 14.1(b), a party may cite to an unpublished opinion of a court from another jurisdiction "only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." GR 14.1(b). The *Head* decision plainly states on its face: "This opinion will be unpublished and may not be cited except as provided by Minn.

Stat. § 480A.08, subd. 3 (2004)," which provides: "Unpublished opinions of the Court of Appeals are not precedential." (emphasis added). While this decision has no precedential value, even if the Court chooses to consider *Head*, it offers no support to Emerick's position.

In *Head* the Minnesota court of appeals upheld the award of attorneys' fees to employees after the trial court modified the terms of the parties' noncompetition agreement, because the employees had "obtained a more favorable result." *Id.* at *2. In contrast, here the trial court granted Cardiac's request for an injunction and enforcement of the parties' noncompete to the extent reasonable and necessary to protect Cardiac's protectable business interests. Emerick has been granted absolutely no affirmative relief. Cardiac clearly obtained the more favorable result here.

The trial court properly applied the framework set out in *Pipekorn v. Adams*, and *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.* when it evaluated the relative position of the parties after granting Cardiac's motion for summary judgment. The trial court correctly concluded that Cardiac received the greatest measure of relief in this litigation and properly determined that Cardiac was the substantially prevailing party. Emerick cannot show any error of law that would warrant reversal, and the trial court's decision should be affirmed.

D. The Trial Court did not Abuse Its Discretion in Awarding Cardiac Its Reasonable Attorneys' Fees but Erred as a Matter of Law by Denying Cardiac Fees Incurred on Appeal.

The legal basis for an award of attorneys' fees is a question of law that the Court of Appeals will review *de novo*. *See Gander v. Yeager*, 167 Wn. App. 638, 646-47, 282 P.3d 1100 (2012) (*citing Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483-84, 260 P.3d 915 (2011); *Bank of New York v. Hooper*, 164 Wn. App. 295, 303, 263 P.3d 1263 (2011)). Once the legal determination has been made with regard to the basis for an award of fees, a trial court's determination of the reasonableness of the fees awarded (or denied) will be reviewed for an abuse of discretion. *Id.* "A trial judge has broad discretion in determining the reasonableness of an attorney fee award and, in order to reverse that award, the opponent must show that the trial court manifestly abused its discretion." *Unifund CCR Partners v. Sunde*, 163 Wn. App. at 484 (citing *Ehtridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001)). However, a trial court abuses its discretion by applying the wrong legal standard or coming to a conclusion that is legally unsound. *E.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Here, the language of the parties' Agreement is mandatory: it states "the prevailing party shall have and recover against the other party ... such sum as the court may adjudge to be a reasonable attorney's fee."

CP 654. The trial court found that Cardiac's attorney's fees were reasonable, and awarded Cardiac its reasonable fees incurred for work performed at the trial court both before and after remand, but ultimately determined that Cardiac did not have a legal basis for recovering its prevailing party attorney's fees for appellate work based on the Court of Appeal's prior decisions. 10/18/13 VTP at 17:23-18:15. This ruling is precisely the type of legal ruling that this Court will review *de novo*. *See Gander v. Yeager*, 167 Wn. App. at 646-47.

1. The trial court erred as a matter of law when it denied Cardiac its reasonable attorneys' fees incurred on appeal.

After the trial court determined that Cardiac was the prevailing party in this action, Emerick argued that Cardiac was not entitled to recover its prevailing party attorney's fees for work done on the first appeal because Cardiac had failed to request these fees in its earlier appeal asking this Court to reverse the order granting Emerick summary judgment and to vacate the award of prevailing party attorney's fees to Emerick. CP 470-71. Emerick also argued that the trial court lacked the authority to award prevailing party attorney's fees to Cardiac for work done on appeal because the Court of Appeals was the only court that could award these fees and it had elected only to award Cardiac its statutory (and not prevailing party) attorneys' fees. CP 470-71; 10/18/13 VTP at 11:9-

13. This argument, and the decision of the trial court based on this argument, is legally flawed.

Washington case law supports an award of prevailing party attorney's fees under RAP 18.1 only where the party requesting those fees is the prevailing party in the underlying action and can demonstrate a basis for the recovery of fees for work performed during a successful appeal. *See, e.g.*, *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 670, 160 P.3d 39 (2007); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 817-18, 225 P.3d 213 (2009); *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001) (noting that because no prevailing party attorneys' fees were available at trial, none were available under RAP 18.1).

In *Belfor* the party requesting an award of attorney's fees under RAP 18.1 had successfully resisted a petition for review of the trial court's order compelling arbitration under the parties' contract. *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669. The court on appeal held that, despite the fact that Belfor prevailed in its request to compel arbitration under the contract, and prevailed in resisting discretionary review of that decision, "Belfor has not yet prevailed in collecting under the contract." *Id.* at 671. Because the parties' contract provided only for prevailing party fees incurred in collecting under the contract, the court reversed the grant of fees to Belfor. *Id.* The court instead found that Belfor could collect its

fees if it prevailed in its collection efforts, but that at the time of the appeal "Belfor is not yet a 'prevailing party' for purposes of the contract's attorney fees provision" and therefore was not yet eligible to recover fees. *Id.*

Similarly, in *Satomi Owners Association*, the parties' agreement stated that if either party instituted suit against the other concerning the agreement, the prevailing party was entitled to recover its fees and costs. After reversing the decision of the trial court and remanding the case for further proceedings, the Supreme Court determined that neither party was entitled to prevailing party fees on appeal because "[the court's] decision is not determinative of the prevailing party with regard to the underlying litigation." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d at 817. As a result, the court deferred the question of RAP 18.1 fees. *Id.* at 818.

In the present case, the Court of Appeals' decision reversing summary judgment in Emerick's favor had the effect of undoing Emerick's status as the prevailing party, but neither the Court of Appeals nor the trial court had yet concluded that Cardiac should prevail on the merits. *See Emerick I*, 170 Wn. App. at 695. Thus, like the situation presented in *Satomi*, there was not yet any "prevailing party" entitled to recover under the parties' Shareholder Employment Agreement. Cardiac was therefore not yet entitled to an award of fees under RAP 18.1, the

Agreement, or RCW 4.84.330. However, after returning to the trial court and prevailing on summary judgment, Cardiac then became the prevailing party in this action and was for the first time entitled to recover its reasonable attorney's fees as provided in the Shareholder Employment Agreement. These included fees incurred in "any suit or action for any type of relief ... including any appeal thereof, arising out of this Agreement." CP at 21.

To avoid this result, Emerick argues that that Cardiac was required to make a premature request for prevailing party attorneys' fees to the Court of Appeals under RAP 18.1 in its earlier appeal, and that Cardiac is forever barred from recovering any fees that would have been included in that baseless request. This argument is illogical and not supported by legal authority. Cardiac was not yet the "prevailing party" in this action when it was last before the Court of Appeals, having returned to the trial court and obtained affirmative relief, Cardiac is now entitled to recover all reasonable attorneys' fees under the Shareholder Employment Agreement, including the fees incurred by Cardiac for work done on appeal. The trial court erred as a matter of law when it determined that Cardiac had waived the right to that portion of its prevailing party attorney's for work performed on appeal, and this decision should be reversed.

Even if this Court finds that Cardiac somehow waived its right to recover attorney's fees as the now-prevailing party for work performed on appeal prior to Cardiac prevailing on the underlying action, this Court should determine that any such bar applies only to the fees Cardiac incurred but failed to request on appeal. Emerick argued that Cardiac incurred $83,169.50 in appellate fees and another $1,368.87 in appellate costs, recovery of which was denied by this Court. CP 470, 476. This calculation is flawed, as Cardiac incurred a substantial amount of these fees after this Court's February 28, 2012, Opinion due to Emerick's continued appellate wrangling, including Emerick's unsuccessful motion for reconsideration and unsuccessful petition for review to the Washington Supreme Court. *See, e.g.*, CP 560-71.

At a minimum the trial court erred in concluding that Cardiac was precluded from recovering any of its fees incurred on appeal, and this Court should reverse that decision and remand with instructions on which fees if any should be excluded from Cardiac's award of attorney's fees.

2. The trial court's assessment of the amount of Cardiac's reasonable fees was not an abuse of discretion.

The attorneys' fees incurred by Cardiac and awarded by the trial court were substantial. Emerick raised nearly identical concerns regarding these fees to the trial court as he is raising on appeal (CP 467-78), the trial

court evaluated each of these points, and determined that Cardiac's attorneys' fees, both in terms of the rates charged and the time expended, were reasonable. CP 620-26; VTP 10/18/13 at 18:8-14. Emerick points to nothing on appeal to suggest that the trial court "manifestly abused its discretion" in making this award. To the contrary, Cardiac demonstrated that the fees incurred over four years of litigation in this matter were reasonable and necessary to reach a successful end result.

Emerick contends that too many attorneys performed work on this matter over a four-year period, that Cardiac should not be permitted to recover fees for motions Cardiac lost before prevailing on appeal, that fees should not be recovered for non-litigation matters or administrative tasks, and that the cost of Cardiac's market analysis expert is not recoverable. As Cardiac demonstrated to the trial court, the number of attorneys involved in this matter did not correlate to the "duplication of efforts" with which Emerick is so concerned. Instead, this matter was primarily handled by two partners, with other attorneys providing input on their particular areas of expertise. *See* CP 605-06. Associate attorneys and paralegals were also used when appropriate, which permitted a substantial amount of work to be performed at lower billing rates.[4] CP 615-16.

[4] It is also worth noting that Cardiac's attorneys performed work on this matter at a negotiated rate between Cardiac's insurance carrier and Cardiac's attorneys. This led to a

Moreover, Cardiac's attorneys' fees were reduced further as a courtesy, which served as an appropriate offset for any of the fees Emerick contended were incurred for the alleged performance of administrative matters by staff or attorneys. CP 330-31; 605-06.

With regard to fees for work performed when the case was first before the trial court, including the expert costs incurred by Cardiac, Emerick entirely ignores the fact that by obtaining a complete reversal at the Court of Appeals for all of Emerick's previous "wins" on summary judgment and fees, Cardiac became the "winner" of all of those underlying motions that were incorrectly decided. Cardiac ultimately won prevailing party status when the trial court granted Cardiac's motion for summary judgment. Emerick also conveniently omits that the previously-filed materials were incorporated, referenced, and relied upon by the trial court in its ruling on summary judgment. This specifically includes the market analysis done by Sandra Champion. CP 3; 8/9/13 VTP at 6:23-25.

Emerick simply does not want to be responsible to Cardiac for the substantial cost of the litigation that Emerick himself initiated. However, Emerick cannot demonstrate that the trial court abused its discretion in its award of fees, and as the Ninth Circuit Court of Appeals has observed:

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substantially discounted hourly rate charged for litigation services in this case compared to counsel's normal hourly rates. CP 337.

"By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). The trial did not abuse its discretion in awarding Cardiac its reasonable attorneys' fees.

E. Emerick is Not Entitled to an Award of Attorneys' Fees Incurred on Appeal.

Emerick is not entitled to an award of attorneys' fees under RAP 18.1 because he is not the prevailing party in this action. *See, e.g., Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 670, 160 P.3d 39 (2007); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 817-18, 225 P.3d 213 (2009); *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001) (noting that because no prevailing party attorneys' fees were available at trial, none were available under RAP 18.1). Even if Emerick prevailed on this appeal, he would not yet have a basis to request an award of prevailing party attorneys' fees, and an award of fees under RAP 18.1 is therefore inappropriate. Emerick's request should be denied.

F. Cardiac Is Entitled to Attorneys' Fees Incurred on Appeal.

Cardiac is the prevailing party in this action having obtained affirmative relief from the trial court. Therefore, pursuant to RAP 18.1, the terms of the parties' Shareholder Employment Agreement (CP 654)

and RCW 4.84.330, Cardiac requests an award of its reasonable attorneys' fees incurred in this appeal.

V. CONCLUSION

Cardiac is entitled to enforce its noncompete with Emerick to the extent the trial court found reasonable to protect Cardiac's business interests. Under Washington law goodwill, patient base, referral sources and the like are all protectable interests justifying the protections of a noncompete. The trial court's decision to enforce the noncompete should be affirmed. Because there is no question that Cardiac has substantially prevailed, Cardiac is entitled to its reasonable attorneys' fees, including fees incurred on both appeals, Cardiac respectfully requests that this Court reverse the trial court's denial of Cardiac's motion for attorneys' fees incurred on appeal and either enter an award of Cardiac's reasonable attorneys' fees as demonstrated by the record, or remand this matter to the trial court for entry of an award of Cardiac's reasonable attorneys' fees. Cardiac should also be awarded its attorneys' fees related to this appeal.

Dated this 28th day of March, 2014.

GORDON THOMAS HONEYWELL LLP

By 

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2014, I filed the foregoing document (original and one) with the Court of Appeals, Division II and delivered a copy of the document via electronic mail on this date and placed and United States Mail to:

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Dated on March 28, 2014, at Tacoma, Pierce County Washington.

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