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Court of Appeals  
Division I  
State of Washington

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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GADDIS EVENTS, INC.,

Appellant,

v.

SHAUNA WU,

Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

In 2013, Respondent Shauna Wu (“Wu”) joined Appellant Gaddis Events, Inc. (“Gaddis”) as a project manager. Wu was given a copy of the Employee Confidentiality, Inventions, and Non-Competition Agreement (“Noncompete Agreement”) before she was offered the position. She signed it before she began working. The Noncompete Agreement had a relatively short two-year duration, and it precluded only working in the corporate events business within 100 miles of Seattle or working for any of Gaddis’ clients.

Wu came to Gaddis with no experience in corporate events, but over the course of two years of training and mentoring, she developed into a full-fledged project manager in charge of large projects. In July 2015, Wu abruptly resigned from Gaddis. A week after her last day with Gaddis, she began working for the Seattle office of Wunderman Chicago. Wunderman Chicago is the corporate events division of a large international marketing firm.

Within a few weeks at Wunderman, Wu was appointed as the lead on the 2015 Fall Windows 10 & Devices Roadshow for the Microsoft U.S. Devices Team (the “MSUS Devices Team”). The MSUS Devices Team was not just a client of Gaddis; it was a hugely important one. Moreover, the MSUS Devices Team was the primary client for which Wu worked while she was employed by Gaddis. Less than a month after leaving Gaddis, Wu was employed by one its competitors to do the same things for the same client that she did for Gaddis.

Washington courts routinely enforce noncompete agreements as long as they conform to basic requirements. As the Supreme Court said in *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004), “Courts enforce noncompete agreements that are validly formed and

are reasonable.” When those requirements are met, courts enforce noncompete agreements as a matter of course.

If employers could not rely on courts to enforce valid and reasonable noncompete agreements, then those agreements would be worthless. The Supreme Court stated this aptly in *Perry v. Moran*, 109 Wn.2d 691, 700–01, 748 P.2d 224, 229 (1987).

One unpleasant alternative for accounting firms and other employers who rely upon covenants not to compete to protect their business, if such covenants are not upheld, is to forever rotate the employees who service clients with other employees, thereby limiting employee client contact as much as possible. Another unattractive alternative is constant management supervision or monitoring of the employee's work so that the client looks always to management rather than the employee for answers. It is readily apparent that forcing such courses of conduct upon an employer is costly, inefficient and would lead to unsatisfactory firm-client relationships. No rule of law should force employers into such actions.

In reliance on its Noncompete Agreement, Gaddis gave Wu complete access to its confidential information and direct access to the decision makers of its clients.

When Gaddis learned what Wu was doing, it first demanded that she stop, and when she refused, Gaddis filed this action. Although Gaddis readily obtained a Temporary Restraining Order to enforce the Noncompete Agreement, King County Superior Court Judge Palmer Robinson denied its Motion for a Preliminary Injunction. Instead of considering whether the Noncompete Agreement was valid and reasonable, Judge Robinson ruled that Gaddis had to prove “entitlement to ‘extraordinary relief.’” CP 137-39 (Order Denying Preliminary Injunction).

Judge Robinson then proceeded to dismiss Gaddis’ entire case on summary judgment. In her summary judgment order, Judge Robinson made findings of fact against Gaddis and said that noncompete agreements were largely limited to “an employee with specialized skills who has had access

to proprietary information of the former-employer or trade secrets.” CP 408. She ruled that employers “may not prohibit every employee from going to work for a competitor absent a showing that the employee had access to particularized information, such as client lists, or proprietary information.” CP 409.

Wu then filed a motion seeking \$58,746 of fees plus a “modest” 25% enhancement for a total of \$73,432.50. Judge Robinson signed Wu’s proposed order with little modification, reducing the attorney time by 1.5 hours for the partner and 16.4 hours for an associate. She did, however, award the 25% enhancement for a total award of \$66,681.

In short, Gaddis hired Wu under a moderate noncompete agreement that was properly executed. Wu resigned and immediately proceeded to violate both provisions of the Noncompete Agreement. Cases like this are supposed to end quickly and predictably with the issuance of a preliminary injunction. Instead, Gaddis now finds itself with a former employee who has court approval to continue violating her Noncompete Agreement and a \$66,000 judgment for attorney fees.

Judge Robinson applied the wrong standard to the enforcement of noncompete agreements. She erred in denying the preliminary injunction, in granting summary judgment, and in awarding \$66,000 of attorney fees. This Court should reverse and remand with instructions to issue the preliminary injunction.

## **II. ASSIGNMENTS OF ERROR**

1. Judge Robinson erred in denying the Motion for Preliminary Injunction.
2. Judge Robinson erred in granting the Motion for Partial Summary Judgment on Proximate Cause and Damages.
3. Judge Robinson erred in awarding attorney fees to Wu.

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Was the Noncompete Agreement validly formed? (First Assignment of Error)
2. Was the Noncompete Agreement reasonable? (First Assignment of Error)
3. Did the trial court decide a different summary judgment than was brought by Wu? (Second Assignment of Error)
4. Is proof of actual damages required to enforce a noncompete agreement? (Second Assignment of Error)
5. Is proof of proximate cause required to enforce a noncompete agreement? (Second Assignment of Error)
6. Was summary judgment properly granted? (Second Assignment of Error)
7. Did Wu properly support her motion for an award of attorney fees? (Third Assignment of Error)
8. Did Gaddis prevail on Wu's Counterclaims? (Third Assignment of Error)
9. Should the Court award either party attorney fees? (Third Assignment of Error)

### **IV. STATEMENT OF THE CASE**

#### **A. Gaddis, Inc.**

Gaddis is an established provider of corporate event services. CP 72 at ¶ 2 (Gaddis Declaration for TRO). It was founded in 2001 by Diane Gaddis and offers a full range of services for corporate events and trade shows, from event planning and logistics to branding and strategic marketing and communications, social media strategies, content management, speaker management, and event technology. *Id.*

Gaddis has been providing event project management services to divisions of Microsoft for over 14 years and is a Microsoft “Preferred Vendor,” which means that Gaddis has historically and repeatedly met the demands of being a turn-key solution vendor for Microsoft. CP 73 at ¶ 3. One business unit that Gaddis has focused on during recent years is the Microsoft U.S. Devices Team (the “MSUS Devices Team”), which manages the marketing of Windows devices that are targeted to customers and enterprises in the United States. *Id.* The MSUS Devices Team has been a \$500,000 per year client for Gaddis. CP 79 at ¶ 15.

**B. Wu Executed a Noncompete Agreement When She Was Hired by Gaddis in 2013.**

In 2013, Gaddis decided to expand and hire additional project managers for events. CP 73 at ¶ 4 (Gaddis Declaration for TRO). Wu applied for one of these positions. *Id.* She had a background in catering and social events, but no experience with large corporate events like those put on by Gaddis. CP 74 at ¶ 5. Despite her lack of specific experience, Gaddis was impressed with Wu’s attitude and enthusiasm and offered her a position. CP 74 at ¶ 5-6.

When she was offered the position, Wu was provided with the employment agreement, which includes a noncompete provision stating:

3.1. Employee agrees that during Employee's employment by Company and for twenty-four (24) months after termination of such employment for any reason (the "Noncompete Period"), Employee will not in any capacity (including without limitation, as an employee, officer, agent, director, consultant, owner, shareholder, partner, member or joint venture) directly or indirectly, whether or not for compensation, engage in or assist others to engage in any business that is, or is preparing to be, in "Competition" with any business in which the Company is engaged or preparing to engage through the date of the termination of Employee's employment; provided, however, that nothing herein shall prevent the purchase or ownership by Employee of shares which constitute less than one percent of the outstanding equity securities of a publicly-held company. "Competition" is defined as (a) providing event planning, organization and implementation for corporations and other business entities,

including without limitation for product launches, employee and/or customer meetings or recreational events, business roundtables, shareholder meetings, and the like, within a one hundred mile radius of Seattle, Washington; and (b) providing services described in subpart (a) anywhere in the United States for any person or entity that was a client or identified potential client of the Company within the twelve month period prior to Employee's termination of employment with the Company. An identified potential client is defined as a person or entity as to which the Company has made a sales call, proposal, bid, or response to an inquiry.

CP 74 at ¶ 6; CP 90-91, Ex. A (Gaddis Declaration for TRO).

As a condition of her hiring, Wu signed the Employee Confidentiality, Inventions, and Non-competition Agreement (“Employment Agreement”).

CP 74 at ¶ 6, Ex. B; CP 55 at ¶ 3, Ex. A (Wu Declaration Opposing TRO)

Gaddis hired Wu and provided extensive training and mentorship. CP 75 at ¶ 8. Over time, Wu grew into the position and was assigned more and more responsibility. CP 75-76. Gaddis focuses its efforts on a select group of companies and business units that regularly host events, an important one of which is the MSUS Devices Team. CP 153 at ¶ 4 (Gaddis Declaration for Reconsideration).

Wu was assigned to work on projects for the MSUS Devices Team and succeeded to the point where in early 2015, she was assigned to be a project manager for it. CP 79 at ¶ 15 (Gaddis Declaration for TRO). In that capacity, she worked on its Spring Windows Roadshow. CP 76 at ¶ 10 (Gaddis Declaration for TRO). As a project manager, “she had complete access to Gaddis clients and records” and “was not just one of the contacts with the clients on her projects, but the primary contact.” CP 155 at ¶ 12 (Gaddis Declaration for Reconsideration).

**C. Wu Resigned from Gaddis and Immediately Began Working for a Competitor on an Event for a Gaddis Client.**

On July 14, 2015, Wu abruptly gave notice of her resignation. CP 77 at ¶ 11 (Gaddis Declaration on TRO). She told Gaddis’ president, Diane Gaddis, that she wanted to get out of doing events and try something else,

another career, and said that she had already secured a position. *Id.* In her exit meeting, Wu reviewed the Noncompete Agreement and acknowledged that she understood her obligations. *Id.* Wu's last day with Gaddis was July 27, 2015. CP 55 at ¶ 3 (Wu Declaration Opposing TRO).

One week later, Wu began working at the Seattle office of Wunderman Chicago. CP 54 at ¶ 2. Wunderman is a global marketing company with 175 offices in 60 countries and employs up to 7,000 people. CP 77 at ¶ 12 (Gaddis Declaration for TRO). "Wunderman Chicago" is the name for the division of Wunderman that does corporate events. CP 153 at ¶ 6 (Gaddis Declaration for Reconsideration). Although that division is headquartered in Chicago, Wu was employed to work in its Seattle office. CP 357 at ¶ 14 (Gaddis Declaration Opposing Summary Judgment). Throughout this dispute, Wu has repeatedly suggested that she works in Chicago, but her only connection to Chicago is that she "remotes in" to a computer there from the Seattle office. CP 54 at ¶ 2 (Wu Declaration Opposing TRO).

At Wunderman, Wu was immediately assigned to be the lead on the 2015 Fall Windows 10 & Devices Roadshow for the MSUS Devices Team. CP 59 at ¶ 15. This event was a continuation of the same series for the same client in the same city that she worked for at Gaddis. See CP 76-77 at ¶ 10 (Gaddis Declaration for TRO). Wu could not have more thoroughly violated the Noncompete Agreement. Within weeks after leaving Gaddis, she was doing the same things for the same client as an employee of a competitor in the same city.

**D. Gaddis Filed This Action and Obtained a Restraining Order.**

Gaddis did not learn of Wu's new employment until September. CP 77-78 at ¶ 12. It demanded that Wu stop working for its client. CP 80 at ¶ 19. When Wu refused, Gaddis filed this action.

Gaddis brought a Motion for Restraining Order to prohibit Wu from working for Gaddis' clients. CP 19-30. The court granted the TRO. CP 133-36. Although Wu's employment of any kind with Wunderman violated the Noncompete Agreement, Gaddis did not seek an order prohibiting Wu from Working for Wunderman entirely, or even from working in the corporate events field. *Id.* . It sought only an order requiring her to stop working for its own clients. *Id.*

**E. Judge Robinson Denied Gaddis' Motion for a Preliminary Injunction.**

A week later, King County Superior Court Judge Palmer Robinson heard Gaddis' motion for a preliminary injunction. She took the matter under advisement, and denied the motion ten days later. CP 137-39 (Order Denying Preliminary Injunction). Although findings are not required for an order denying a preliminary injunction, Judge Robinson made findings to explain her decision. CP 138. Her primary finding states:

The parties agree that Gaddis did some work for Microsoft on some discrete projects and that Ms. Wu did work on those projects while she worked for Gaddis. Ms. Wu's current employer, Wunderman, has assigned Ms. Wu to work on the same type of project. However, the parties agree that Gaddis did not bid on that project. They further agree that an order prohibiting her from doing any work for any division or project of Microsoft is too broad. At this point, any damage to plaintiff is speculative.

CP 138 at ¶ 3. These findings are contrary to all the evidence.

Gaddis did not work on "some discrete projects" for Microsoft. It had a deep and ongoing relationship with the MSUS Devices Team. CP 78-79 at ¶ 15 (Gaddis Declaration for TRO); CP 153 at ¶ 4-5 (Gaddis Declaration for Reconsideration). Nor did Wunderman assign Wu to work on "the same type of project." It assigned her to work on the same event series for the same client that took up most of Wu's time at Gaddis. CP 79 at ¶16 (Gaddis Declaration for TRO).

In her Order, Judge Robinson went on to rule that proof of Wu's possession of trade secrets and actual damages was required.

There is no evidence in the record establishing that Ms. Wu possesses any trade secrets or confidential information or that the non-compete is protecting business or goodwill. Plaintiff's claim of damages is speculative. Plaintiff has also failed to establish both the likelihood of success on the merits, as well as the likelihood of harm in the absence of a preliminary injunction.

CP 138 at ¶ 2. In the last paragraph of her Order, Judge Robinson explained her decision by stating that "plaintiff has not met its burden to prove entitlement to 'extraordinary relief.'" CP 139 at ¶ 3.

In fact, the record did contain the evidence that Judge Robinson found lacking. Diane Gaddis submitted a declaration detailing the training given to Wu, her access to confidential information, and the need for a noncompete agreement to protect Gaddis' goodwill. CP 75-76 at ¶¶ 8-9 (Gaddis Declaration for TRO). Judge Robinson apparently rejected this evidence without ever acknowledging or discussing it.

Gaddis filed a Motion for Reconsideration pointing out that in *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004), the Supreme Court held that "Courts enforce noncompete agreements that are validly formed and are reasonable." CP 142, ll. 3-4. No proof of exceptional circumstances or actual harm is required. CP 148-50.

Judge Robinson called for a response, and the parties fully briefed the Motion, but she denied reconsideration without explanation. CP 233-34 (Order Denying Reconsideration). Wu then proceeded to file her Answer and asserted counterclaims for a wrongful TRO and for unpaid vacation benefits. CP 223-32. Gaddis filed a Petition for Discretionary Review to this Court for the injunction denial, which was argued on March 4, 2016, and taken under advisement. See Docket in this appeal.

**F. Wu's Summary Judgment Motions.**

While that Petition was pending, Wu filed two Motions for Partial Summary Judgment, the first on her wage claim for unpaid accrued vacation (CP 312-22) and the second on the issues of proximate cause and damages for Gaddis' noncompete agreement claim (CP 242-57). Both Motions were noted for hearing at the same time on March 18, 2016.

**1. Wu Abandoned Her Wage Motion When She Was Proven Wrong.**

In her Motion for Partial Summary Judgment on Nonpayment of Wages, Wu's asserted that when Wu left Gaddis, "she noticed that it reflected her use of the remaining 59.71 hours of vacation in that single pay period -- when she clearly did not use it -- with no payment." CP 315-16. As proof of her claim, she attached her she attached her last pay stub. CP 329.

However, that paystub plainly showed that Wu was in fact paid for her accrued vacation. After this was repeatedly pointed out to her counsel, Wu withdrew her motion on the wage claim as well as a motion to compel that she had filed. CP 333-34 (Notice of Withdrawal of Motions).

**2. Wu's Motion for Partial Summary Judgment on Proximate Cause and Damages Was Limited to Those Issues.**

In her Motion for Partial Summary Judgment on Proximate Cause and Damages, Wu argued that all of Gaddis' claims "require a showing of proximate cause and they require a showing of actual, economic damages." CP 251. She argued that proximate cause and damages were speculative, and that the trial court therefore should grant partial summary judgment. CP 253-55. In its response, Gaddis pointed out that this very Court held in *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn.App. 711, 730, 357 P.3d 696, 706 (2015) that a plaintiff seeking enforcement of a noncompete

agreement “does not have to prove actual competition or damages.” *Id.* at 723. CP 348 (Response to Partial Summary Judgment).

**G. Judge Robinson’s Summary Judgment Order.**

Judge Robinson issued her Order Granting Partial Summary Judgment before this Court ruled on the Petition for Discretionary Review. That Order is erroneous in several respects.

**1. Judge Robinson Weighed the Evidence and Made Findings.**

Judge Robinson’s Order never mentions the standard on summary judgment, but instead sets forth findings. CP 406-08. She did not reach those findings by considering the evidence in a light most favorable to Gaddis Events, but instead by accepting Wu’s statements as true. *Id.* Some of the more notable findings are highlighted in the following excerpt:

Ms. Wu worked for Gaddis from October 1, 2013, to July 27, 2015. **Prior to going to work for Gaddis Ms. Wu had worked as an event planner for 8 years.** She left Gaddis to go to work for Wunderman Chicago. **In her declaration Ms. Wu stated** that she was not part of any pitching/sales efforts when she worked at Gaddis and used no documents which were property of or confidential to Gaddis. **She also states in her declaration** that she received **no special training at Gaddis** had no organizational leadership role, did not do business development work or **have access to sensitive information.** She described her work **"I would coordinate food, entertainment, different vendors and address various client satisfaction issues within the realm of both social and corporate events. Declaration of Shanna Wu, Signed on November 6, 2015, p. 2, ll 9-10.**

\* \* \* \*

**A project on which Ms. Wu had worked when she was at Gaddis, but before 2015,** was the Microsoft Window 10 and Devices Roadshow. Sometime before July, 2016, Wunderman was awarded that project. **Gaddis had not bid on it.**<sup>1</sup> After Ms. Wu went to work for Wunderman she did work on the Roadshow. **Wunderman describes her work** as executing projects, which they describe as coordinating vendors, overseeing event staff and addressing client concerns. They state she is not expected or allowed to generate business and that her job does not require specialized knowledge or connections.

In its response to the motion for summary judgment **Gaddis argued that Ms. Wu breached the Agreement by "providing event planning, organization and implementation"** and conceded at oral argument that under their definition Ms. Wu would be violating the Agreement were she to work as a server at any event of an identified potential client.

CP 406-08.

As can be seen from those excerpts, Judge Robinson accepted the declarations of Wu and her supervisors as true even when they were disputed. Wu did not work in the events business for eight years before joining Gaddis. Ms. Gaddis testified that Wu came to work for Gaddis with no relevant experience. CP 74 at ¶ 5 (Gaddis Declaration for TRO). Wu did receive extensive training at Gaddis. CP 75 at ¶¶ 8-10. She had complete access to Gaddis' confidential information. CP 75 at ¶ 8. Judge Robinson found that Wu worked on other roadshow projects for the MSUS Devices Team "before 2015," but Gaddis made Wu a project manager for the MSUS Devices Team, in the Spring of 2015, shortly before she resigned. CP 79 at ¶15.

In a footnote, Judge Robinson states that "Gaddis did not oppose Wu's motion to have the unanswered and overdue requests for admissions deemed admitted." CP 407 at n.1. Wu never brought a motion on the requests for admission. Wu did file a motion to compel other discovery, but she withdrew it. CP 333 (Notice of Withdrawal of Motions).

When Judge Robinson did finally address Diane Gaddis' declaration on the merits, she dismissed it in two sentences.

Diane Gaddis states in her declaration that Ms. Wu had complete access to Gaddis clients. Ms. Gaddis also has a conclusory statement that Ms. Wu would have "the inside track" managing Gaddis clients because of the "time and effort that Gaddis invested in training her and the opportunities she was given to develop those relationships."

CP 408. Judge Robinson's Order completely ignores the rest of Ms. Gaddis' declaration or whether it presented questions of fact. *See* CP 353-58 (Gaddis Declaration Opposing Summary Judgment).

**2. Judge Robinson Did Not Decide the Motion Before Her.**

Judge Robinson did not even decide the motion brought by Wu. Wu's motion was directed at the issues of proximate cause and damages. CP 242-57. Judge Robinson's Order, however, never even mentions those issues. CP 405-10.

Judge Robinson instead belatedly acknowledged that noncompete agreements are evaluated on a reasonableness test..

Covenants not to compete are to be judged by a consideration of three factors: (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

CP 408 (citing *Perry v. Moran*, 109 Wn.2d 691, 748 P.2d 224 (1987)).

After setting forth this test, however, Judge Robinson never applied it. Instead, she immediately went on to say that "cases upholding non-competes in employment contracts usually do so in the context of an employee with specialized skills who has had access to proprietary information of the former-employer or trade secrets." CP 408. Even if that statement were correct, it has nothing to do with any of the *Perry* factors.

Judge Robinson ultimately decided the motion based on a new rule that she created herself: "an employer may not prohibit every employee from going to work for a competitor absent a showing that the employee had access to particularized information, such as client lists, or proprietary information." CP 409. Instead of granting partial summary judgment, she dismissed Gaddis' entire case. *Id.*

#### **H. Motion and Order for Fees.**

Wu then brought a Petition for Reasonable Attorneys' Fees, Costs, and Entry of Final Judgment ("Motion for Attorney Fees") seeking \$58,746 of fees plus a 25% enhancement for a total of \$73,432.50. CP 411-22. Wu asserted that she was entitled to an award of fees because "the Court dismissed each of Gaddis' claims." CP 417. Wu then claimed that her counsel already had gone through the time entries and "excluded (1) time entries that were directed exclusively towards issues that would not be subject to fee-shifting (*e.g.*, counter-claims); (2) time entries that appeared redundant, in retrospect; and (3) time entries that did not appear necessary, in retrospect." CP 419. Since the trial court did not need to engage in the same process, Wu did not attach or identify any of the records that she excluded.

Gaddis objected on two principal grounds. First, Wu was not the only prevailing party. CP 480-81 (Response to Motion for Attorney Fees). The wage and wrongful injunction counterclaims were dismissed, making Gaddis the prevailing party of those claims. When both parties prevail on major issues, no fees should be awarded. *Id.* Second, Wu had not provided the trial court with information or records about the time that she removed from the request, making review or a response impossible. CP 481.

On May 4, 2016, Judge Robinson granted the Motion for Attorney Fees by adopting the proposed order with minimal changes and reducing the fee award from \$58,746 to \$53,345.50. CP 538-48 (Final Judgment and Order Granting Reasonable Attorneys' Fees and Costs). No explanation was given other than that the Court disallowed 1.5 hours of Rosenberg's time and 16.4 hours of an associate's time. CP 544. She did grant a 25% enhancement of the award. CP 544-45. The arguments raised by Gaddis are not mentioned at all. Gaddis timely appealed.

## V. ARGUMENT

### A. Standard of Review.

A trial court's decision on a motion for preliminary injunction generally is reviewed for abuse of discretion. *Huff v. Wyman*, 184 Wn.2d 643, 648, 361 P.3d 727, 730 (2015). When a trial court applies the wrong legal standard, it necessarily abuses its discretion. *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 531, 342 P.3d 308, 314 (2015) (“An error of law necessarily constitutes an abuse of discretion.”); *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 13, 330 P.3d 168, 175 (2014) (“Generally, when a trial court applies the wrong legal standard an abuse of discretion will necessarily be found and the case remanded for the trial court to apply the correct standard.”).

Noncompete agreements are enforced when they are: (1) validly formed or lawful; and (2) reasonable. *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004); *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn.App. 711, 721, 357 P.3d 696, 702 (2015). Whether a noncompete agreement was validly formed primarily depends on whether it is reasonable, which is a question of law that is reviewed *de novo*. *Labriola*, 152 Wn.2d at 832-33. Whether a noncompete agreement is reasonable also presents a question of law that this Court reviews *de novo*. *Emerick*, 189 Wn.App. at 721. (“As the reasonability of the noncompete covenant is a legal question, this court's review is *de novo*.”).

Appellate courts “review summary judgment orders *de novo*, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015). This Court considers only the evidence that was before the trial court on the summary judgment motion. RAP 9.12.

“The question whether a party is entitled to attorney fees is an issue of law” that this Court reviews *de novo*. *King Cty. v. Vinci Const. Grands Projets*, 191 Wn.App. 142, 183, 364 P.3d 784, 805 (2015). The amount of the award is reviewed for abuse of discretion. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827, 833 (2012).

**B. Gaddis Was Entitled to a Preliminary Injunction.**

**1. Courts Enforce Noncompete Agreements That Are Valid and Reasonable.**

Gaddis’ motion for Preliminary Injunction was directed to the trial court’s discretion, but that discretion must be exercised in accordance with the law. According to longstanding precedent, “Courts enforce noncompete agreements that are validly formed and are reasonable” (*Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004)). Those are the questions that Judge Robinson should have considered on the Motion, but she instead denied the preliminary injunction because Gaddis “has not met its burden to prove entitlement to ‘extraordinary relief.’” CP 139 (Order Denying Preliminary Injunctions). Judge Robinson ruled that Gaddis had to prove “(1) a clear legal or equitable right; (2) a well-grounded fear of imminent invasion of that right; and (3) that the facts complained of are either resulting in or will result in actual and substantial injury.” CP 138.

If noncompete agreement cases were subject to the legal standard that Judge Robinson applied, they would be utterly worthless. Employers could not rely on noncompete agreements to provide any protection if courts would not act until the employer had suffered appreciable damage, nor could they afford even to attempt to enforce noncompete agreements if they had to prove entitlement to extraordinary relief instead of simply proving that the noncompete agreement was valid and reasonable.

The Supreme Court addressed these very issues at length in *Perry v. Moran*, 109 Wn.2d 691, 698, 748 P.2d 224, 228 (1987).

We find Judith Moran's covenant not to perform accounting work for PWT clients to be proper, reasonable and enforceable. PWT has a legitimate interest in protecting its existing client base from depletion by a former employee. It had a justifiable expectation that if it provided employment to an accountant, that employee would not take its customers. A covenant prohibiting the former employee from providing accounting services to the firm's clients for a reasonable time is a fair means of protecting that client base. A bargain by an employee not to compete with the employer during the term of employment or thereafter for a reasonable time and within a reasonable territory, as may be necessary for the protection of the interests of the employer without imposing undue hardship on the employee, is valid. Restatement of Contracts § 516(f) (1932). Such covenants encourage employment of accountants by accounting firms and they discourage the taking of the employer's clients without preventing the employee from engaging in the profession. *Wolf & Co. v. Waldron*, 51 Ill.App.3d 239, 9 Ill.Dec. 346, 366 N.E.2d 603 (1977); *Faw, Casson & Co. v. Cranston*, 375 A.2d 463 (Del.Ch.1977); 15 A.L.R.4th 559.

One unpleasant alternative for accounting firms and other employers who rely upon covenants not to compete to protect their business, if such covenants are not upheld, is to forever rotate the employees who service clients with other employees, thereby limiting employee client contact as much as possible. Another unattractive alternative is constant management supervision or monitoring of the employee's work so that the client looks always to management rather than the employee for answers. It is readily apparent that forcing such courses of conduct upon an employer is costly, inefficient and would lead to unsatisfactory firm-client relationships. No rule of law should force employers into such actions.

*Id.* at 700-01. The *Perry* court did not limit its discussion to the parties or the specific facts before it, but instead spoke broadly about an agreement between “an employee” and “the employer.” It was setting forth principles that apply to every noncompete agreement.

Just a year ago, this Court revisited the issue of noncompete agreements in *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn.App. 711, 722, 357 P.3d 696, 702 (2015). Like *Perry*, that decision stated that “the law in Washington is clear that an employer has a legitimate interest in protecting

its existing client base and in prohibiting the employee from taking its clients.” (quotation marks omitted). The *Emerick* Court likewise explained that enforcement of noncompete agreements does not depend on actual competition or damages, but instead on “the potential to compete.” *Id.* at 723.

Judge Robinson failed to consider whether the Noncompete Agreement was valid and reasonable. She instead considered whether Gaddis had proven actual damages and exceptional circumstances. Although appellate courts ordinarily would remand a case like this to the trial court for further consideration under the applicable standard, that is neither necessary nor appropriate here. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345-46, 858 P.2d 1054, 1079 (1993) (“Where, as here, the trial judge has applied the wrong legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court may independently review the evidence to determine whether a violation of the certification rule occurred.”). This Court therefore should determine whether the Noncompete Agreement in this case is valid and reasonable.

## **2. The Noncompete Agreement Was Validly Executed.**

Wu has never argued that the Noncompete Agreement was not validly executed. When an employee is informed that an employment agreement contains a noncompete provision and voluntarily signs it, the requirements of mutual assent and consideration are satisfied. *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn.App. 670, 677–78, 578 P.2d 530, 535 (1978). It is undisputed that Wu was given the employment agreement and the noncompete provision when she was offered the position. CP 74 at ¶6; CP 83-84; CP 89-92. The validity requirement is satisfied as a matter of law.

### 3. The Noncompete Agreement is Reasonable.

The legal determination whether a noncompete agreement is reasonable is based on a three-part test.

The three part test for reasonableness asks (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.

*Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn.App. 711, 721–22, 357 P.3d 696, 701 (2015). “As the reasonability of the noncompete covenant is a legal question, this court's review is de novo.” *Emerick*, 189 Wn.App. at 721.

#### a. Necessary to protect Employer's Interest.

The first element is whether the restraint is necessary to protect the employer's business. Wu effectively argued that the Noncompete Agreement was not necessary because she did not solicit Gaddis' customers and because Gaddis had not proven any actual harm from her violation of the agreement. *E.g.*, CP 36-37 (Opposition to TRO); CP 59 at ¶ 14 (Wu Declaration Opposing TRO). Judge Robinson accepted this argument, denying the injunction in part because Gaddis failed to prove “the likelihood of harm in the absence of a preliminary injunction.” CP 138, ll. 22-23.

The employee in *Emerick* made the same argument, but this court rejected it as irrelevant.

Still, *Emerick* argues that CSC failed to demonstrate why the noncompete was *necessary to protect* its goodwill and business interests. He contends that it was not enough that CSC prove, via generalized statements, that it has protectable business interests. He claims that CSC needs to prove that the noncompete is necessary to protect its business interests, because *Emerick* has already taken actual affirmative steps to threaten CSC's business interests.

**He is wrong.** CSC needs to demonstrate a protectable interest exists and that *Emerick* could pose a threat to that interest if not

adequately restrained. CSC has done so. **It does not have to prove actual competition or damages.** Emerick does not dispute that he could have competed and damaged CSC. He merely asserts that he has not relied on CSC's referral sources or traded on his prior employment at CSC since leaving CSC, and therefore the enforcement of the covenant is not necessary. But, it is the potential to compete—not the actual competition—that makes the noncompete necessary. In fact, he has an office in close proximity to CSC from which he practices cardiology. The risk is clear, as is the need for the restraint.

*Id.* at 723 (emphasis added).

According to Perry and Emerick, employers have a legitimate interest in protecting their client relationships as a matter of law. *Perry v. Moran*, 109 Wn.2d 691, 700, 748 P.2d 224, 229 (1987) (“PWT has a legitimate interest in protecting its existing client base from depletion by a former employee.”); *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn.App. 711, 722, 357 P.3d 696, 702 (2015) (“Specifically, the law in Washington is clear that an employer has a legitimate interest in protecting its existing client base and in prohibiting the employee from taking its clients.” (quotation marks and citation omitted)). The existence of the interest cannot be disputed.

There is no dispute that Wu is doing exactly what she agreed not to do. She is working in the corporate events business for another employer in Seattle and has worked, or is working, for one of Gaddis’ clients. Given the factual existence of an ongoing breach of the Noncompete Agreement, restraint is entirely necessary to protect Gaddis’ interests.

**b. No more restraint than necessary.**

“The second reasonableness factor focuses on the extent to which the covenant adversely affects the employee's ability to earn a living. *Emerick*, 189 Wn.App. at 724. It concerns both the scope of the agreement and its duration.

Gaddis limited the Noncompete Agreement to work within 100 miles of Seattle because while it is a national business, its primary focus is on the

Western Washington area. CP 156 at ¶ 17 (Gaddis Declaration for Reconsideration). One hundred miles is a considerably larger geographic range than has been approved by other Washington courts, but that is a result of the realities of modern life, not a case of overreaching by Gaddis.

Wu has never disputed the reasonableness of the 100-mile restriction in any meaningful way. The only reference of any kind to the provision in any of Wu's submissions to the trial court was the statement, "Gaddis neither bargained for this, nor does it have any apparent intention of letting Ms. Wu pursue her livelihood on this side of the mountains," which was made in Wu's Reply Brief in Support of Partial Summary Judgment. CP 365.

**c. No injury to the public.**

This third element presents questions of public policy. *Emerick*, 189 Wn.App. at 728. The only time Wu made any mention of this element was in her Opposition to Plaintiff's Motion for a Temporary Restraining Order, where she argued that

Even though an employer may have a legitimate business interest, there are "equally competing concerns of freedom of employment and free access of the public to professional services." *Id.* at 370. This non-competition provision violates public policy because enforcing it will not only deprive Microsoft of competent services, but it will also deprive Ms. Wu of employment and income.

\* \* \* \*

Here, a balancing of the equities sharply favors denying this motion. Gaddis will suffer no injury if the Court denies its request. In contrast, if the Court grants it, Ms. Wu will be forced to cease her employment with Wunderman and lose all income - which is more than a mere inconvenience. Ms. Wu has a right to pursue a livelihood and is doing so without breaching her Employment Agreement with Gaddis. The public, including Microsoft, would be worse off as well. *See Tyler Pipe Indus. Inc. v. Dep 't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982); *Northwest Gas Ass 'n v. Washington Utilities*, 141 Wn.App. 98, 122, 168 P.3d 443 (2007) (appropriate to consider hardships to parties and the public).

CP 48-49.

Alleged injuries to Wu and Microsoft are not injuries to the public, and Wu has never made any actual arguments about public policy. For that reason, in her later Order on summary judgment, Judge Robinson commented that the public interest element “is not involved here.” CP 408.

**d. To the extent that the Court disagrees it should modify the Agreement.**

Even if this Court were to disagree in some respect, it should still enforce the noncompete agreement to the extent that is reasonable and modify it accordingly. *Wood v. May*, 73 Wn.2d 307, 313, 438 P.2d 587, 591 (1968); *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn.App. 538, 544, 635 P.2d 1114, 1118 (1981). Judge Robinson failed to consider that question at all.

If noncompete agreements are enforceable at all, then Wu’s Noncompete Agreement must be enforced with a preliminary injunction. If employers cannot enforce a routine noncompete agreement against an employee who resigns and immediately violates its terms, then such agreements will become worthless. This Court should enforce the law and remand with instructions to grant the preliminary injunction.

**C. The Trial Court Erroneously Granted Summary Judgment.**

Wu brought a Motion for Partial Summary Judgment on the Issues of Proximate Cause and Damages. The motion was not well taken because, as set forth above, in an action to enforce a noncompete agreement, the employer plaintiff seeking enforcement of a noncompete agreement “does not have to prove actual competition or damages.” *Emerick*, 189 Wn.App. at 723. Gaddis pointed that out to the trial court, but instead of dismissing the Motion, Judge Robinson ruled on the merits of the claim, making

apparent findings of fact and dismissing the case on entirely different grounds.

**1. Judge Robinson Failed to the Apply the Summary Judgment Standard.**

In deciding a summary judgment motion, the court must accept the nonmoving party's evidence as true and make all reasonable inferences in favor of that party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015). Judge Robinson never even suggested that she was applying the summary judgment standard, but instead launched directly into findings for which she cited Wu's declaration and ignored Gaddis' declaration.

In her Order Granting Partial Summary Judgment, Judge Robinson set forth the facts of the case, but she appears to have made factual findings based on Wu's evidence.

Ms. Wu worked for Gaddis from October 1, 2013, to July 27, 2015. Prior to going to work for Gaddis Ms. Wu had worked as an event planner for 8 years. She left Gaddis to go to work for Wunderman Chicago. **In her declaration** Ms. Wu stated that she was not part of any pitching/sales efforts when she worked at Gaddis and used no documents which were property of or confidential to Gaddis. She also states **in her declaration** that she received no special training at Gaddis; had no organizational leadership role, did not do business development work or have access to sensitive information. She described her work "I would coordinate food, entertainment, different vendors and address various client satisfaction issues within the realm of both social and corporate events." **Declaration of Shanna Wu**, Signed on November 6, 2015, p. 2, ll 9-10.

\* \* \* \*

A project on which Ms. Wu had worked when she was at Gaddis, but before 2015, was the Microsoft Window 10 and Devices Roadshow. Sometime before July, 2016, Wunderman was awarded that project. Gaddis had not bid on it. After Ms. Wu went to work for Wunderman she did work on the Roadshow. **Wunderman describes** her work as executing projects, which they describe as coordinating vendors, overseeing event staff and addressing client concerns. **They state** she is not expected or allowed to generate business and that her job does not require specialized knowledge or connections.

CP 406-07.

Many if not most of these statements were disputed. Diane Gaddis submitted declarations stating that when Wu was hired, she had no relevant experience and was given extensive training and mentorship (CP 75 at ¶ 8); Wu was made a project manager for the MSUS Devices Team in 2015 and worked on the Spring Road Show (CP 76 at ¶10); Wu managed projects for Gaddis independently and dealt directly with the clients (CP 76 at ¶10); and Gaddis did submit a full bid for the roadshow event (CP 354 at ¶ 6).

When Judge Robinson did finally address Ms. Gaddis' declarations, she simply dismissed them.

Diane Gaddis states in her declaration that Ms. Wu had complete access to Gaddis clients. Ms. Gaddis also has a conclusory statement that Ms. Wu would have "the inside track" managing Gaddis clients because of the "time and effort that Gaddis invested in training her and the opportunities she was given to develop those relationships."

CP 408. Nothing in the order suggests that Judge Robinson gave serious consideration to the evidence submitted by Gaddis.

"The trial court is not permitted to weigh the evidence in ruling on summary judgment." *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990, 993 (1964). Judge Robinson's failure to view the evidence in the appropriate light is itself grounds to reverse her Order, and this Court should reverse the Order granting summary judgment.

## **2. Judge Robinson Did Not Decide the Motion that Was Before Her.**

Judge Robinson effectively granted summary judgment *sua sponte* by basing her decision on grounds that were never raised, briefed, or argued. The motion was brought on the issues of damages and proximate, but those issues are never discussed in the Order. CP 405-10. The word "proximate" does not even appear except in a footer.

Judge Robinson instead belatedly acknowledged that noncompete agreements are evaluated on a reasonableness test.

Covenants not to compete are to be judged by a consideration of three factors. *Perry v. Moran* 109 Wash.2d 691, 698, (1987):

(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.

The third factor is not involved here.

CP 408. The reasonableness of the agreement was not even mentioned in the Motion for Partial Summary Judgment. CP 242-57. It was error to grant a motion that was never brought and to decide new issues without notice to Gaddis and an opportunity to respond.

### **3. The Trial Court's Legal Analysis Was Incorrect.**

After setting forth the reasonableness test, Judge Robinson never applied it. Judge Robinson instead immediately stated that "The cases upholding non-competes in employment contracts usually do so in the context of an employee with specialized skills who has had access to proprietary information of the former-employer or trade secrets." CP 408. That simply is not true. Since the year 2000, there have been seven reported cases concerning disputes over noncompete agreements, and five of them fail her test. *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn.App. 898, 359 P.3d 884, 888 (2015) (Veterinarian); *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn.App. 711, 357 P.3d 696 (2015) (Doctor); *McKasson v. Johnson*, 178 Wn.App. 422, 315 P.3d 1138 (2013) (Fitness Instructor); *MP Med. Inc. v. Wegman*, 151 Wn.App. 409, 412, 213 P.3d 931, 934 (2009) (Medical Equipment Salesman); *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d

828, 831, 100 P.3d 791, 792 (2004) (Commercial Print Salesperson); *Sanders v. Woods*, 121 Wn.App. 593, 595, 89 P.3d 312, 313 (2004) (Laminated Book Sales); *All Star Gas, Inc., of Washington v. Bechard*, 100 Wn.App. 732, 734, 998 P.2d 367, 369 (2000) (Propane sales retail manager).

Judge Robinson went on to say that “This case is much closer to *Copier Specialists v. Gillen*. 76 Wash.App. 774 (1995).” CP 408. That statement is difficult to understand. The plaintiff in *Copier Specialists* was an entry-level copy machine repairman. *Id.* at 772. His employment lasted six months, the first three of which consisted of training and failing the proficiency test before apparently passing it the second time. *Id.* He was fired by Copier Specialists before he had any exposure to confidential information or customer lists. *Id.* Wu was employed for two years and progressed to a position of responsibility. She was exposed to all of Gaddis’ confidential information and developed relationships with its clients. Wu resigned and immediately went to work for a competitor on a project for a Gaddis client. The suggestion that these two cases are factually similar is nonsense.

Although Judge Robinson’s Order accurately states the law that “Covenants to compete will be enforced when they are reasonable in scope and duration when they are necessary to protect the legitimate business interests of an employer” (CP 409), she did not apply that rule to decide the case. Instead, she based her decision on a new rule of her own making.

However, an employer may not prohibit every employee from going to work for a competitor absent a showing that the employee had access to particularized information, such as client lists, or proprietary information.

CP 409. No Washington case has ever imposed such a requirement, and countless cases have enforced noncompete agreements in circumstances that would fail this test.

Even if it were proper for Judge Robinson to reach the merits of the claim, she dismissed Gaddis' case based on a legal rule that does not exist. This Court should reverse.

**D. Judge Robinson Erred in Her Award of Attorney Fees.**

Following the summary judgment order, Wu brought a Petition for Reasonable Attorneys' Fees, Costs, and Entry of Final Judgment ("Motion for Attorney Fees") seeking \$58,746 of fees plus a 25% enhancement for a total of \$73,432.50. CP 411-423. Wu asserted that she was entitled to an award of fees because "the Court dismissed each of Gaddis' claims." CP 417. In her Final Judgment and Order Granting Reasonable Attorneys' Fees and Costs ("Order Granting Attorney Fees") Judge Robinson granted the Motion with only a minor reduction in the time and awarded the 25% enhancement for a total award of \$66,681. CP 538-48.

**1. Judge Robinson's Fee Award Violates the Requirements of this Court's Holding in *Berryman v. Metcalf*.**

Judge Robinson's decision on the Motion for Attorney Fees seems almost designed to contradict every aspect of this Court's holding in *Berryman v. Metcalf*, 177 Wn.App. 644, 312 P.3d 745 (2013). In *Berryman*, this Court admonished trial courts not to simply deduct a few hours from fee requests and accept them at face value, but instead to give them serious and independent consideration.

Most notably, counsel for Wu claimed to have excluded time entries that were duplicated or unproductive, but neither produced the records of that time nor stated how much time was excluded.

Before re-presenting them, I went through and excluded (1) time entries that were directed exclusively toward issues that

would not be subject to fee-shifting, such as the counterclaims; (2) time entries that appeared redundant, in retrospect; and (3) time entries that did not appear necessary, in retrospect. In all, I excised substantial time.

CP 428.

*Berryman* is very clear that a trial court may not simply accept partial documentation of a fee request based on the assurances of counsel. The most important aspect of that inquiry is that it be independent.

While the trial court did enter findings and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee.

*Berryman*, 177 Wn.App. at 658.

The trial court must make an independent judgment about how much time is reasonably spent in “client and witness preparation” where all but one of six witnesses had testified in the arbitration, and one of the expert witnesses testified by videotape.

*Berryman*, 177 Wn.App. at 664.

The billing details discussed above are only some of the concerns Farmers raised below that the trial court failed to address. On remand, the trial court should conduct a careful review of the record and make its own independent determination of the number of hours to include in the lodestar.

*Berryman*, 177 Wn.App. at 664.

Under *Bowers*, the trial court must make an independent evaluation of the reasonableness of the fees claimed and discount for unproductive time.

*Berryman*, 177 Wn.App. at 677–78.

Gaddis objected to the fee request on the grounds that it was inadequate and did not permit Gaddis to respond in a meaningful way. CP 481 (Response to Motion for Attorney Fees). Without the records for the time that was excluded, Gaddis had no way to evaluate the fee request.

Judge Robinson's Order does not reflect the independent review required by *Berryman*. Instead, she specifically stated that she deferred to Wu's counsel.

Counsel has also gone through and excluded time related to (a) claims *not* subject to fee shifting, such as her dismissed counterclaims, (b) time that was not productive, at least in retrospect, and (c) time that was duplicative, at least in retrospect. This culminated in substantial time being excised. The Court finds that the total amount of time identified in Exhibit D to Mr. Rosenberg's declaration is reasonable.

CP 544 at ¶ 7. Judge Robinson reduced Rosenberg's time by 1.5 hours from 116.3 to 114.8 and his associate's time by 16.4 hours from 51.3 to 34.9. Nothing in the Order identifies her reasoning.

If *Berryman* has any teeth, Judge Robinson's Order cannot be affirmed. Even if the Court affirms in all other respects, it should reverse the fee award.

## **2. No Fees Should Have Been Awarded at All.**

Gaddis' claims were not the only ones asserted in this case. Wu asserted counterclaims for unpaid wages in the form of vacation pay and for a wrongful Temporary Restraining Order. CP 227-30 (Answer and Counterclaims). As set forth above, the wage claim was withdrawn after Gaddis proved that the vacation pay was included in Wu's final paycheck, and Wu voluntarily dismissed her claim for wrongful injunction.

The "general rule" is that when the plaintiff voluntarily dismisses a claim, the defendant is deemed the prevailing party. *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865, 505 P.2d 790, 792 (1973); *Escude ex rel. Escude v. King Cty. Pub. Hosp. Dist. No. 2*, 117 Wn.App. 183, 193, 69 P.3d 895, 900 (2003) ("Under the general rule of CR 41, a defendant is regarded as having prevailed when the plaintiff obtains a voluntary nonsuit."); *Boeing Co. v. Lee*, 102 Wn.App. 552, 556, 8 P.3d 1064, 1065

(2000); *Hawk v. Branjes*, 97 Wn.App. 776, 781, 986 P.2d 841, 843 (1999) (“We noted that under the general rule, the defendant is regarded as having prevailed when the plaintiff obtains a voluntary nonsuit.”); *Walji v. Candyco, Inc.*, 57 Wn.App. 284, 288, 787 P.2d 946, 948 (1990).

While Wu prevailed on the noncompete claim, Gaddis prevailed on the wage and wrongful TRO claims. When both parties prevail on major issues, the court generally should not award fees to either party.

If both parties prevail on major issues, however, there may be no prevailing party. *American Nursery Prod. Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 234-35, 797 P.2d 477 (1990); *Puget Sound Serv. Corp. v. Bush*, 45 Wash.App. 312, 320-21, 724 P.2d 1127 (1986). In such situations, neither party is entitled to an attorney fee award. *American Nursery*, 115 Wash.2d at 235, 797 P.2d 477; *Puget Sound*, 45 Wash.App. at 321, 724 P.2d 1127. Accordingly, when both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees. *Marine Enter., Inc. v. Security Pacific Trading Corp.*, 50 Wash.App. 768, 772, 750 P.2d 1290, review denied 111 Wash.2d 1013 (1988).

*Phillips Bldg. Co., Inc. v. An*, 81 Wn.App. 696, 702-03, 915 P.2d 1146, 1149-50 (1996). Numerous cases have reached this result. *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477, 487 (1990) (“However, because both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract.”); *City of Lakewood v. Koenig*, 160 Wn.App. 883, 896, 250 P.3d 113, 120 (2011) (“But if both parties prevail on major issues, an attorney fee award is not appropriate.”); *Transpac Dev., Inc. v. Oh*, 132 Wn.App. 212, 217, 130 P.3d 892, 895 (2006) (“If both parties prevail on major issues, it is appropriate to let each bear their own costs and fees.”).

When this argument was made, Wu disputed that her counterclaims were a “major issue,” but she offered no basis for that assertion.

In all, the counterclaims were never a "major issue," they did not arise out of the non-compete contract, and their disposition had no legal impact. Gaddis's attempt to avoid application of the contract *it* wrote-in a litigation *it* brought-should be rejected.

\* \* \* \*

Gaddis-who has the burden to establish itself as a "prevailing party on a major issue"-offers only a conclusory assertion. This is because Gaddis never even answered the counterclaims, never responded to discovery related to the counterclaims, never brought or responded to a substantive motion about the counterclaims, and secured no relief related to them. They were never a "major issue" in the case. Supp. Rosenberg Decl. ¶ 2.

CP 514 (Reply in Support of Fee Petition).

Cases discussing this issue appear to consider only whether both parties prevailed on claims in the case, rather than attempting to determine whether they were major. *Country Manor MHC, LLC v. Doe*, 176 Wn.App. 601, 613, 308 P.3d 818, 824 (2013) applied this rule when "Country Manor ultimately obtained a judgment in its favor in this mobile home unlawful detainer action, but only after the trial court rejected its request for a summary disposition and gave the Cliftons an opportunity to cure their default." *Columbia Cmty. Bank v. Newman Park, LLC*, 166 Wn.App. 634, 646, 279 P.3d 869, 875 (2012) applied the rule when "Newman Park prevails as to validity of the deed of trust. But Columbia prevails on its equitable subrogation claim." *Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn.App. 531, 547, 260 P.3d 906, 915 (2011) applied this rule when "The Association prevails on the issue of whether the Park's letter violated RCW 59.20.135, but the Park prevails on the issue of whether the trial court erred by finding a contract implied in fact."

Wu's assertion that her wage claim was not a major issue in the case is disingenuous. She considered it a major enough issue to plead the counterclaim and then to file a motion for summary judgment on it. She

sought not only her alleged unpaid wages, but also double damages and attorney fees. CP 223-32.

Wu also argued that the court should only consider claims for which an award of fees was authorized. The identity of the prevailing party has nothing to do with whether they are subject to an award of attorney fees. It is simply the identification of the prevailing party. Not a single reported case has ever held that whether attorney fees are authorized for a claim dictates the major issues for purposes of identifying the prevailing party.

In any event, Wu completely misunderstands the applicable law. She claims that the answer is dictated by “controlling precedent” in the form of *Wachovia SEA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009), and she then proceeds to argue that she is entitled to attorney fees under RCW 4.84.330. CP 512-14.

Wu has missed the central point of *Wachovia*. RCW 4.84.330 applies only to unilateral attorney fee provisions. *Wachovia*, 165 Wn.2d at 489-90. The sole purpose of the statute is to make unilateral attorney fee provisions bilateral. *Id.* Consequently, when a party to a contract with a unilateral attorney fee provision favoring the other party prevails, its claim for fees is made under the statute, and not under the contract.

RCW 4.84.330 has its own definition of the prevailing party: “As used in this section ‘prevailing party’ means the party in whose favor final judgment is rendered.” In *Wachovia*, the Supreme Court held that because a voluntary dismissal does not result in a judgment, it cannot create a “prevailing party” for purposes of RCW 4.84.330.

All of this would mean something in this case if the Noncompete Agreement contained a unilateral fee provision, but it doesn’t. Section 7.2 of the Agreement provides:

The prevailing party shall be entitled to reasonable attorneys' fees and costs incurred in connection with any such litigation arising under or related to this Agreement.

CP 65. The fee provision here is bilateral, and neither RCW 4.84.330 nor *Wachovia* have any bearing on this case.

Wu also cited *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 398, 325 P.3d 904, 909 (2014) for the proposition that *Wachovia* “nullified” the general rule that a voluntary dismissal makes the other party prevail. However, the quoted language actually is a reference to “contextual” interpretation of the small claims attorney fee provision in connection with other provisions of RCW Chapter 4.84. *Alliance One* simply held that a judgment is required for an award of attorney fees under the statute for awards of attorney fees in claims under \$10,000. Again, that has nothing to do with this case.

The cases holding that when a plaintiff voluntarily dismisses a claim, the defendant is the prevailing party are still good law outside the context of unilateral fee provisions and RCW 4.84.330. The fee provision at issue is extremely broad, providing for fees to the “prevailing party” that are “incurred in connection with any such litigation arising under or related this Agreement.” CP 65 (Noncompete Agreement, Section 7.2). Gaddis is the prevailing party on the dismissed counterclaims, and the rule when both parties prevail on major issues applies.

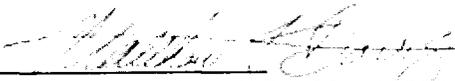
## **VI. CONCLUSION**

This should have been a simple, routine noncompete agreement case. The validity of the Noncompete Agreement was never questioned, and its restrictions are well within the scope of the law. The violations of the Noncompete Agreement were immediate and undeniable. The law permits only one decision on the undisputed facts, and that is to enforce the Noncompete Agreement.

While this appeal proceeds, Wu continues to work in Seattle for a corporate events business doing work for at least one former Gaddis client. Time is of the essence. This Court should reverse the trial court's decisions and remand with instructions to issue the preliminary injunction.

DATED this 30<sup>th</sup> day of August, 2016.

**BRACEPOINT LAW P.S.**

By   
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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on August 31, 2016, I caused a true and correct copy of the foregoing document to be served on the following counsel of record via e-mail:

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Attorney for Respondent Shauna Wu

Dated this 31<sup>st</sup> day of August, 2016 at Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Matthew A. Davis", is written over a horizontal line.