

NO. 41597-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CARDIAC STUDY CENTER, INC, a Washington Corporation.

Appellant

v.

ROBERT EMERICK, MD,

Respondent.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
MAY 23 PM 4:19
EMERICK

DR. EMERICK'S OPENING BRIEF

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I. INTRODUCTION

Dr. Emerick is a board certified cardiologist who provided life-saving care to members of our community. His employment with Appellant was terminated by Appellant in September, 2009. The record below establishes that prior to his termination date, the Appellant engaged in a significant effort to re-direct Dr. Emerick's patients to other physicians employed with Appellant.

In spite of being terminated by Appellant, Dr. Emerick did not start practicing elsewhere in the community. He initiated suit to have the noncompetition provision of Appellant's Shareholder Employment Agreement (SEA), which would have barred Dr. Emerick from practicing medicine, including providing care to his own patients, in Pierce County and part of King County for five years, declared invalid for obvious public policy reasons. On cross motions for summary judgment, the Superior Court granted Dr. Emerick's motion, denied Appellant's motion and held that the noncompetition provision of Appellant's SEA is unenforceable as a matter of public policy.

II. ASSIGNMENT OF ERROR

Dr. Emerick assigns no errors in this appeal.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court erred in holding that the five-year, two county, non-competition provision of Appellant's SEA was invalid under the public policy exception to enforcement of such contractual provisions.

IV. STATEMENT OF THE CASE

A. Substantive Factual History

At the outset, Appellant improperly attempts to smear Dr. Emerick's professional reputation in its brief. Br. Of App. at 4-6. Dr. Emerick moves this Court for an Order striking that portion of Appellant's Opening Brief. The information on which Appellant culls this particular portion of its brief was stricken by the Superior Court. There was never any motion for reconsideration by the Appellant at the Superior Court level and Appellant has not assigned any error in this Appeal to the Superior Court's Order striking the Declarations that set forth this information. By doing this, the Appellant is doing nothing more but trying to sully Dr. Emerick's reputation. Dr. Emerick wholeheartedly disputes Appellant's recitation of "facts" in this regard and respectfully requests that the Court ignore the same. CP 1124-1125 (Superior Court's Order on Motion to Strike)

Dr. Emerick is a licensed Interventional and Consultative Cardiologist. Until almost two (2) years ago (September 30, 2009), Dr. Emerick was employed by, and a shareholder of, Appellant. Dr. Emerick's employment with Appellant commenced on February 1, 2002 and two years later he became a shareholder of the Appellant. CP 635-638 (Emerick Declaration.).

Dr. Emerick practiced general cardiology and heart failure medicine, and his subspecialty is interventional cardiology. At the time of this litigation, Appellant employed six other interventionalists. Outside of Appellant, there were approximately four or five other interventionalists

practicing in Pierce County and approximately three interventionalists practicing in Federal Way. CP 635-638 (*Emerick Decl.*). Dr. Emerick acquired his general cardiology, heart failure medicine, and interventional cardiology skills prior to joining Appellant. As an Interventional Cardiologist, he performs percutaneous coronary interventions or revascularizations. These procedures provide proven, life-saving services for emergent patients, such as heart attack patients, and improve the quality of life in the elective or non-urgent setting by reducing or eliminating angina (chest pain symptoms) and improving exercise tolerance or capacity. In short, the procedures he performs offer patients a non-surgical alternative to coronary bypass surgery with equivalent, if not better, overall outcomes. CP 635-638. (*Emerick Decl.*)

While the aforementioned procedures drastically improve the quality of life for Dr. Emerick's patients, they are not always sufficient to correct or reverse a patient's cardiovascular problems. As a result, follow-up care in the office is essential to achieving a durable result and good long-term clinical outcomes. CP 635-638 (*Emerick Decl.*).

Dr. Emerick's patients range in age (from twenty-somethings to grandmothers). He first met many of his patients years ago in an emergent setting and continued to serve those patients every three to six months in the office. As his patients age and their medical needs evolve, they often need periodic adjustments in their medicines or even further procedures to continue feeling well and free of cardiovascular limitations or further adverse events. CP 635-638 (*Emerick Decl.*)

After two years of employment with the Appellant, Appellant offered Dr. Emerick an opportunity to become a shareholder. In so doing, Appellant presented Dr. Emerick with the SEA which had been previously prepared by Appellant. CP 1-22 (*Complaint, Exhibit A*).

Paragraph 13 of the SEA provides in relevant part as follows:

The Employee . . . agrees and covenants that during the Employee's employment by the Corporation and for sixty (60) full months after termination of such employment for any reason, the Employee will not, directly or indirectly, (i) anywhere within Pierce County and Federal Way, Washington ("Restricted Area"), engage in the practice of cardiac medicine in any manner which is directly competitive with any aspect of the business of the Corporation . . . whether or not using any *Confidential Information*; (ii) anywhere in the Restricted Area, have any business dealings or contracts, except those which demonstrably do not relate to or compete with the business or interests of the corporation, with any then existing patient, customer or client (or party with whom the Corporation contracts) of the Corporation or any person or firm which has been contacted or identified by the Corporation as a potential customer or client of the Corporation; or (iii) be an employee, employer, consultant, agent, officer, director, partner, trustee, or shareholder of any person or entity that does any of the activities just listed. Provided, however, nothing herein shall preclude a patient from selecting a provider of their [sic] choice.

Id.

The SEA further provides, at Paragraph 18, that "[i]f either party shall bring any suit or action against the other for any type of relief, declaratory or otherwise, including any appeal thereof, arising out of this Agreement, the prevailing party shall have and recover against the other

party, in addition to all court costs and disbursements, such sum as the court may adjudge to be a reasonable attorney's fee." Id. When Dr. Emerick signed the SEA, he anticipated that he would remain a shareholder of Appellant for the remainder of his practice. CP 635-638 (*Emerick Decl.*).

What is a matter of fact which has not been stricken by the Superior Court is that toward the end of his tenure with Appellant, Appellant greatly impeded Dr. Emerick's ability to serve his patients. While Dr. Emerick was still employed with Appellant, one of Dr. Emerick's patients made several attempts to schedule an office appointment with him. The patient was told by Appellant that Dr. Emerick could not see the patient and that the patient was required to see a different practitioner at Appellant's offices. The patient refused to do so and again requested to schedule an appointment with Dr. Emerick. The receptionist maintained that the patient could not see Dr. Emerick. In a final attempt to see Dr. Emerick, the doctor of her choice, the patient visited Appellant's offices when she knew that Dr. Emerick would be there and was finally able to secure care from Dr. Emerick at that time. CP 635-638 (*Emerick Decl.*, ¶ 9.)

Under the guise of the SEA, Appellant is compromising patient care by preferring its own financial interests over the interests of patients in the community. Despite the SEA's specific proviso that it "shall not preclude a patient from selecting a provider of [his or her] choice," Appellant did, in fact, prohibit at least one patient that is known and by

attempting to seek enforcement of the SEA continues to try and prohibit patients from choosing the doctor from whom they would like to receive care.¹ CP 1-22 (*Complaint, Exhibit A* at 12). Appellant's efforts to divert patients away from the doctor of their choice is memorialized in a letter in a letter from Appellant to Dr. Emerick's patients directing them to reschedule their appointments with Dr. Daniel Guerra. CP 692-696 (*Morgan Decl., Exhibit C*).

Dr. Emerick, was obviously concerned about his patient's care upon his threatened termination and immediately sought the cooperation of the Appellant to agree the noncompetition provision of the SEA would not apply. The Appellant, however, steadfastly refused to meaningfully discuss the parameters of its enforcement of the SEA. Despite Appellant's recognition on the face of the SEA that patients have an undeniable right to access the provider of their choosing, Appellant refused to state whether it would actively enforce the SEA. Until Appellant moved for summary judgment, it was entirely unclear whether it would seek to enforce the SEA as written or would acknowledge its unenforceability, CP 692-696 (*Morgan Decl., Exhibit V*), stating, "[Appellant] has consistently taken the position that it would attempt to enforce the non-competition provisions, **if at all**, in a reduced geographic area and only for a period of three years.") (emphasis added). As a result, in order to continue to serve his patients desirous of his care and expertise, Dr. Emerick was forced to

¹ The last sentence in Paragraph 13 renders the entire paragraph void.

seek guidance from the Superior Court regarding the enforceability of the noncompetition provisions of the SEA. The Complaint was filed on September 24, 2009, notably, while Dr. Emerick was still in Appellant's employ.

V. ARGUMENT

A. Standard of Review

This case comes to this Court after cross-motions for summary judgment. In its Motion for Summary Judgment, Appellant asserted that there were no genuine issues of material fact. Appellant's Opening Brief does assert any genuine issue of material fact that should have prevented summary judgment in favor of Dr. Emerick. "A trial court properly grants summary judgment when no genuine issues of material fact exist, thereby entitling the moving party to judgment as a matter of law." Poulsbo Group, LLC v. Talon Development, LLC, 155 Wn. App. 339, 345, 229 P.3d 906 (Div 2, 2010) (citing CR 56(c)).

Appellant, however, seems to suggest that upon review, this Court should consider the facts in a light most favorable to Appellant. Br. Of App. At 9. This particular summary judgment concept is not relevant to the case at bar because Appellant does not assert there is any genuine issue of material fact.²

B. Summary of Argument

² This particular issue is further complicated by the fact that Appellant does not state whether it is appealing the Superior Court's denial of its motion for summary judgment or whether it is appealing the Superior Court's grant of Dr. Emerick's motion for summary judgment.

For over 30 years, Washington law has held that covenants not to compete are disfavored. *See Organon, Inc. v. Hepler*, 23 Wn. App. 432, 436, 595 P.2d 1314 (1979) (“A covenant not to compete is in restraint of trade, and such restraints are disfavored.”). Our State Supreme Court recently pronounced that our Courts should be loath to enforce covenants not to compete against employees who seek no unfair advantage over their former employees. *See Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 846-47, 100 P.3d 791 (2004). Dr. Emerick seeks no unfair advantage over Appellant nor is there a scintilla of evidence in this record that even hints that Dr. Emerick has ever sought such advantage. The Court will recall that it was the Appellant who terminated Dr. Emerick. Even in the face of termination, Dr. Emerick came to the Court for relief so that he could serve his patients.

While Washington law is replete with numerous cases addressing covenants not to compete, our courts have not yet addressed such covenants in the context of a physician-specialist such as Dr. Emerick, who provides life-impacting care for members of our community.

C. Appellant’s noncompetition provision of its SEA is unreasonable and places the public at risk by removing a skilled provider of critical care services from the community because Appellant is more concerned about its bottom line profit.

As noted above, for over 30 years, Washington law has held that

covenants not to compete are disfavored.³ Courts are loath to enforce covenants not to compete against employees who seek no unfair advantage over their former employees.⁴ For years, the State Supreme Court and our Courts of Appeal have held that one important factor of the three factor test for determining whether a covenant not to compete is enforceable is, “whether the degree of injury to the public is such loss of service and skill of the employee as to warrant nonenforcement of the covenant.” *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 680 P.2d 448 (1984) (citing *Racine v. Bender*, 141 Wash. 606, 252 P. 115 (1927), *Alexander & Alexander, Inc. v. Wholman*, 19. Wn. App. 670, 684, 578 P.2d 530 (1978)) and *Restatement (Second) of Contracts* Section 188 (1981). Notably, the appellant spends approximately four (4) pages of its 25 page brief (Br. Of App. at 19-25) addressing the public policy issue which was obviously the foundation of the Superior Court’s ruling in this case.

While Washington law is replete with numerous cases addressing covenants not to compete, our courts have not yet addressed whether and when such covenants violate public policy when they operate to bar skilled physicians from providing critical care to patients in the community and for reasons unbeknownst to Dr. Emerick, Appellant’s argument is largely focused on discussing whether Appellant’s noncompetition provisions in its SEA is necessary for the protection of its business and whether it imposes restraint on Dr. Emerick greater than necessary to protect Appellant’s bottom line. Because of the dictates of

³ See *Organon, Inc. v. Hepler*, 23 Wn. App. 432, 436, 595 P.2d 1314 (1979).

⁴ See *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 846-47, 100 P.3d 791 (2004).

RAP 10.3(b) that a Respondent's brief should, "answer the brief of appellant or petitioner," Dr. Emerick will address the Appellant's briefing on these issues. While Dr. Emerick asserts that Appellant's noncompetition provision of its SEA is not necessary for the protection of its business and that it imposes a greater restraint on Dr. Emerick than is necessary to protect Appellant's bottom line, Dr. Emerick respectfully suggests that the focus by this Court should be the same as the Superior Court: whether the degree of injury to the public is such loss of the service and skill of the employee to warrant nonenforcement of the covenant. The Superior Court, after reviewing all the entire record (and striking portions of "evidence" provided by Appellant as noted above), made the determination that Appellant's noncompetition provisions of its SEA were an injury to the public because it prevented persons in need of critical and sometimes lifesaving care from seeing the physician of their choosing.

Appellant cites three cases for the proposition that noncompetes involving physicians are enforceable.⁵ The courts in these cases, however, were not asked to decide whether the covenants at issue fell within Washington's recognized public policy exception and contained no relevant analysis to the issue at bar.

First, *Lehrer*⁶ did not actually involve an employment noncompetition agreement. *Lehrer* involved a non-specialist physician

⁵ *Ashley v. Lance*, 80 Wn.2d 274, 493 P.2d 1242 (1972); *Ashley v. Lance*, 75 Wn.2d 471, 475, 451 P.2d 916 (1969); *Lehrer v. State, Dept. of Social and Health Sers.*, 101 Wn. App. 509, 5 P.3d 722 (2000); *Schneller v. Hayes*, 176 Wash. 115, 28 P.2d 273 (1934).

⁶ 101 Wn. App. 509, 5 P.3d 722 (2000)

who was the subject of patient complaints.⁷ He agreed to resign his employment and signed a settlement agreement in which he agreed not to work at Eastern State Hospital or Western State Hospital.⁸ The doctor, then, attempted to avoid the settlement agreement, arguing that it violated public policy and constituted an unlawful restraint on trade.⁹ The court disagreed, noting the novelty of the case, in part because the settlement agreement was entered into as a resolution of an employment dispute and not at the commencement of employment.¹⁰

While the court held that a settlement agreement prohibiting a doctor from working at his former employer did not violate public policy,¹¹ Dr. Emerick has never sought re-employment with Appellant. More importantly, however, the settlement agreement in *Lehrer* did not involve the sweeping prohibition at issue here.¹² In this case, Appellant is attempting to bar Dr. Emerick from practicing his profession at *any and all* medical facilities located in Pierce County or Federal Way for a period of five years.

Moreover, the Court in *Lehrer* did not offend public policy for one very simple reason: Dr. Lehrer was not barred geographically or temporally from practicing medicine. “He [Dr. Lehrerr] was free to

⁷ *Id.* at 511.

⁸ *Id.*

⁹ *Id.* at 513.

¹⁰ *Id.* at 513-14 (“Here, Dr. Lehrer uniquely argues the agreement not to seek work with ESH and WSH violates public policy because it constitutes an unlawful restraint on trade. We could find no Washington case directly on point.”) (emphasis added).

¹¹ *Lehrer*, 101 Wn. App. at 514.

¹² *See id.* at 514 (“He was free to practice his profession at any number of other facilities or go into private practice without geographical or time restrictions.”) (emphasis added).

practice his profession at any number of other facilities or go into private practice **without geographical or time restrictions.**”) *Id.*, (emphasis added). This feature of the settlement agreement in *Lehrer* differs so sharply from Paragraph 13 of the SEA in this case that it renders the analysis in *Lehrer* irrelevant. Unlike Dr. Emerick, Dr. Lehrer could go to work the very next day in the very same community. *Lehrer*, 101 Wn. App. at 514. If the Appellant is willing to concede that the noncompetition provision of its SEA is enforceable only to the extent that it bars Dr. Emerick from working for the Appellant then Dr. Emerick will agree to the same and the parties and the Court can be finished with this case. Appellant will never concede that principle.

In *Lehrer*, the court was also assured that other physicians were available to serve patients. Here, there is only a small number of physician-specialists practicing in Dr. Emerick’s narrow specialty. CP 635-638 (*Emerick Decl.*, ¶ 2 (four or five other interventionalists practice in Pierce County and approximately three interventionalists practice in Federal Way).

Finally, in *Lehrer*, the court was assured that other physicians were available to serve patients.¹³ Here, there is only a small number of physicians practicing in Dr. Emerick’s narrow specialty. CP ____

Appellant also relies on the *Ashley* cases. In *Ashley*, three partners sought to avoid the enforcement of a noncompete agreement by the fourth

¹³ *See id.*

partner.¹⁴ One of the partners had very limited experience in private practice; the others had no previous experience.¹⁵ The *Ashley* noncompete lasted ten years but barred the practice of medicine within ten miles of the City of Bothell.¹⁶ The parties in the *Ashley* cases did not argue and the court therefore did not address whether the covenant at issue was reasonable or whether the covenant violated public policy so as to warrant it unenforceable. The issue before the *Ashley* court was the enforceability of the covenant by only one partner after the other partners withdrew.¹⁷

Appellant lastly cites to *Schneller v. Hayes*, Br. Of App. at 10 but undertakes no analysis of that opinion in that case. Notably, in that case, the Court upheld the trial court's refusal to enjoin an optician from practicing in Walla Walla despite an employment agreement that professed to contain such a prohibition. Central to the holding was the agreement's unlimited temporal scope and the employer's inducement of the former employee to move to Walla Walla only to then reduce his hours and wages until he was forced to quit. The *Schneller* court did not address any public policy issues and did not deem the optician's noncompete agreement enforceable. The Appellant also declines to recognize that non-competition agreements which bar physicians from practicing medicine require stricter scrutiny than typical noncompetition agreements.

¹⁴ *Ashley v. Lance*, 75 Wn.2d at 475.

¹⁵ *Id.*

¹⁶ *Ashley*, 80 Wn.2d at 276. The geographic scope in *Ashley* is tiny compared to the area at issue here.

¹⁷ *Id.* at 279.

In evaluating the enforceability of a non-competition agreement against a physician, courts analyze not only the concerns of the physician and the physician's former employer; courts must also consider the interests of patients. *See Ohio Urology*, 72 Ohio App. 3d at 453, 594 N.E.2d at 1031-32 (“**It is vital that the health and expectations of patients, who are rarely aware of private agreements among physicians, be adequately protected. It is also important that competition among physicians be encouraged in these times of increasing health care costs.**”) (emphasis added). The Superior Court engaged in this evaluation and in reviewing the Superior Court's decision, this Court should also, “evaluate the extent to which enforcing the covenant would foreclose patients from seeing the departing physician if they desire to do so” because patients have “significant interests” in seeing the doctor of their choosing, and such interests are worthy of “substantial of protection.” *Farber*, 194 Ariz. at 371, 982 P.2d at 1285; *see also Intermountain Eye*, 142 Idaho at 229, 127 P.3d at 132 (2005) (“The extent of Intermountain Eye's interest in those patients Dr. Miller inherited when he joined the firm and those patients it provided him thereafter is limited by those patients' interests in continuity of care and access to the health care provider of their choice.”). Here, Appellant can point to no interest that outweighs Dr. Emerick's patients' interests in continuity of care and access to the physician of their choice. The exact extent of Appellant's attempts to trump patients' rights by dictating the doctors who will provide treatment to those patients is unclear. What is clear is that

Appellant had already taken steps, even while Dr. Emerick remained employed with Appellant, to override the will of Dr. Emerick's patients and force them to see a different provider. This is a clear, significant violation of the very public policy that enforcement of the SEA would lead to.

Moreover, in light of the small number of physicians practicing in Dr. Emerick's specialty, there is a grave risk that prohibiting Dr. Emerick from practicing will impact the public's access to necessary medical care. Numerous courts across the country have considered the impact of covenants not to compete on the public's access to healthcare and declined to enforce such covenants where there were a limited number of other physicians of similar specialties available in the restricted area. *See, e.g., New Castle Orthopedic Associates v. Burns*, 481 Pa. 460, 392 A.2d 1383, 1387 (1978) ("In an era where the availability of and the rising cost of medical services are matters of national concern, the law must consider the impact of the enforcement of these non-competitive clauses upon the problem. Paramount to the respective rights of the parties to the covenant must be its effect upon the consumer who is in need of the service."); *Odess v. Taylor*, 282 Ala. 389, 211 So.2d 805, 810 (1968) ("Adapting the needs of the public to today's existing shortage of medical doctors necessitates the conclusion that the public in Jefferson County would suffer by removing a highly trained specialist from practicing his profession in that area. We hold that under the facts of this case the lower court was justified in finding that it would be adverse to the public interest

to enjoin the respondent from practicing his profession.”); *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C.App. 21, 373 S.E.2d 449, 455 (N.C.App. 1988) (“The doctor-patient relationship is a personal one and we are extremely hesitant to deny the patient-consumer any choice whatsoever”); *Duffner*, 718 S.W.2d at 113-14 (“From our review of all the facts and circumstances, we are of the opinion that the contract provision prohibiting appellant from practicing medicine within thirty miles of the City of Fort Smith constitutes an undue interference with the interests of the public right of availability of the orthopedic surgeon it prefers to use and that the covenant's enforcement would result in an unreasonable restraint of trade.”); *Dick v. Geist*, 107 Idaho 931, 693 P.2d 1133, 1137 (Idaho App. 1985) (“It has been shown, in this case, by sufficient competent, though disputed, evidence that the welfare of the public in the Twin Falls area would have been seriously impaired by enjoining Geist and Miles from practicing their specialty. This consideration outweighs the public interest in enforcing the restrictive covenant against these two doctors.”) (emphasis omitted); *Lloyd Damsey, M.D., P.A. v. Mankowitz*, 339 So.2d 282, 283 (Fla. App. 1976) (denial of injunctive relief in favor of employer was proper where covenant not to compete would force physician “to remove himself from the community where he has made substantial investments to maintain the standards of a physician and move . . . 70 miles. . . and enforcement of the covenant would jeopardize the public health of the community” in light of the “compelling need for defendant's services as a surgeon in the area.”). In

this case, there are only a small handful of physicians practicing in Dr. Emerick's specialty outside of Appellant in Pierce County and Federal Way. Patients in Pierce County and Federal Way would be underserved if Dr. Emerick were barred from practicing. The risk of depriving patients of needed medical care renders the SEA's noncompetition provisions void as against public policy.

D. Non-competition Agreements Against Physicians Warrant Closer and Stricter Scrutiny than Garden-Variety Agreements.

One citation this Court will not find in Appellant's Opening Brief is to the American Medical Association's (AMA's) own policy statement warning that noncompetition agreements among physicians can compromise patient care. In fact, the AMA has not only criticized non-competition agreements enforced against physicians, but has found that such agreements deprive the public of medical services. The AMA's opinion states in part:

Opinion 9.02 - Restrictive Covenants and the Practice of Medicine

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

AMA Code of Medical Ethics, Council on Ethical and Judicial Affairs Op. E-9.02 (Issued prior to April 1977; Updated June 1994 and June 1998) (emphasis added).¹⁸

Courts throughout the United States that have addressed this similar issue have almost uniformly found that the medical field so differs from the ordinary commercial context, that non-competition agreements involving physicians are worthy of greater and stricter scrutiny for the very reasons the AMA has warned about:

We therefore conclude that the doctor-patient relationship is special and entitled to unique protection. It cannot be easily or accurately compared to relationships in the commercial context. In light of the great public policy interest involved in covenants not to compete between physicians, each agreement will be **strictly construed** for reasonableness.

Valley Medical Specialists v. Farber, 194 Ariz. 363, 369, 982 P.2d 1277, 1283 (1999) (emphasis added).

Consistent with the AMA's concerns, many states have enacted statutes outright barring enforcement of non-competition agreements against physicians. *See* Colo. Rev. Stat. § 8-2-113 ("Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void . . ."); Del. Code Ann. tit. 6, § 2707 ("Any

¹⁸ CP 692-698 (*Morgan Decl.*, **Exhibit E**) (also available online at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion902.shtml> (last accessed Sept. 17, 2009)).

covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void”); Mass. Gen. Laws ch. 112, § 12X (“Restrictive covenants upon physicians rendered unenforceable”).

In addition, numerous courts have recognized the unique public policy concerns posed by non-competition agreements in the medical context. *See, e.g., Farber*, 194 Ariz. at 368, 982 P.2d at 1282 (“By restricting a physician's practice of medicine, this covenant involves strong public policy implications and must be closely scrutinized.”); *see also Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 229, 127 P.3d 121, 132 (2005) (“We find that doctor-patient relationships are different from most other relationships between service providers and their customers. While the public has a strong interest in freedom of contract, that interest must be balanced against the public interest in upholding the highly personal relationship between the physician and his or her patient.”); *Ohio Urology, Inc. v. Poll*, 72 Ohio App.3d 446, 453, 594 N.E.2d 1027, 1032 (1991) (“These covenants should be strictly construed in favor of professional mobility and access to medical care and facilities.”).

Legal commentators, too, recognize that covenants not to compete warrant special attention in the medical context because the relationships

between doctors and their patients are far more important than the business relationship between a company and its customers:

The physician-patient relationship is unlike most other business relationships. When a physician must terminate his or her relationship with a patient because of a restrictive covenant, the patient may suffer the consequences physically. In most other cases, the customer who is denied the service of the professional under a noncompetition clause is harmed only financially. **Because physicians have an ethical duty to put the welfare of their patients above their own, a noncompetition clause undermines those ethics when it places the employers' financial interests above patients' interests. Thus, physician restrictive covenants should be viewed in a very different manner from covenants existing in other business relationships. The potential harm to the patient should play a more active role in determining whether or not to enforce a restrictive covenant.**

S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 Wake Forest L. Rev. 189, 208 (Spring 2006) (footnote omitted) (emphasis added).

Even if the employer can establish a legitimate interest in squashing competition, public policy concerns may outweigh that interest in the medical context. Farber, 194 Ariz. at 368, 982 P.2d at 1282. In the proceedings below, Appellant suggested that the Superior Court should simply weigh Dr. Emerick's interest in earning a living against Appellant's interest in stifling competition. That was in improper suggestion. The Superior Court below considered the interests of the patients affected and this Court should do so also. *See id.* at 370, 982 P.2d at 1284 ("In the medical context, however, the personal relationship

between doctor and patient, as well as the patient's freedom to see a particular doctor, affects the extent of the employer's interest.”). Here, Dr. Emerick’s patients clearly desire to continue their care with Dr. Emerick. CP 635-638 (*Emerick Decl*) The Appellant, however, is clearly preferring its financial interests over the interests of its patients. Even though Dr. Emerick remained an employee of the Appellant until September 30, 2009, Appellant began actively diverting Dr. Emerick’s patients to other doctors during such employment, completely disregarding Dr. Emerick’s patients’ choice of provider and clearly demonstrating that Appellant’s true concern is its financial interests, not the patients’ well-being. No contract between Dr. Emerick and Appellant can or should dictate whether a patient is permitted to see the physician of her choosing, but this is exactly what Appellant is trying to accomplish. In fact, Appellant recognizes as much in Paragraph 13 of the SEA, which provides, **“Provided, however, nothing herein shall preclude a patient from selecting a provider of their [sic] choice.”** CP 1-22 *Complaint, Exhibit A* at 12 (emphasis added). Appellant’s actions, however, in actively attempting to divert Dr. Emerick’s patients to a different provider despite their professed desire to remain a patient of Dr. Emerick, clearly contravene the last sentence of Paragraph 13. The crux of Paragraph 13 serves to *preclude a patient from selecting a provider of his or her choice*. The Superior Court considered the perverse effect that Appellant’s enforcement of Paragraph 13 of the SEA was having, and will continue to have, on the medical community as a whole. Barring Dr. Emerick from

gainful employment in his chosen field could severely hamper Dr. Emerick's practice, as he could miss out on medical advancements while Appellant forces him to wait on the sidelines. More importantly, though, enforcement of Paragraph 13 of the SEA does exactly what the AMA warns - it deprives our community of Dr. Emerick's services.

Appellant also relies on *Lovelace Clinic v. Murphy*, 417 P.2d 450, 453-454 (N.M. 1966), an opinion from the same year in which Appellant claims it began its practice. *Lovelace*, however, is distinguishable both factually and analytically. First and foremost, *Lovelace* involved a practice group of dermatologists and there is no indication in the opinion that life-saving care was at issue by the practitioners in the case. Second, Dr. Murphy voluntarily left the practice group that sued him and he started up his own competing practice. There can be no doubt that a component of equity comes into play in a case like this where Dr. Emerick did not voluntarily leave the practice group, had patients that desired care and treatment from him and said patients were intentionally steered away from him by the Appellant to other physicians in Appellant's employ despite the provision in Appellant's SEA that patients have the right to the physician of their choosing.

In 2009, the Court of Appeals of Indiana held that covenants not to compete among physicians violate Indiana's public policy due to the negative impact on the public's choice of heart surgeons. *Mercho-Roushdi-Shoemaker-Dilley-Thoraco-Vascular Corporation v. Blatchford, et. al.*, 900 N.E.2d 786 (2009).

A similar result occurred this year in Arkansas where the Arkansas Court of Appeals upheld a trial court's entry of summary judgment in favor of a physician in a lawsuit brought by the physician's former employer for breach of a noncompetition provision of an agreement because the noncompete agreement did not even meet the typical test for such agreements under Arkansas law. *Mercy Health System of Northwest Arkansas, Inc. v. Briack*, ____ S.W.3d ____ (2011) Ark App. 341, 2011 WL 1785618.

In evaluating the enforceability of a non-competition agreement against a physician, courts must consider the interests of patients.¹⁹ The Court should "evaluate the extent to which enforcing the covenant would foreclose patients from seeing the departing physician if they desire to do so" because patients have "significant interests" worthy of "substantial of protection."²⁰ Here, Appellant's interests do not outweigh Dr. Emerick's patients' interests in continuity of care and access to the physician of their choice. Indeed, Paragraph 13 impliedly recognizes as much.²¹ Moreover, in light of the small number of interventional cardiologists outside of Appellant, there is a grave risk of impeding the public's access to necessary medical care. Numerous courts across the country have

¹⁹ See *Ohio Urology*, 72 Ohio App. 3d at 453, 594 N.E.2d at 1031-32 ("It is vital that the health and expectations of patients, who are rarely aware of private agreements among physicians, be adequately protected.").

²⁰ *Farber*, 194 Ariz. at 371, 982 P.2d at 1285; see also *Intermountain Eye*, 142 Idaho at 229, 127 P.3d at 132 (2005) ("The extent of Intermountain Eye's interest in those patients . . . is limited by those patients' interests in continuity of care and access to the health care provider of their choice.") (emphasis added).

²¹ See Appendix 20 ("Provided, however, nothing herein shall preclude a patient from selecting a provider of their [sic] choice.").

considered the impact of covenants not to compete on the public's access to healthcare and declined to enforce such covenants in light of such concerns. Indeed, Washington has at least impliedly recognized that patients' inability to access the provider of their choice may render a noncompete void as against public policy.²² In this case, there are only a small handful of physicians practicing in Dr. Emerick's specialty outside of Appellant²³ in Pierce County and Federal Way. Patients in Pierce County and Federal Way would be underserved if Dr. Emerick were barred from practicing. The risk of depriving patients of needed medical care warrants nonenforcement.

E. Appellant's noncompetition provision in its SEA fails even the traditional test for enforcement of non-competition provisions.

In reviewing a lower court's decision, it is well established that the appellate court can affirm on any basis supported by the record.²⁴ Here, notwithstanding the Superior Court's determination that Appellant's SEA violates public policy, the Superior Court's decision should stand because Appellant's SEA violates the traditional standards governing covenants not to compete.

Covenants not to compete are disfavored under Washington law

²² See *Lehrer*, 101 Wn. App. at 514 (“[N]o evidence exists in our record that other psychiatrists were unavailable to serve in these two public institutions. In this context, the loss of Dr. Lehrer's service did not injure the public.”).

²³ It is appropriate to consider the number of available providers *outside* of Appellant See *Statesville Medical Group, P.A. v. Dickey*, 106 N.C. App. 669, 418 S.E.2d 256, 259 (1992).

²⁴ *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

and will not be enforced unless the employee seeks an unfair advantage over a former employer.²⁵ Aside from the public policy prong in the test for enforcement, covenants not to compete will be enforced only if the restraint is necessary to protect the employer's business or goodwill and the covenant imposes no greater restraint than is reasonably necessary.²⁶ Put another way, a covenant not to compete should be no greater in scope than is necessary to protect the employer's business or goodwill in light of "equally competing concerns of freedom of employment and free access of the public to professional services."²⁷

1. Appellant's only interest is in stifling fair competition.

Appellant implies, as it did below, with no factual support, that it invested time, energy, and expense to advance Dr. Emerick's practice. Notwithstanding Appellant's intimations to the contrary, Dr. Emerick brought his skills and knowledge to Appellant's practice; he did not learn unique skills from Appellant, and, as a result, there is no risk that Dr. Emerick will use skills learned at Appellant to benefit a different practice group. This is simply not a case where an employer invested time and money in training an employee only to have the employee leave and use those skills to benefit a competitor; Dr. Emerick was hired by Appellant because he was already a skillful Interventional and Consultative Cardiologist. Preventing use of those skills would be highly detrimental to Dr. Emerick's existing and future patients. Appellant's noncompetition provision of its SEA is unenforceable because it does not protect

²⁵ *Organon, Inc.*, 23 Wn. App. at 436; *see also Labriola*, 152 Wn.2d at 846-47.

²⁶ *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 369, 680 P.2d 448 (1984).

²⁷ *Id.* at 370.

Appellant from *unfair* competition.²⁸

Appellant's economic interests are negligible when it comes to healing Pierce County and South King County patients. The typical purpose of non-competition agreements is unpersuasive in the professional context, where employees' skills are not learned during the course of employment. *See Farber*, 194 Ariz. at 370, 982 P.2d at 1284 ("Dr. Farber was a pulmonologist. He did not learn his skills from VMS. Restrictive covenants are designed to protect an employer's customer base by preventing a skilled employee from leaving an employer and, based on his skill acquired from that employment, luring away the employer's clients or business while the employer is vulnerable-that is-before the employer has had a chance to replace the employee with someone qualified to do the job.") (quotations omitted); *Duffner v. Alberty*, 19 Ark. App. 137, 718 S.W.2d 111, 114 (1986) ("Nor were any trade secrets, formulas, methods, or devices which gave appellant an advantage over the appellees involved here. At the time he joined the association he had received his training and skills elsewhere and brought them with him. There is nothing in the record to indicate that he learned any trade secret or surgical procedures from the appellees which were not readily available to other orthopedic surgeons.").

²⁸ *See, e.g., Farber*, 194 Ariz. at 370, 982 P.2d at 1284 ("Restrictive covenants are designed to protect an employer's customer base by preventing a skilled employee from leaving an employer and, based on his skill acquired from that employment, luring away the employer's clients or business . . .") (quotations omitted); *Duffner v. Alberty*, 19 Ark. App. 137, 718 S.W.2d 111, 114 (1986) ("Nor were any trade secrets, formulas, methods, or devices which gave appellant an advantage over the appellees involved here. At the time he joined the association he had received his training and skills elsewhere and brought them with him.").

Here, Dr. Emerick brought his skills and knowledge to Appellant; he did not learn unique skills from Appellant, and, as a result, there is no risk that Dr. Emerick will use skills learned while employed with the Appellant to benefit a different practice group. This is simply not a case where an employer has invested time and money in training an employee only to have the employee leave and use those skills to benefit a competitor or to go into direct competition with the former employer; Dr. Emerick was hired by Appellant because he was a skillful Interventional and Consultative Cardiologist, and his skills predate his employment with Appellant. CP 635-638 (*See Emerick Decl*) Preventing use of those skills would be highly detrimental to Dr. Emerick's existing patients and to future patients in our community who will need Dr. Emerick's skills.

2. Appellant's SEA imposes a greater restraint than necessary.

Appellant's SEA is exceedingly burdensome and demonstrates that Appellant's true motive is to eliminate competition from highly skilled specialists such as Dr. Emerick. To determine Appellant's SEA imposes a greater restraint than necessary, the Court need only compare Appellant's SEA to the covenant at issue in *Knight, supra*.²⁹ In *Knight*, the court upheld a noncompete that barred accountants from servicing former clients of their former employer with whom they came into contact as a direct result of their employment.³⁰ In doing so, the court noted that the clause, "d[id] not unduly restrain freedom of employment" because the

²⁹ 37 Wn. App. 366.

³⁰ *Knight*, 37 Wn. App. at 370.

accountants were “not precluded from practicing in Tacoma, [we]re free to compete for clients served by anyone other than [their former employer] and [we]re not precluded from engaging in other branches of accounting work.”³¹ Appellant’s SEA is distinguishable in all respects.

First, Appellant seeks to bar Dr. Emerick from working with any actual or potential patient of Appellant. Unlike in *Knight*, there is no requirement that Dr. Emerick have any prior contact with the patients whom he is barred from treating. A covenant barring service of clients with whom the departing employee had no contact is unenforceable and cannot be cured through blue penciling.³²

Second, unlike the noncompete in *Knight*, Appellant’s SEA does not merely bar Dr. Emerick from practicing in Tacoma or Puyallup where he practiced while employed with Appellant. Instead, Appellant’s SEA bars Dr. Emerick from practicing in countless cities where he never worked while employed with Appellant and, in fact, where Appellant has no offices (South King County).

Third, under Appellant’s analysis, Dr. Emerick is not free to service patients not served or never served by Appellant because Appellant’s SEA is so broad that it professes to apply even to persons “identified by the Corporation as a potential customer or client.” Unless Appellant turned over all of its marketing materials to Dr. Emerick, how

³¹ *Id.*

³² See *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100, 106-108 (2005) (“[T]he Covenant prohibits Freiburger from taking any of this large group of clients regardless of whether Freiburger helped to develop J-U-B’s goodwill effort towards that client.”).

could he possibly ever determine whether Appellant had identified a heart attack victim as a potential patient. Would Dr. Emerick be required to quiz the potential patient while she lay on the gurney gasping for air? “Before I can assist you Ms. Smith, I need to call [Appellant] to find out if my former employer has every identified you as a potential customer. Hold on.”

Fourth, while the accountants in the *Knight* case were not barred from engaging in other types of accounting work, Appellant’s SEA professes to bar Dr. Emerick from the entire “practice of cardiac medicine.”

Even the authority cited by Appellant in the proceedings below but now apparently abandoned by the Appellant, recognizes that a covenant barring service of clients with whom the departing employee had no contact is unenforceable. *See Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100, 106-107 (2005) (“The Covenant at issue here is clearly an overbroad means of protecting J-U-B’s legitimate business interest. . . . “[T]he Covenant prohibits Freiburger from taking any of this large group of clients regardless of whether Freiburger helped to develop J-U-B’s goodwill effort towards that client.”). The *Freiburger* court concluded that the over-breadth of the agreement rendered it unsalvageable:

Here, it would be necessary not only to strike some of the words of the Covenant, but in addition, to add clauses relating to good will and relationships between Freiburger and the clients and defining the parameters of what services

Freiburger would be prohibited from providing to J-U-B clients. This is far more than a “blue pencil” approach to an unreasonable word or two and would have the district court and this Court re-writing the parties’ contract. The district court correctly concluded that **merely striking a few words from the Covenant could not achieve the goals of making it reasonable and enforceable and we agree that the only alternative was to declare the entire clause void and unenforceable as a matter of law.**

Freiburger, 111 P.3d at 108.

Here, the Appellant’s SEA professes to apply to “any person or firm which has been contacted or identified by the Corporation as a potential customer or client . . .” and therefore, like the agreement in *Freiburger* is overly broad and cannot be re-written or enforced by the Court.

Paragraph 13 is unduly broad, and there are ample grounds upon which the court could have ruled it unenforceable.

3. Appellant’s SEA is Overly Broad in Temporal Scope.³³

Although the Superior Court performed no blue-penciling of Appellant’s SEA regarding geographic scope, Appellant argues now that this Court should blue-pencil the document to create multiple zones of noncompetition near Appellant’s various locations. Again, this is a case involving highly specialized cardiac physicians – not Kentucky Fried Chicken franchises. It is not as though a potential patient is going to walk

³³ For reasons explained in Dr. Emerick’s trial court briefing, Appellant’s SEA is also overly broad in geographic scope. As the trial court did not blue pencil Appellant’s SEA to remedy is geographic scope, those arguments will not be repeated here.

into one of Appellant's offices, decide the wait to see someone is taking too long walk out and see a neon sign advertising Dr. Emerick's services.

Notwithstanding the public policy implications, Appellant's SEA is overly broad in geographic scope which would provide another basis to strike it down. Appellants SEA would have barred Dr. Emerick from practicing medicine in Pierce County and Federal Way for a period of 60 months. CP 1-22 (*Complaint, Exhibit A.*) This restriction is much more than would be necessary if Appellant had interests worthy of protection. *See Knight*, 37 Wn. App. at 369 (reasonableness turns on whether the restraint is necessary to protect the employer's business or goodwill and whether the covenant imposes upon greater restraint than is reasonably necessary to secure the employer's business or goodwill.).

First, the geographic scope is clearly excessive. Appellant has offices in Gig Harbor, Lakewood, Puyallup, Tacoma, and Covington. CP 635-638 (*See Emerick Decl.*). Appellant does not have offices in Federal Way. Dr. Emerick practiced out of the Tacoma and Puyallup offices. *See id.* Appellant's SEA attempts to bar Dr. Emerick from practicing in Pierce County and Federal Way. This "restricted area" measures nearly 2,000 square miles.³⁴ Particularly in light of the very small number of interventionalists practicing in Pierce County and Federal Way, this is clearly excessive. For example, in *Farber*, the court held that a restrictive

³⁴ CP 692-696. According to Census data, Pierce County measures 1,678.91 square miles and Federal Way measures 21 square miles. *See Morgan Decl., Exhibits C and D.*

covenant spanning just 5% of the same square miles would “mak[e] it very difficult for [the doctor’s] existing patients to continue treatment if they so desire[d].” *Farber*, 194 Ariz. at 371, 982 P.2d at 1285. In this case, Appellant’s SEA would make it virtually impossible for patients to see Dr. Emerick. Requiring his patients to travel long distances for treatment has the practical effect of barring those patients from seeing the physician of their choosing. This is particularly true for Dr. Emerick’s patients in need of emergent care.

In this respect, the geographic scope is quite clearly designed to “preclude a patient from selecting a provider of their [sic] choice.” CP 1-22 (Complaint, **Exhibit A** at 12). For example, if one of Dr. Emerick’s patients were to experience an emergency, in Pierce County or Federal Way, such patient would be barred from continuing to select Dr. Emerick as his or her provider. If Dr. Emerick were barred from practicing in Pierce County and Federal Way, his emergent patients would be forced to seek a different provider because they could not afford the time it would take to travel to seek care from Dr. Emerick. This result clearly contravenes both public policy and the plain language of the last sentence of Appellant’s SEA. Particularly in light of the broad geographic scope, there is simply no way to enforce the noncompetition provisions of Appellant’s SEA without violating both the last sentence of Paragraph 13 (regarding patients’ choice of providers), sound public policy and the AMA’s opinion regarding these agreements.

Second, the temporal scope is similarly overly broad and therefore unreasonable. In the medical context, analysis of the temporal scope of the non-competition agreement should take into account the length of time between typical contacts with patients; in medical specialties requiring fewer, infrequent contacts between physicians and patients, a longer restriction may be justified. *See Karlin v. Weinberg*, 77 N.J. 408, 423, 390 A.2d 1161, 1169 (1978). Here, though, the typical interval between visits for Dr. Emerick's patients spans two weeks to six months. CP 635-638 (Emerick Decl.). A five-year prohibition is patently unreasonable in the context of Dr. Emerick's practice.

The Superior Court's decision should also be affirmed on the grounds that the temporal scope of Appellant's SEA is overly broad. In the medical context, the appropriate temporal scope depends on the length of time between typical contacts with patients; in medical specialties requiring fewer, infrequent contacts between physicians and patients, a longer restriction may be justified.³⁵ Here, the typical interval between visits for Dr. Emerick's patients spans two weeks to six months. At the time of the summary judgment hearing, Dr. Emerick had already not practiced his specialty for six months. As of this writing it has been almost two (2) years since Dr. Emerick was terminated and there does not seem to be any concern by the Appellant about patients Dr. Emerick may have begun treating since the Superior Court invalidated the noncompetition

³⁵ *See Karlin v. Weinberg*, 77 N.J. 408, 423, 390 A.2d 1161, 1169 (1978).

provision of the SEA. The Appellant never sought any order staying the enforcement of the Superior Court's decision insofar as it allowed Dr. Emerick to continue providing care to patients. While Dr. Emerick believes that the entirety of the noncompetition provision of the SEA should be struck down, in the alternative, be affirmed on the grounds that Appellant's noncompetition provision in its SEA is enforceable only for a period of six months.

F. The Superior Court did not err in permitting Dr. Emerick to solicit former patients or referral sources.

Appellant makes a two-sentence argument in its brief that the Superior Court erred in permitting Dr. Emerick to solicit his former colleagues, patients and referral sources. Br. Of App. at 23. The entire sum of Appellant's argument in this regard is, "[t]his is plan error, and should be reversed." *Id.* This unsupported argument places Dr. Emerick in the unenviable position of trying to guess the reasons behind Appellant's argument which he (Dr. Emerick) cannot do. Appellant should be further barred from making any argument in this regarding in its Brief in Reply as that would prevent Dr. Emerick from being able to respond.

In the proceedings below, Dr. Emerick asserted that this the Court should enjoin enforcement of the sweeping provisions of Appellant's SEA under the reasoning of *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 687, 578 P.2d 530 (1978) ("In considering hardships on the

employee, the employee is not precluded from engaging in his profession, but is limited in his pursuit of customers whom he may be permitted to solicit and serve.”). In that case, a covenant not to compete prohibited insurance brokers from engaging in the insurance brokerage business within a 100 mile radius of the former employer and from soliciting, selling, serving, diverting or receiving insurance business to or from the employer’s customers. The Court held the covenant was enforceable only insofar as it barred solicitation and diversion of the customers but refused to apply the covenant to bar the brokers from accepting business from the employer’s former customers whom the brokers did not solicit, noting as follows:

In considering the injury to the public test, in this instance members of the public should be entitled to select whatever insurance broker they desire. The relationship between broker and insured is often highly personal. The evidence in this case does indicate that there were customers who would have preferred to be served by the defendant insurance brokerage firm rather than by the plaintiff, even without any solicitation upon the part of the defendants.

Id. at 687; *see also A Place for Mom, Inc. v. Leonhardt*, 2006 WL 2263337 at *5, No. C06-457P (“The Court will not grant the sweeping injunction sought by Plaintiff. Defendant will, however, be enjoined from initiating contact with any individuals or institutions with whom he developed a business relationship while working for Plaintiff. This prohibition does not extend to contacts which Defendant does not initiate; i.e., if he receives an unsolicited contact from such a party, he is not prohibited from entering into discussions with them.”).

Here too, the only patients at issue are those who, of their own volition, are choosing to continue their care with Dr. Emerick without any

solicitation whatsoever. Enjoining Dr. Emerick from continuing these patients' care would plainly be unreasonable.

Moreover, to hold otherwise would serve simply to bar Dr. Emerick from lawfully using his labor and skills as there is no evidence that he has disclosed any confidential information or otherwise attempted to gain "unfair advantage." See *Labriola*, 152 Wn.2d at 846-47, ("[E]mployers can take measures to protect legitimate business interests, but may not unreasonably restrict the freedom of current or former employees to earn a living. Noncompete agreements are therefore unreasonable whenever they are used to secure employers against employees' lawful use of labor and skills.") (footnotes and citations omitted). Enforcing Paragraph 13 of the SEA would simply operate as a punitive measure against both Dr. Emerick and his patients. It unreasonably restricts the freedom of Dr. Emerick to earn a living and prevents him from the lawful use of his labor and skills.

G. The Superior Court's Penciling Requires No Erasing

Appellant next provides some analysis under what it calls, "the pencil test." Br. Of App. at 18-19. It argues, without citation to any authority, though that its five-year, two county restrictions are "reasonable" and then it asserts, again without authority, that if this Court believes the restrictions are too broad, this Court should prohibit Dr. Emerick from practicing within a five mille radius of Appellant's four

existing offices for five years “or to the maximum extent that is reasonable and lawful.” Br. Of App. at 19.

Appellant’s suggestions sound like the imposition of a criminal sentence and make argument as though the parties are disputing Kentucky Fried Chicken franchises.

Appellant repeatedly misrepresents the extent of the trial court’s ruling. While holding that Appellant’s SEA violates public policy, the trial court “blue penciled” Appellant’s SEA and enforced it so far as public policy would allow by upholding the solicitation prohibition.

Appellant, again without authority, believes this Court should take its blue pencil and scribble over what the Superior Court’s own penciling. First and foremost, the Appellant cites to no authority which would permit an appellate court to engage in such an action. Second, contentions that the trial court should have done something more or something different in blue penciling Appellant’s SEA reflect a fundamental misunderstanding of the superior court’s ruling. This is not a case where the trial court found the scope to be excessive, in which case blue penciling could save the clause. How could the trial court be expected to blue pencil Appellant’s SEA to remedy a public policy violation?

Moreover, the trial court did blue pencil Appellant’s SEA by carving out the portion of the SEA that does not offend public policy (the solicitation provision) and enforcing that portion.³⁶ Washington law offers no guidance as whether or how noncompetition provisions must be blue

³⁶ Dr. Emerick does not concede that any portion of Paragraph 13 is enforceable.

penciled if they violate public policy,³⁷ and the trial court's methodology does not equate with the requisite obvious or probable error or an alteration of the status quo.

H. The Superior Court's award of attorney's fees and costs should be upheld pursuant to the terms of the contract and this Court should award Dr. Emerick his attorney's fees and costs on appeal pursuant to contract and RAP 18.

The Superior Court awarded Dr. Emerick his attorney's fees and costs pursuant to paragraph 18 of the Appellant's SEA. Rather than pay Dr. Emerick those attorney's fees and costs after he sat unemployed throughout the proceedings below, Appellant deposited those funds and additional funds with the registry of the Court so that Dr. Emerick could not collect the fees.

Although the Appellant assigned error to the Superior Court's award of attorney's fees and costs, it makes no argument regarding the same. Appellant also asks this Court to award it its attorney's fees and costs in the proceedings below and on appeal, again without citation to any authority for the same. Br. Of App. at 25. RAP 18.1(a) states, in part, that a party requesting attorney's fees pursuant to "applicable law . . . must request the fees or expenses as provided in this rule[.]" Pursuant to RAP 18.1(b), the party making the request, "must devote a section of its

³⁷ *But see Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 687, 578 P.2d 530 (1978) (enforcing only nonsolicitation provisions and declining to enforce covenant not to compete where "[t]he evidence . . . indicate[d] that there were customers who would have preferred to be served by the defendant . . . even without any solicitation . . ."); *see also A Place for Mom, Inc. v. Leonhardt*, 2006 WL 2263337 at *5, No. C06-457P (W.D. Wash. 2006) (enforcing nonsolicitation but not entire noncompete).

opening brief to the request for the fees or expenses.” The Appellant has not complied with RAP 18.1(a) or (b) in making its request for fees on appeal.

Dr. Emerick requests his fees and costs on appeal pursuant to paragraph 18 of the Appellant’s SEA and pursuant to RAP 18.1(a) and (b).

V. CONCLUSION

The Appellant in this case cares most about its money and least about the health care of the people of this Community. That is why it seeks to enforce a non-compete that would prevent the ill and infirm from having the cardiac physician of their choice. The Appellant’s noncompetition provision in its SE notably runs counter to the directive from the American Medical Association that physician groups not demand adherence to noncompetition agreements. For these reasons and for the reasons set forth above, Dr. Emerick respectfully requests that this Court affirm the Superior Court in every respect and hold that CSC’s noncompetition provision of the S.E.A. violate public policy.

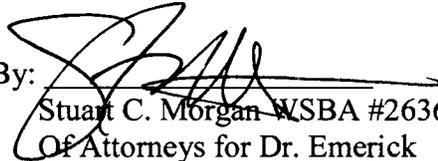
Dr. Emerick further respectfully requests that the Court affirm the trial court’s grant of attorney’s fees and costs to him and award him his attorney’s fees and costs on appeal pursuant to RAP 18. Dr. Emerick was terminated from his employment in September, 2009. As a professional, Dr. Emerick did not voluntarily leave his employment with the Appellant and establish a practice in competition with the Appellant. Dr. Emerick did the right thing and came to the Superior Court with clean hands in an effort to seek guidance from the Court as to the enforceability of a

noncompetition provision in Appellant's SEA so he could continue to treat those of his patients that desired treatment from him and so he could continue to provide services to our community. Appellant's bottom-line financial concerns do not trump the life-saving care that Dr. Emerick can provide to the citizens of our community.

DATED this 22nd day of May 2011

EISENHOWER & CARLSON, PLLC

By:

A handwritten signature in black ink, appearing to read 'S. Morgan', is written over a horizontal line. The signature is stylized and cursive.

Stuart C. Morgan WSBA #26368

Of Attorneys for Dr. Emerick

DECLARATION OF SERVICE

Lisa Carr states:

I am a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On the 23rd day of May, 2011, I caused to be filed via Legal Messenger with the Court of Appeals of the State of Washington, Division II, the foregoing OPENING BRIEF. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<i>Counsel for Appellant:</i>	
Ms. Valarie S. Zeeck	(x) Via Hand Delivery
Attorney at Law	() Via Legal Messenger
Gordon, Thomas, Honeywell	() Via Overnight Courier
1201 Pacific Avenue, Suite 2200	() Via Facsimile
P.O. Box 1157	() Via U.S. Mail
Tacoma, WA 98401-1157	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Tacoma, Washington, this 23rd day of May, 2011.



 Lisa Carr

11 MAY 23 PM 6:18
 STATE OF WASHINGTON
 BY _____
 CLERK OF COURT